APPENDIX

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 20-2460

Charles E. Sisney

Plaintiff - Appellee

v.

Denny Kaemingk, in his official capacity as the South Dakota Secretary of Corrections; Darrin Young, in his official capacity as the Warden of the South Dakota State Penitentiary; Sharon Reimann, in her official capacity as an SDSP designated Mailroom Officer; Craig Mousel, in his official capacity as an SDSP designated Property Officer

Defendants - Appellants

National Coalition Against Censorship

Amicus on Behalf of Appellee(s)

Appeal from United States District Court
for the District of South Dakota - Southern

Submitted: June 17, 2021
Filed: October 15, 2021

Before GRUENDER, BENTON, and STRAS, Circuit Judges.

GRUENDER, Circuit Judge.

Charles E. Sisney brought as-applied and facial challenges to the South Dakota State Penitentiary's pornography policy (the "Policy") under the First and Fourteenth Amendments, naming as defendants four South Dakota corrections officials in their official capacities. The district court granted in part and denied in part the parties' motions for summary judgment, and the defendants appeal. We affirm in part and reverse in part.

I.

Sisney is an inmate at the South Dakota State Penitentiary. In 2015, prison officials rejected several items in Sisney's incoming mail. These items included four issues of a comic-book series entitled *Pretty Face*; a reprint of the iconic Coppertone advertisement featuring a puppy pulling at a little girl's swim bottoms; two erotic novels, *Thrones of Desire* and *Pride and Prejudice: The Wild and Wanton Edition*; a fine-art book entitled *Matisse, Picasso and Modern Art in Paris*; and nine pictures of Renaissance artwork featuring nudity, including Michelangelo's "David" and the Sistine Chapel. Prison officials based their decision to reject these items on the Policy, which prohibits inmates from receiving pornographic material. The Policy defines "pornographic material" as follows:

> Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature nudity or "sexually explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publications or material that features, or includes photographs, drawings, etchings, paintings, or other graphic depictions of nudity or sexually explicit material.
>
> "Nudity" means a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed. Published material containing nudity illustrative of medical, educational or anthropological content may be excluded from this definition.

> "Sexually Explicit" includes written and/or pictorial, graphic depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation. Sexually explicit material also includes individual pictures, photographs, drawings, etchings, writings or paintings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.

After exhausting his administrative remedies, Sisney sued the defendants in federal court, claiming that the Policy was unconstitutionally overbroad on its face and, in any event, unconstitutional as applied to the items enumerated above. Both parties moved for summary judgment. The district court held that the Policy was unconstitutionally overbroad on its face and then appeared to adjudicate Sisney's as-applied challenges against a prior version of the Policy. *See Sisney v. Kaemingk*, CIV 15-4069, 2016 WL 5475972 (D.S.D. Sept. 29, 2016), *vacated*, 886 F.3d 692 (8th Cir. 2018).

On appeal, a panel of this court vacated the district court's summary-judgment order and remanded. *Sisney v. Kaemingk* (*Sisney I*), 886 F.3d 692, 694 (8th Cir. 2018). We explained that the proper course under *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), was first to resolve Sisney's as-applied challenges against the version of the Policy in effect and then to consider Sisney's overbreadth challenge only if at least one of Sisney's as-applied challenges failed. *Sisney I*, 886 F.3d at 698-99.

On remand, the district court rejected Sisney's as-applied challenges to the *Pretty Face* comics and the Coppertone advertisement but sustained Sisney's as-applied challenges to the other items. Turning to Sisney's overbreadth challenge, the district court concluded that the Policy was overbroad but that it was possible to remedy its constitutional defects without enjoining its enforcement *in toto*. The district court explained that the Policy remained enforceable to the extent that it overlapped with a hypothetical amended version of the Policy that the district court drafted. The district court's amended definition of "pornographic material" reads as follows, with deletions in ~~strikethrough~~ and insertions in <u>underline</u>:

> Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature ~~nudity or~~ "sexually explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publications or material that features~~, or includes~~ photographs, drawings, etchings, paintings, or other graphic depictions of ~~nudity or~~ sexually explicit material. Featured: is defined as a publication which routinely and regularly featured pornography, or in the case of one-time issues, promoted itself based on pornographic content. The depiction of nudity of minors is prohibited.[1]
>
> "Nudity" means a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed. Published material containing nudity illustrative of medical, educational or anthropological content may be excluded from this definition.
>
> "Sexually Explicit" includes written and/or pictorial, graphic depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation. Sexually explicit material also includes individual pictures, photographs, drawings, etchings, writings or paintings of ~~nudity or~~ sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.

The *Pretty Face* comics and the Coppertone advertisement fell within the scope of this hypothetical amended version of the Policy. Therefore, because the district court enjoined enforcement of the Policy only to the extent that it did not overlap with this hypothetical amended version, the district court's remedy for the Policy's alleged overbreadth did not affect which of the challenged materials Sisney would be permitted to receive.

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[1]The district court's order included two formulations of its definition of "featured" or "feature" and its provision regarding nudity of minors. One is reproduced above; the other reads as follows: "'Feature' means a publication which routinely and regularly featured pornography, or in the case of one-time issues, promoted itself based on pornographic content. Graphic depictions of nudity of minors is [sic] prohibited." Our analysis does not depend on which formulation is controlling.

The defendants appealed, challenging the district court's adverse rulings on Sisney's as-applied challenges and the district court's conclusion that the Policy was overbroad. The defendants did not appeal the district court's remedy for the alleged overbreadth. Nor did Sisney, who did not file a cross-appeal, even though he had urged the district court to enjoin enforcement of the Policy *in toto* after concluding that it was overbroad.

After filing their notice of appeal, the defendants asked us to stay the district court's order. We denied this request. Alleging that the defendants have nevertheless refused to comply with the district court's order, Sisney has filed two motions asking us to sanction the defendants for contempt of court.

II.

We review the district court's grant of summary judgment *de novo*. *Sisney I*, 886 F.3d at 697.[2] "When a prison regulation impinges on inmates' constitutional

[2]Under the doctrine of *Pullman* abstention, we sometimes stay ruling on a state law's constitutionality "pending determination in state court of state-law issues central to the constitutional dispute." *See Moore v. Sims*, 442 U.S. 415, 427-28 (1979). *Pullman* abstention "does not require that [the court] defer to the wishes of the parties," *Ohio Bureau of Emp't Servs. v. Hodory*, 431 U.S. 471, 480 n.11 (1977), and may be raised by the court *sua sponte*, *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976). That said, *Pullman* abstention is a "limited" exception to the "virtually unflagging obligation" that federal courts have "to exercise their jurisdiction in proper cases." *Beavers v. Ark. State Bd. of Dental Exam'rs*, 151 F.3d 838, 840-41 (8th Cir. 1998). It is especially "disfavored" when the plaintiff is bringing a facial challenge to a state law under the First Amendment. *Id.* at 841; *see also City of Houston v. Hill*, 482 U.S. 451, 467-48 (1987) ("[W]e have been particularly reluctant to abstain in cases involving facial challenges based on the First Amendment."). And although a court may invoke *Pullman* abstention against the parties' wishes, the fact that "neither party requested it" and "the litigation ha[s] already been long delayed" weighs against doing so. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329 (1964). Here, the parties have been litigating Sisney's First Amendment challenges since 2015 and have not asked for abstention. Accordingly, we decline to invoke *Pullman* abstention in this case.

rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The Supreme Court has articulated a two-step, four-factor test to determine when a regulation that impinges on inmates' constitutional rights is "reasonably related to legitimate penological interests." *Id.* The first factor operates as a threshold condition that the regulation must satisfy to pass constitutional muster. *See Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998). Assuming the regulation satisfies this threshold requirement, the court must determine the regulation's constitutionality by balancing the remaining three factors. *See id.* at 201-03.

The first factor is that "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (internal quotation marks omitted). When the regulation in question "restrict[s] inmates' First Amendment rights," then it must also "operate[] in a neutral fashion" to further this interest. *Id.* at 90. This means that the proffered mechanism by which the regulation promotes the legitimate government interest must be "unrelated to the suppression of expression." *See Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989). For example, although "inmate rehabilitation" is a legitimate government interest, *Dawson v. Scurr*, 986 F.2d 257, 261 (8th Cir. 1993), a prison may not censor "literature advocating racial purity" on the ground that exposure to racist ideas inhibits rehabilitation, *McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir. 1987). But a prison may censor depictions of nude or scantily clad minors on the ground that consumption of such images inhibits rehabilitation of sex offenders, not by exposing them to corrupting ideas, but by feeding their desires to perform criminal acts. *See, e.g.*, *Ahlers v. Rabinowitz*, 684 F.3d 53, 58, 65 (2d Cir. 2012) (holding that the government interest in rehabilitating prisoners convicted of sexually abusing minors justified withholding "images of children in bathing suits").

Generally, the prison bears the burden of proving the existence of a "rational connection" between the challenged regulation and a legitimate government interest. *See Murchison v. Rogers*, 779 F.3d 882, 887-88 (8th Cir. 2015). This does not require proving that "the regulation in fact advances the government interest," but it

does require proving that the policymaker "might reasonably have thought that it would." *Amatel*, 156 F.3d at 199. Unless a rational connection between the regulation and the asserted interest is a matter of "common sense," *id.*, the prison "must proffer some evidence to support" the existence of such a connection, *Shimer v. Washington*, 100 F.3d 506, 509-10 (7th Cir. 1996). *See also Turner*, 482 U.S. at 97-99 (holding a regulation unconstitutional after noting that the prison "pointed to nothing in the record suggesting" the existence of a rational connection between the regulation and the asserted government interest and that "[c]ommon sense likewise suggests that there is no [such] connection").

The "second factor . . . is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. The Supreme Court has held that this factor weighs in favor of the constitutionality of a prison's regulation of incoming mail if the regulation "permit[s] a broad range of publications to be sent, received, and read." *Thornburgh*, 490 U.S. at 417-18.

The "third consideration is the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. This factor weighs in favor of the constitutionality of a regulation censoring material that would inhibit some inmates' rehabilitation and that "would likely be disseminated" throughout the prison. *See Dawson*, 986 F.2d at 262; *Amatel*, 156 F.3d at 201 ("Even if pornography could be directed only to those not likely to be adversely affected, it could find its way to others, interfering with their rehabilitation and increasing threats to safety.").

"Finally, the absence of ready alternatives [to the regulation] is evidence of the reasonableness of a prison regulation." *Turner*, 482 U.S. at 90. "By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Id.* (internal quotation marks omitted).

Here, the defendants do not deny that the First Amendment, incorporated against the states through the Fourteenth Amendment, generally protects the right to possess many of the materials that the Policy censors, including the materials that Sisney sought. There is no dispute, then, that the Policy triggers *Turner*'s test by "imping[ing] on inmates' constitutional rights," *Turner*, 482 U.S. at 89, and Sisney's constitutional rights in particular. Accordingly, we apply *Turner*'s test to Sisney's claims.

III.

We begin with Sisney's as-applied challenges, *see Sisney I*, 886 F.3d at 698-99, considering each of the contested materials in turn and asking "whether a ban on *th[at] particular item[]* is reasonably related to a legitimate penological objective," *Murchison*, 779 F.3d at 887. Because Sisney did not cross-appeal, we consider only those of Sisney's as-applied challenges that the district court sustained on summary judgment; namely, those that concerned *Thrones of Desire*; *Pride and Prejudice: The Wild and Wanton Edition*; *Matisse, Picasso and Modern Art in Paris*; and the nine pictures of Renaissance artwork.

A.

We begin with the two erotic novels. In *Carpenter v. South Dakota*, 536 F.2d 759, 762-63 (8th Cir. 1976), we held that it was "well within the discretion" of prison officials under *Procunier v. Martinez*, 416 U.S. 396 (1974), *overruled by Thornburgh*, 490 U.S. 401, to censor material whose "primary purpose" was sexual arousal because such material "would have a detrimental effect upon rehabilitation." *Martinez*'s test was "less deferential" than the test from *Turner* that replaced it. *Thornburgh*, 490 U.S. at 409-13. Therefore, *Carpenter*'s holding that *Martinez* permits prison officials to censor material whose primary purpose is sexual arousal implies that *Turner* too permits prison officials to censor material whose primary purpose is sexual arousal. Furthermore, *Thornburgh* held that *Turner* permits prisons to take an "all-or-nothing" approach to censorship, prohibiting books in their

entirety if they contain any censorable content. *Id.* at 418-19. In conjunction, then, *Carpenter* and *Thornburgh* entail that prisons may censor books in their entirety if they contain material whose primary purpose is sexual arousal. Both erotic novels at issue here contain graphic descriptions of sexual acts whose primary purpose is clearly to cause sexual arousal in the reader.[3] Therefore, the Policy is constitutional as applied to these books in their entirety.

Furthermore, even if *Carpenter* and *Thornburgh* did not control the resolution of Sisney's challenges to the Policy as applied to the erotic novels, we would reach the same conclusion by conducting an independent analysis of *Turner*'s four factors.

As applied to the erotic novels, the Policy clears *Turner*'s threshold requirement. Courts have routinely held that there is a rational connection between censoring pornography and promoting legitimate penological interests. *See, e.g.*, *Mauro v. Arpaio*, 188 F.3d 1054, 1059-60 (9th Cir. 1999) (en banc); *Amatel*, 156 F.3d at 196-201. True, many of these cases concern bans on pornographic images. *See, e.g.*, *Amatel*, 156 F.3d at 194. *But see Cline v. Fox*, 266 F. Supp. 2d 489, 493-501 (N.D. W. Va. 2003) (rejecting an as-applied challenge to the censorship of a pornographic writing); *Snelling v. Riveland*, 983 F. Supp. 930, 935-37 (E.D. Wash. 1997), *aff'd*, 165 F.3d 917 (9th Cir. 1998) (rejecting a challenge to a ban that

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[3]The Amazon.com advertisement for *Pride and Prejudice: The Wild and Wanton Edition*, which is in the record, describes the book as follows:

> [W]e've never been able to see Elizabeth and Fitzwilliam *in flagrante delicto*—until now. In this deliciously naughty updating of the beloved classic, you can peek behind the closed doors of Pemberley's sexiest master bedroom—and revel in the sexual delights of your favorite couple. From first kiss to orgasmic finish, this book is every Austen fan's dream come true—the story you love, with the heat turned up to high. It will come as no surprise that the dashing Mr. Darcy is as passionate and intense with his knickers off as he is with them on.

The record also includes an excerpt from *Thrones of Desire*, which we do not reprint here, that describes in detail a series of masturbations.

extended to pornographic writings). Nonetheless, common sense confirms that pornographic writings such as the two at issue here can present the same obstacles to legitimate penological interests as pornographic images. *See Cline*, 266 F. Supp. 2d at 497-98 (finding "a common sense nexus" between prohibiting a book with graphic but exclusively "verbal" descriptions of sexual acts and "legitimate penological purposes"). Furthermore, the defendants' censorship of the erotic novels because of their sexually explicit content "operated in a neutral fashion." *See Turner*, 482 U.S. at 90. Prison officials did not censor the books because they advanced claims about human sexuality that the prison officials deemed subversive and therefore worthy of suppression. Instead, prison officials censored the books because they contained passages "intended to serve no other purpose than to arouse the sexual desires of those reading the book."

Given that *Turner*'s threshold requirement is met, we apply *Turner*'s remaining three factors. All three weigh in the defendants' favor. *Turner*'s second factor weighs in the defendants' favor because censoring the erotic novels is consistent with "permit[ting] a broad range of publications to be sent, received, and read." *See Thornburgh*, 490 U.S. at 418. *Turner*'s third factor weighs in the defendants' favor because sexually explicit material is likely to find its way through bartering to the prisoner who finds it most sexually stimulating, potentially interfering with rehabilitation. *See id.*; *Dawson*, 986 F.2d at 262; *Amatel*, 156 F.3d at 201. And *Turner*'s fourth factor weighs in the defendants' favor because alternatives such as page-by-page censorship and monitored reading rooms are not "obvious, easy alternatives." *See Thornburgh*, 490 U.S. at 418-19.

Thus, we conclude that the district court erred in granting summary judgment for Sisney on his claim that the Policy is unconstitutional as applied to *Thrones of Desire* and *Pride and Prejudice: The Wild and Wanton Edition*. Whether under *Carpenter* and *Thornburgh* or under an independent application of *Turner*, the defendants were within their discretion to censor these books.

B.

We reach the opposite conclusion regarding Sisney's challenge to the Policy as applied to *Matisse, Picasso and Modern Art in Paris* and the nine pictures of Renaissance artwork. As the district court observed, *Matisse, Picasso and Modern Art in Paris* "is simply an art book." Although a few of the featured works include nudity, the defendants have identified none that even arguably depicts its subject "lewdly or as engaged in any actual or simulated sexual acts." The same is true of Michelangelo's "David," the Sistine Chapel, and the other works of art represented in the nine pictures that the defendants withheld from Sisney. Common sense does not suggest, and the defendants have offered no evidence to prove, a rational connection between banning pictures of artwork such as Michelangelo's "David" and legitimate government interests such as security and rehabilitation. *See Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1080 (W.D. Wis. 2000) (denying prison officials' motion for summary judgment in part because they "failed to submit any credible evidence" of a rational connection between banning "great works of art" and promoting rehabilitation, "and common sense suggests none"). Therefore, the defendants' censorship of *Matisse, Picasso and Modern Art in Paris* and of the nine pictures of Renaissance artwork fails *Turner*'s threshold requirement. The district court properly granted summary judgment for Sisney on his claim that the Policy is unconstitutional as applied to these items.

IV.

Having resolved Sisney's as-applied challenges to the Policy, we turn to his facial challenge based on the claim that the Policy is overbroad.

A.

We begin by addressing the threshold question of subject-matter jurisdiction. Although neither the district court nor the parties raised this issue, "[w]e have an obligation to consider sua sponte both our jurisdiction and . . . the jurisdiction of the

district court." *See Thomas v. United Steelworkers Loc. 1938*, 743 F.3d 1134, 1138-39 (8th Cir. 2014).

The overbreadth doctrine "allow[s] litigants whose own speech could constitutionally be regulated to challenge overly broad regulations which affect them." *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 799 (8th Cir. 2006). "Under no circumstances, however, does the overbreadth doctrine relieve a plaintiff of [his] burden to show constitutional standing." *Id.* Nor does it permit a federal court to adjudicate an issue that has become moot. *See Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1311-12 (8th Cir. 1997) (dismissing an overbreadth challenge as moot). Both rules are jurisdictional. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997). In fact, subject to caveats inapplicable here, *see Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-91 (2000), the difference between standing and mootness doctrines is merely one of "time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)," *Arizonans for Official English*, 520 U.S. at 68 n.22. This means, among other things, that a federal court lacks subject-matter jurisdiction to rule on an overbreadth challenge unless it is true right up until the court decides the question that a favorable decision would likely redress the plaintiff's injury by lifting the restriction on his speech. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (explaining that the likelihood "that the injury will be redressed by a favorable decision" is a necessary element of standing (internal quotation marks omitted)); *Advantage Media*, 456 F.3d at 801-02 (holding that a plaintiff bringing an overbreadth challenge lacked standing because a favorable decision would not allow the plaintiff to engage in the speech at issue).

A corollary of this conclusion is that a federal court lacks subject-matter jurisdiction to rule on an overbreadth challenge if it is possible to remedy the alleged overbreadth without enjoining enforcement of those parts of the law that apply to the plaintiff's speech. Generally, when confronting a constitutional problem in a law, courts should "limit the solution" by enjoining enforcement of "any problematic

portions while leaving the remainder intact." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (internal quotation marks omitted); *see also New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982) ("[I]f [an overbroad statute] is severable, only the unconstitutional portion is to be invalidated."). Sometimes a limited solution is not possible because it would "entail quintessentially legislative work" (in the case of a statute) or executive work (in the case of a regulation) that the Constitution does not empower federal courts to undertake. *See Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *Free Enter. Fund*, 561 U.S. at 509-10 (holding that to "blue-pencil" a statute would be to assume an "editorial freedom [that] belongs to the Legislature"). When that is the case, the court has no choice but to enjoin enforcement of the law *in toto*. *E.g.*, *Acosta v. City of Costa Mesa*, 718 F.3d 800, 812 (9th Cir. 2013) (per curiam). But when a more limited "judicial remedy" is available, the court should adopt it. *See Ayotte*, 546 U.S. at 329. And if this limited remedy would leave in effect those parts of the law that apply to the plaintiff's speech, then it would not redress the plaintiff's injury. *See Advantage Media*, 456 F.3d at 801-02 (concluding that a favorable decision on the plaintiff's overbreadth claim would not redress the plaintiff's injury because the challenged provisions were "properly considered severable" and the plaintiff's speech "would still violate other . . . provisions"). Therefore, if a court confronted with an overbreadth challenge decides that it would be possible to remedy the alleged overbreadth without enjoining enforcement of those parts of the law that apply to the plaintiff's speech, then it must dismiss the challenge for lack of subject-matter jurisdiction. *See id.* at 799-802; *accord Midwest Media Prop., L.L.C. v. Symmes Tp., Ohio*, 503 F.3d 456, 465 (6th Cir. 2007).[4]

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[4]The dissent objects to this conclusion on the ground that it "puts the cart before the horse." *Post*, at 25. "Overbreadth is a merits question," and "severability is a remedies question," it explains, "and a court can only consider either after determining it has subject-matter jurisdiction." *Post*, at 25-26. We agree that ordinarily a court may consider merits or remedies questions only after confirming that it has subject-matter jurisdiction. *See, e.g.*, *Crawford v. F. Hoffman-La Roche Ltd.*, 267 F.3d 760, 764 (8th Cir. 2001). But sometimes a court cannot determine whether it has subject-matter jurisdiction without addressing questions that are also relevant to the merits or the remedy. *See Brownback v. King*, 592 U.S. ---, 141 S.

Here, the district court construed Sisney's *pro se* complaint as bringing a two-part overbreadth challenge alleging that the Policy's prohibition on nudity and the Policy's prohibition on sexually explicit content were both overbroad. By the time the district court considered this challenge on remand, it had already sustained all of Sisney's as-applied challenges except those that concerned the Coppertone advertisement and the *Pretty Face* comics. Sisney's only remaining injuries were thus being deprived of these two items. The district court then concluded that a limited judicial remedy for the alleged overbreadth in the prohibition on nudity was available that would not bar enforcement of the Policy against either item. Having reached this conclusion, the district court should have dismissed as moot Sisney's claim that the prohibition on nudity was overbroad on the ground that a favorable decision on this claim would not have redressed either of Sisney's remaining injuries. Similarly, the district court concluded that a limited judicial remedy for the alleged overbreadth in the prohibition on sexually explicit content was available that would not bar enforcement of the Policy against either the Coppertone advertisement or the *Pretty Face* comics. Again, having reached this conclusion, the district court should have dismissed as moot Sisney's claim that the prohibition on sexually explicit content was overbroad on the ground that a favorable decision on this claim would not have redressed either of Sisney's remaining injuries. In sum, the district

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Ct. 740, 749 (2021) ("[M]erits and jurisdiction will sometimes come intertwined . . . ."). In that case, the court may—indeed, must—address these questions at the outset to determine whether it has subject-matter jurisdiction. *See, e.g.*, *Hillesheim v. Holiday Stationstores, Inc.*, 953 F.3d 1059, 1062 (8th Cir. 2020) (concluding that the case was moot because "injunctive relief is the only private relief available in a Title III case"); *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 797-99 (8th Cir. 2010) (deciding whether a statute authorized monetary damages in order to determine whether the plaintiffs had standing); *Brownback*, 141 S. Ct. at 749-50 (explaining that "a court can decide . . . the merits issues" necessary to resolve a jurisdictional question because "a federal court always has jurisdiction to determine its own jurisdiction"); *Richardson v. BNSF Ry. Co.*, 2 F.4th 1063, 1068-69 (8th Cir. 2021) (concluding that there was subject-matter jurisdiction under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, because the claim could be resolved under Federal Rule of Civil Procedure 12(b)(6) without interpreting the collective-bargaining agreement).

court should have dismissed as moot Sisney's overbreadth challenge in its entirety without reaching the merits.

Typically, when a district court enters judgment on a claim that it should have dismissed as moot, we vacate the judgment and remand with instructions to dismiss the claim for lack of subject-matter jurisdiction. *See, e.g.*, *Brazil v. Ark. Dep't of Human Servs.*, 892 F.3d 957, 960-61 (8th Cir. 2018). In this case, however, the matter is not so simple. What mooted Sisney's overbreadth challenge was the combination of (1) the district court's rulings on his as-applied challenges, which left him with only two remaining injuries, and (2) the district court's choice of remedy, which redressed neither one. Because neither party appealed the district court's choice of remedy, we do not review it. *See United States v. Sineneng-Smith*, 590 U.S. ---, 140 S. Ct. 1575, 1579 (2020) (explaining that courts should "normally decide only questions presented by the parties" instead of "sally[ing] forth . . . looking for wrongs to right"); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 478-79 (1999) (holding that the appellate court erred in addressing parts of the district court's orders that the parties did not appeal); *J.B. Hunt v. BNSF Ry. Co.*, 9 F.4th 663, 670 (8th Cir. 2021) ("Even assuming the district court erred . . . , it would be inappropriate for us to [correct the error] because neither party appealed the issue."). But the defendants did appeal the district court's decision to sustain all of Sisney's as-applied challenges other than those that concerned the Coppertone advertisement and the *Pretty Face* comics. And, after reviewing this decision, we concluded that the district court erred with respect to the two erotic novels, *Thrones of Desire* and *Pride and Prejudice: The Wild and Wanton Edition*. *See supra* Section III.A. Before remanding with instructions to dismiss Sisney's overbreadth challenge as moot, then, we must determine whether it remains true that the challenge is moot now that two additional injuries have survived resolution of Sisney's as-applied challenges.

With respect to Sisney's claim that the prohibition on nudity is overbroad, the answer is "yes." A favorable decision on this claim would trigger the district court's remedy for the alleged overbreadth in the prohibition on nudity—again, not because

we would affirm this remedy were we to review it *de novo* but because neither party appealed it. The district court's remedy was to enjoin the enforcement of the prohibition on nudity except against nudity involving minors. But the defendants censored the erotic novels under the Policy's prohibition on sexually explicit content. Because the district court's remedy for the alleged overbreadth in the prohibition on nudity did not affect the prohibition on sexually explicit content, it would not bar enforcement of the Policy against either book. Thus, a favorable decision on Sisney's claim that the prohibition on nudity is overbroad would not redress any of Sisney's remaining injuries. Sisney's claim that the prohibition on nudity is overbroad is therefore moot.[5]

The same is not true about Sisney's claim that the prohibition on sexually explicit content is overbroad. A favorable decision on this claim would trigger the district court's remedy for the alleged overbreadth in the prohibition on sexually

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[5]The dissent argues that a case or controversy currently exists on this point because "[t]he aggrieved parties now are the *prison officials*, so the question for us is whether we can give *them* any effective relief if we decide the appeal in their favor." *Post*, at 26 (internal quotation marks and brackets omitted). We disagree. The requirement that the plaintiff's injury be redressable by a favorable resolution of his claim "subsists through all stages of federal judicial proceedings, trial and appellate." *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); *see also Whitfield v. Thurston*, 3 F.4th 1045, 1047 (8th Cir. 2021) (explaining that mootness "occurs when the requisite personal interest that gave the plaintiff standing to bring the suit disappears as the case proceeds" (internal quotation marks omitted)). We cannot evade this requirement in cases where the defendant lost before the district court by substituting the defendant's injury of having suffered an adverse judgment for the injury that gave the plaintiff standing to sue in the first place. *See, e.g.*, *Gillpatrick v. Frakes*, No. 4:18CV3011, 2019 WL 7037367, at *8 (D. Neb. June 7, 2019) (enjoining the enforcement of a prison policy), *vacated as moot*, 997 F.3d 1258 (8th Cir. 2021) (holding that the prison officials' appeal of the injunction was moot because the plaintiffs' injury was no longer redressable). To be sure, we may vacate the district court's judgment in such a case. *See Gillpatrick*, 997 F.3d at 1259. But redressing the adverse judgment against the defendant does not require—and in any event Article III does not permit—going beyond vacatur and reaching the merits, as the dissent would do here. *Compare id. with post*, at 27-28.

explicit content—once again, not because we would affirm this remedy on *de novo* review but because neither party appealed it. The district court's remedy involved enjoining the enforcement of the prohibition on sexually explicit content against any nonperiodical publication that does not "promote[] itself based on pornographic content." Unfortunately, the term "based on" is ambiguous. On one interpretation, a publication "promote[s] itself based on pornographic content" if its promotional materials allude to the fact that the publication contains pornographic content. On another interpretation, a publication "promote[s] itself based on pornographic content" only if its promotional materials themselves contain pornographic content. On the first interpretation, the district court's remedy would not bar enforcement of the Policy against *Pride and Prejudice: The Wild and Wanton Edition*, whose Amazon.com advertisement broadcasts the fact that it contains pornographic content, and it likely also would not bar enforcement of the Policy against *Thrones Desire*, whose book cover seeks to entice the reader with a picture of a scantily clad woman and a promise of "erotic tales" within. On the second interpretation, however, the district court's remedy likely would bar enforcement of the Policy against both books because there is no evidence of pornographic content in the books' promotional materials themselves. Given the district court's conclusion that the First Amendment protects both books, we presume that the district court understood its fine-tuned remedy for the Policy's overbreadth to bar enforcement of the Policy against both books. Accordingly, we adopt the second interpretation of the district court's remedy and conclude that a favorable decision on Sisney's claim that the prohibition on sexually explicit content is overbroad would likely redress Sisney's injuries of being deprived of the erotic novels. Sisney's claim that the prohibition on sexually explicit content is overbroad is therefore not moot.

Thus, we will remand with instructions to dismiss as moot Sisney's claim that the prohibition on nudity is overbroad. But Sisney's claim that the prohibition on sexually explicit content is overbroad remains a live case or controversy thanks to our reversal of the district court's ruling on his as-applied challenges regarding the erotic novels. Consequently, were we to vacate and remand on this claim, we would need to instruct the district court to reach the merits for a second time. And this

would be a futile exercise because the district court has already indicated that it agrees with Sisney that the prohibition on sexually explicit content is overbroad. Accordingly, rather than necessitate a third appeal in this case, we settle the matter here. *See Crown Cork & Seal Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 916 (8th Cir. 2007) (deciding a question on appeal rather than remanding because "remand would be inefficient and unnecessary").

B.

Unlike a typical facial challenge, which requires showing that "no set of circumstances exists under which" the law could be constitutionally applied, a First Amendment overbreadth challenge requires showing only that "a substantial number of [the law's] applications are unconstitutional, judged in relation to [the law's] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472-73 (2010). "The first step in overbreadth analysis is to construe the challenged [law]; it is impossible to determine whether a [law] reaches too far without first knowing what the [law] covers." *United States v. Williams*, 553 U.S. 285, 293 (2008). Just as this court does with respect to federal laws, *see, e.g.*, *Union Pac. R.R. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 892-93 (8th Cir. 2013); *Chu Drua Cha v. Noot*, 696 F.2d 594, 596 (8th Cir. 1982), the South Dakota Supreme Court construes South Dakota laws in accordance with the doctrine of constitutional avoidance, which requires adopting a construction of a law that avoids questions about its constitutionality if such a construction is "fairly possible," *see State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985). Generally, we construe a state's laws according to that state's principles of construction. *E.g.*, *Behlmann v. Century Sur. Co.*, 794 F.3d 960, 963 (8th Cir. 2015). Whether this case is an exception depends on whether the First Amendment precludes applying the doctrine of constitutional avoidance in the context of an overbreadth challenge.

We conclude that it does not. We recognize that the Fifth Circuit has suggested otherwise, attributing to the U.S. Supreme Court a "decision not to rely upon the canon of constitutional avoidance in the overbreadth context." *See Serafine*

v. Branaman, 810 F.3d 354, 369 (5th Cir. 2016) (internal quotation marks omitted) (citing *Stevens*, 559 U.S. at 481); *cf. Turchik v. United States*, 561 F.2d 719, 723-24 (8th Cir. 1977) (stating in *dicta* that "the preferred position of the First Amendment greatly weakens" the doctrine of constitutional avoidance in the context of an overbreadth challenge). But we respectfully disagree with the Fifth Circuit's reading of *Stevens*, where the Supreme Court merely asserted the unremarkable proposition that the doctrine of constitutional avoidance is not a license to "rewrite a . . . law to conform it to constitutional requirements," 559 U.S. at 481, a proposition that it has also recited outside the First Amendment context, *see, e.g.*, *Seila Law LLC v. CFPB*, 591 U.S. ---, 140 S. Ct. 2183, 2207 (2020). In fact, the Supreme Court has explicitly endorsed the doctrine of constitutional avoidance in the context of overbreadth challenges. *Osborne v. Ohio*, 495 U.S. 103, 119-20 (1990) (rejecting the "content[ion] that . . . a court may not construe [a] statute to avoid [First Amendment] overbreadth problems" and upholding "the State Supreme Courts' ability to narrow state statutes so as to limit the statute's scope to unprotected conduct"); *Ferber*, 458 U.S. at 769 n.24 ("When a federal court is dealing with a federal statute challenged [under the First Amendment] as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. . . . A state court is also free to deal with a state statute in the same way."); *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 811 (7th Cir. 2014) (recognizing that the Supreme Court has engaged in "application of the constitutional-avoidance doctrine to address . . . overbreadth concerns"); *accord United States v. Miselis*, 972 F.3d 518, 531 (4th Cir. 2020) ("In [construing an allegedly overbroad statute], we must seek to avoid any constitutional problems by asking whether the statute is subject to a limiting construction." (internal quotation marks and brackets omitted)); *United States v. Brune*, 767 F.3d 1009, 1023-24 (10th Cir. 2014) (applying constitutional avoidance to an overbreadth challenge). Therefore, the First Amendment does not preclude applying the doctrine of constitutional avoidance in this case.

Reading the Policy in light of the doctrine of constitutional avoidance, we conclude that Sisney failed to show that the Policy's prohibition on sexually explicit

content is "substantially overbroad." *See Stevens*, 559 U.S. at 482. Sisney's most compelling example of allegedly sexually explicit content protected by the First Amendment is the Bible. But the Policy's definition of "sexually explicit" limits sexually explicit writings to those that include "graphic" descriptions of sexual acts. An interpretation of the word "graphic" on which the passages from the Bible that Sisney cites do not include "graphic" descriptions of sexual acts is fairly possible, even plausible. The first passage recounts how King David saw Bathsheba "washing herself" and "lay with her." *2 Samuel* 11:1-5 (KJV). In the second passage, from the *Song of Solomon*, the lover tells his beloved that her "stature is like to a palm tree, and [her] breasts to clusters of grapes" and declares that he "will take hold the boughs thereof." *Song of Solomon* 7:1-10 (KJV). Neither of these brief allusions to a sexual act, the first cloaked in euphemism and the second in metaphor, paints a "vivid picture with explicit detail," "Graphic," *The New Oxford American Dictionary* 756 (3d ed. 2010), or offers a "clear lifelike or vividly realistic description," "Graphic," *Merriam-Webster's Collegiate Dictionary* 545 (11th ed. 2005).

To be sure, even construed narrowly, the Policy's prohibition of sexually explicit content extends to some literary works that many hold in high esteem. In most cases, however, censoring these works will pass constitutional muster for the same reasons that censoring *Thrones of Desire* and *Pride and Prejudice: The Wild and Wanton Edition* did. We are unpersuaded that consistent application of the prohibition as we have construed it will limit inmates' access to literature so severely that the defendants can no longer be said to "permit a broad range of publications to be sent, received, and read." *See Thornburgh*, 490 U.S. at 418.

It is true, as Sisney points out, that the defendants have suggested that they could enforce the Policy's prohibition on sexually explicit content against the Bible if they chose to do so. But although we defer to a state agency's interpretation of its own regulation "if the meaning of the words used is in doubt," *Smith v. Sorensen*, 748 F.2d 427, 432 (8th Cir. 1984) (citing *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)), we do so only after applying canons of construction such

as the doctrine of constitutional avoidance, *see Kisor v. Wilkie*, 588 U.S. ---, 139 S. Ct. 2400, 2415 (2019) (holding that "a court must exhaust all the traditional tools of construction" before "resort[ing] to *Auer* deference" (internal quotation marks omitted)); *Union Pac. R.R.*, 738 F.3d at 893 ("Constitutional avoidance trumps even *Chevron* deference, and easily outweighs any lesser form of deference we might ordinarily afford an administrative agency . . . ."). Here, applying the doctrine of constitutional avoidance resolves Sisney's claim that the Policy's prohibition on sexually explicit content is overbroad. Consequently, we "ha[ve] no business deferring to any other reading, no matter how much the agency insists it would make more sense." *Kisor*, 139 S. Ct. at 2415.

We conclude that although resolution of Sisney's as-applied challenges does not moot his claim that the Policy's prohibition on sexually explicit content is overbroad, this claim fails on the merits.

V.

Finally, we address Sisney's motions for sanctions. The Eleventh Amendment does not bar a federal court from enforcing its orders against a state entity, including, if necessary, by sanctions. *Hutto v. Finney*, 437 U.S. 678, 689-93 (1978). But "civil contempt should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct." *Taggart v. Lorenzen*, 587 U.S. ---, 139 S. Ct. 1795, 1801 (2019) (internal quotation marks, alterations, and emphasis omitted); *see also King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995) (requiring the movant to establish, among other things, that the alleged "contemnor has not diligently attempted to comply in a reasonable manner").

"There are two kinds of civil contempt penalties a court can impose." *Klett v. Pim*, 965 F.2d 587, 590 (8th Cir. 1992). "The first is a coercive penalty . . . designed to force the offending party to comply with the court's order." *Id.* The second is compensation to the movant for damages incurred "as a result of the offending party's contempt." *Id.* "A court cannot impose a coercive civil contempt sanction

if the underlying [order] is no longer in effect." *Id.* In contrast, a contempt sanction compensating the movant for damages incurred as a result of the offending party's noncompliance while the order was in effect remains appropriate even after the order is no longer in effect, unless the order was "vacated because it was issued erroneously." *Id.* Under no circumstances may a federal court impose any kind of sanction for contempt of another court's order. *Id.* at 590-91 (citing 18 U.S.C. § 401).

Here, Sisney seeks both coercive and compensatory sanctions for the defendants' alleged refusal to comply with our order denying their motion for a stay of the district court's injunction pending this appeal.[6] Now that we have resolved the appeal, this order is moot and thus no longer in effect. *See In re Champion*, 895 F.2d 490, 492 (8th Cir. 1990) (per curiam) (dismissing a motion for a stay pending appeal as moot after resolving the appeal); *Klett*, 965 F.2d at 590 (treating an order as no longer in effect for purposes of sanctions once it has become moot). Therefore, we must deny Sisney's request for coercive sanctions. Of course, Sisney remains free to ask the district court to impose coercive sanctions on the defendants if he believes that they are refusing to comply with those parts of the district court's injunction that we have affirmed. Because we are not "the court that issued [the] injunction," however, we would be unable to grant any such request. *See Klett*, 965 F.2d at 591.

As for Sisney's request for compensatory sanctions, we conclude that Sisney failed to show that the defendants "ha[ve] not diligently attempted to comply in a reasonable manner." *See King*, 65 F.3d at 1058. Sisney presents evidence that, five days after we denied the motion to stay, a prison official refused to release material that an inmate argued was protected under the district court's order on the ground that the Policy "will continue to be followed as written" while the motion was pending. But Sisney presents no evidence that this official knew that we had just

[6]Sisney also seeks sanctions for the defendants' alleged failure to comply with the district court's discovery orders. We cannot grant this request because we are not the court that issued the orders. *See id.*

denied the motion. On the contrary, the text of the official's response suggests that he believed that the motion was still pending. And the defendants have submitted evidence that, upon receiving notice of our denial of their motion to stay, they promptly initiated a process for bringing their procedures into compliance with the district court's order, including implementing the district court's suggestion to create viewing rooms for the consumption of sensitive material. In the meantime, the defendants were "keeping material for delivery once viewing rooms are established and opened." While the defendants may not have achieved full compliance as swiftly as they might have, and certainly not as swiftly as Sisney would have liked, we cannot say that there is no "fair ground of doubt as to the wrongfulness of [their] conduct" with respect to our denial of their motion to stay. *See Taggart*, 139 S. Ct. at 1801 (emphasis omitted). Therefore, Sisney is not entitled to compensatory sanctions for the defendants' alleged violations of our order denying their motion for a stay.

Of course, whether Sisney is entitled to compensatory sanctions for the defendants' alleged violations of those parts of the district court's injunction that we have affirmed is another question, one that he is free to raise with the district court. Again, however, because we did not issue the injunction, we cannot impose sanctions for violations of it. *See Klett*, 965 F.2d at 591.

VI.

In sum, for the reasons explained above, we resolve this appeal as follows. We reverse the district court's grant of summary judgment for Sisney and remand for entry of summary judgment for the defendants on Sisney's challenge to the Policy as applied to *Thrones of Desire* and *Pride and Prejudice: The Wild and Wanton Edition*. We affirm the district court's grant of summary judgment for Sisney on his challenge to the Policy as applied to *Matisse, Picasso and Modern Art in Paris* and the nine pictures of Renaissance artwork. We vacate the district court's grant of summary judgment for Sisney on his claim that the Policy's prohibition on nudity is overbroad, vacate the remedy issued in connection with this summary-

judgment ruling, and remand with instructions to dismiss this claim for lack of subject-matter jurisdiction. We reverse the district court's grant of summary judgment for Sisney on his claim that the Policy's prohibition on sexually explicit content is overbroad, vacate the remedy issued in connection with this summary-judgment ruling, and remand for entry of summary judgment for the defendants on this claim. We dismiss as moot Sisney's request for coercive sanctions for the defendants' alleged violations of our denial of their motion to stay. We deny Sisney's request for compensatory sanctions for the defendants' alleged violations of our denial of their motion to stay. And we deny Sisney's request for sanctions for the defendants' alleged violations of the district court's orders.

STRAS, Circuit Judge, concurring in part and dissenting in part.

The word "moot" should not appear in this opinion. The parties do not raise it, the district court did not discuss it, and there is no reason for us to delve into the issue either. Nothing about this case is moot.

Consider the procedural history. Sisney sued several prison officials who used a 2014 prison policy to prevent him from accessing four *Pretty Face* comics; two erotic novels named *Thrones of Desire* and *Pride and Prejudice: The Wild and Wanton Edition*; an art book called *Matisse, Picasso, and Modern Art in Paris*; reproductions of Michelangelo's and Lorenzo Ghiberti's works; and a Coppertone advertisement. The policy prohibited "pornograph[y]," including "material[s]" that feature "nudity or sexually explicit" content.

Sisney raised two types of First Amendment challenges. The first was as applied, meaning he was challenging the policy's application to him. *See Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004) (defining an "as-applied challenge" as one "to the statute's application only as-applied to the party before the court"). The second was "facial overbreadth," which required him to show that "the impermissible applications of the [policy]," including to other inmates, were "substantial when judged in relation to the [its] plainly legitimate

sweep." *Id.* at 791 (explaining that the reason for allowing this type of claim is "to eliminate the deterrent or chilling effect an overbroad law may have"). Sisney personally had to have Article III standing to raise either type of challenge, but overbreadth challenges are unique in the sense that they loosen third-party standing requirements by allowing plaintiffs to raise the "First Amendment rights of others." *Id.* at 792.

In addressing the as-applied challenges, the district court gave Sisney access to some materials but not others. He could have the Michelangelo and Ghiberti reproductions, the erotic novels, and the art book, but the Coppertone advertisement and *Pretty Face* comics remained off-limits. Moving onto overbreadth, the court did not give Sisney access to anything else, but it rewrote the policy after concluding that it was substantially overbroad. By removing the words "nudity or" from the list of "pornographic material[s]," the rewritten policy is now narrower than before. Aggrieved by the now-watered-down policy, prison officials appeal the overbreadth ruling.

None of this procedural history is disputed, and it is in fact quite ordinary, other than the district court's decision to rewrite the policy. Still, the court concludes today, without input from the parties, that Sisney's failure to appeal the remedy presents a mootness problem. And best I can tell, the reason is that the district court's remedy—removing the words "nudity or" from the policy—mooted Sisney's overbreadth claim. What gets lost, however, is that the overbreadth claim has never been moot and *prison officials*, rather than Sisney, filed the appeal.

To the extent the court suggests that Sisney's overbreadth claim was moot because the revisions to the policy did not restore his access to the *Pretty Face* comics or the Coppertone advertisement, this analysis puts the cart before the horse. Overbreadth is a merits question, *see Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482–83 (1989), severability is a remedies question, *see Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2207 (2020), and a court can only

consider either after determining it has subject-matter jurisdiction. Simply put: the remedy cannot moot the underlying claim.

The proof is in the pudding. There can be no dispute that Sisney still had an injury when the district court moved onto the overbreadth challenge: his lack of access to the *Pretty Face* comics and the Coppertone advertisement. If the district court had enjoined prison officials from enforcing the whole policy, rather than taking the highly unusual step of rewriting it, then Sisney's access to those two items would have been restored. *See, e.g.*, *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011); *Willson v. City of Bel-Nor, Mo.*, 924 F.3d 995, 999 (8th Cir. 2019). Regardless of what the court actually did, the fact that it *could have* fashioned "some form of meaningful relief" by enjoining enforcement of the entire policy was enough to keep the controversy alive. *See Church of Scientology of Ca. v. United States*, 506 U.S. 9, 12–13 (1992).

To the extent the court is concerned that there is *currently* no case or controversy, there is no reason to be. The aggrieved parties now are the *prison officials*, so the question for us is whether we can give *them* "any effective relief" if we decide "the [appeal] in [their] favor."[7] *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th

[7]The court's claim that *Sisney* must still be aggrieved for the *defendants* to appeal cannot be correct. *See ante*, at 16 n.5. Otherwise, any time a plaintiff prevails, the defendant could not appeal. Indeed, under the court's reasoning, even if the district court had enjoined the entire policy, the defendants would be stuck because "the *plaintiff's* injury" would no longer be "redressable by a favorable resolution of *his* claim," which the court thinks must "subsist[] through all stages of federal judicial proceedings, trial and appellate." *Ante*, at 16 n.5 (emphasis added) (quoting *Spencer v. Kemna*, 523 U.S. 1, 7 (1998)). To be sure, as in *Spencer*, if the *plaintiff* is appealing, then there must be a continuing injury that is redressable by appellate review. *See Spencer*, 523 U.S. at 7 (stating that the "case-or-controversy requirement subsists through all stages of federal judicial proceedings," not that the plaintiff's injury must continue on appeal (citation omitted)). But not when the party appealing is somebody else. *See Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (explaining that Article III's requirements "must be met by persons seeking appellate review" (citation omitted)). The reason, of course, is that an adverse judgment is

Cir. 1986) ("The test for mootness of an appeal is whether the appellate court can give the *appellant* any effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." (emphasis added)); *see also Flynn v. Sandahl*, 58 F.3d 283, 287 (7th Cir. 1995).

Viewed through this lens, I have no doubt that we can. The prison officials have challenged the district court's overbreadth ruling because they want to ban additional items containing nudity that are now available to prisoners under the narrowed policy. If we agree with them that Sisney failed to meet his burden of proving that the prison's original policy was substantially overbroad, then not only will they be able to potentially withhold additional items from Sisney, but from other prisoners too. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976).

I would reach exactly that conclusion. Sisney had the "burden of demonstrating, from the text of the [policy] and from actual fact, that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (internal quotation marks and brackets omitted)). To satisfy this burden, he had to show that "a substantial number of [the policy's] applications are unconstitutional, [when] judged in relation to [its] plainly legitimate sweep." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted).

Sisney never made this showing. First, he did not "adduce any evidence that third parties will be affected in any manner differently from [him]self." *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 912 (8th Cir. 2017) (concluding that "[i]t is inappropriate to entertain a facial overbreadth challenge" under these circumstances). Second, even if he proved that the prison's policy prevents access to some materials that the First Amendment protects, the record does not establish how prevalent those materials are, much less how they compare to the

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itself a "kind of injury" that supports appellate standing. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989) (citing *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U.S. 249, 261–65 (1933)).

quantity of materials that the prison can constitutionally withhold. *See Wash. State Grange*, 552 U.S. at 449 n.6 ("We generally do not apply the 'strong medicine' of overbreadth analysis where the parties fail to describe the instances of arguable overbreadth of the contested law."). In short, there may well be substantial overbreadth, but Sisney failed to prove it.

Without proof of substantial overbreadth, there was nothing for the district court to remedy. Accordingly, rather than dismissing in part for mootness, as the court does, I would vacate and remand for further proceedings.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

CHARLES E. SISNEY, Plaintiff, vs. DENNY KAEMINGK, in his official capacity as the South Dakota Secretary of Corrections; DARIN YOUNG, in his official capacity as the Warden of the South Dakota State Penitentiary; SHARON REIMANN, in her official capacity as an SDSP designated Mailroom Officer; and CRAIG MOUSEL, in his official capacity as an SDSP designated Property Officer, Defendants.	*	CIV 15-4069 AMENDED MEMORANDUM OPINION AND ORDER

This case is upon remand from *Sisney v. Kaemingk*, 886 F.3d 692 (2018). Subsequently the case has been briefed and argued to the Court. Sisney makes both as applied and facial challenges to the current South Dakota Department of Corrections (DOC) pornography policy. Count V deals with Defendants' rejection of seven specific publications which were to be delivered to Mr. Sisney, those being: Pretty Face Manga Comics, Volumes 3, 4, 5, 6, a book entitled Thrones of Desire, and another book, Pride and Prejudice: The Wild and Wanton Edition, and an art book entitled Matisse, Picasso and Modern Art in Paris. Count VI deals with Defendants' rejection of nine pictures:

- Paradise by Michelangelo
- The Expulsion from the Garden by Michelangelo (Sistine Chapel ceiling painting, bay 4)

- Statute of David by Michelangelo
- Bronze The Creation of Adam and Eve by Lorenzo Ghiberti
- The Fall and Expulsion from the Garden of Eden by Michelangelo (Sistine Chapel ceiling painting)
- Study of the Resurrection of the Dead by Michelangelo
- Paradise Bronze by Michelangelo

The Report and Recommendation details the factual history of the case and those factual findings are adopted unless stated otherwise.

The 2014 DOC "Pornography" policy in question "prohibits the purchase, possession and attempted possession and manufacturing of pornographic material by offenders in its institutions."

The definitions are:

> **Pornographic Material:**
> Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature nudity or "sexually explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publications or material that features, or includes photographs, drawings, etchings, paintings, or other graphic depictions of nudity or sexually explicit material.
>
> **Nudity:**
> "Nudity" means a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed. Published material containing nudity illustrative of medical, educational or anthropological content may be excluded from this definition.
>
> **Sexually Explicit:**
> "Sexually Explicit" includes written and/or pictorial, graphic depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation. Sexually explicit material also includes individual pictures, photographs, drawings, etchings, writings or paintings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.

DISCUSSION

In reviewing the 2014 DOC Policy, the policy as applied is what must be considered. Even though the current policy does still contain the word "feature," the policy as applied is that one word or one image is enough to get a book or other publication banned even though nudity or pornography is not "featured" in the publication or the image.

This Court previously approved another prison publication review policy in 2003. *King v. Dooley*, 4:00-cv-04052-LLP, Docket No. 34 (D.S.D. June 16, 2003). How the *King* policy would apply to the publications in question is dicta. The only consideration of the *King* policy is to dismiss the Defendants' claim that the *King* policy is essentially the same as the 2014 policy now under consideration and as an alternative policy. See Report and Recommendation detailing the differences, pp 36-41 (Doc. 105). In brief, the *King* policy did not apply to written materials nor to the manufacturing of images or objects. The *King* policy under its definition of "features" looked at the item in question in its entirety rather than, for example, censoring an entire book because of one page in the book even if that page was present not for its prurient interest but instead was a part of the narrative in the theme of the book. An example is the book Some Luck by Pulitzer prize winning author Jane Smiley. The book is a 395 page novel published in 2014 as the first of a trilogy dealing with the life of an Iowa farm family starting in 1920. The book was selected by the South Dakota Humanities Council for the One Book South Dakota program and thus read by a variety of reading groups. A couple of short scenes in the narrative theme of the maturation of Frank, one of the principal characters. The scenes would get the book banned under the current policy as it is applied. Those scenes are an integral, albeit brief part of the book and a part of Frank's early experiences and not presented for any prurient interest.

An as applied as well as a facial challenge is being analyzed where there has been no separate justification for the 2014 policy put forth by the Defendants other than broad general arguments. Court approval of the *King* policy is no basis for the approval of the present policy as they differ significantly. In addition, Defendants have not shown another approved policy in another jurisdiction that is as restrictive as this policy as it is applied. *Turner* analysis is applicable to both as applied and facial challenges. *Thornburgh v. Abbott*, 490 U.S. 401, 403, 109 S.Ct. 1874 (1989)

(considering both a facial and as applied challenge); *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004). The ultimate *Turner* reasonable relation to legitimate penological interests test will be applied to each item. *Turner* provides four factors for the reasonable relations test. The factors have the same analysis for each of the items except as otherwise noted. The four factors need not be each given the same weight in each analysis.

Under the first *Turner* factor, the governmental objective underlying the regulations is legitimate and neutral. The pornography policy is related to a governmental objective, but not reasonably so except in the instances of Manga Comics and Coppertone®.

As for the second factor, there is no alternate means by which prisoners can exercise their First Amendment rights unless prisoners were evaluated individually and provided access according to their profile. For example, prisoners inclined to violence would get no violence related materials. See *Murchison v. Rogers*, 779 F.3d 682 (8th Cir. 2015) (single issue of Newsweek magazine banned to all the prison population for its strong depiction of gang violence). Child sex offenders would not get Coppertone® type ads or other similar materials. Although such specific limitations are possible, it is not reasonable for the courts to require that level of specificity from prison administrators. As a result, there are no reasonable alternate means by which prisoners could exercise their First Amendment rights.

Third, what impact would the accommodation of Mr. Sisney's asserted constitutional right have on others (guards and inmates) inside the prison. Given the dearth of evidence in the record, it is difficult to envision any impact upon others except for the Manga Comics and the Coppertone® ad. Each could be trading stock to some. The Manga Comics could be bartered for their sexual themes and could give rise to new ideas with which to taunt female employees.

Fourth, whether there are obvious, easy alternatives whose existence show that the regulation in question is not reasonable, but is an "exaggerated response" to prison concerns. An easy alternative, by no means the only one, is the *King* policy that this Court approved of in 2003. No reasons have been shown for this strict departure from that policy. No showing has been made that

the *King* policy caused problems in the penitentiaries. The banning, for example, of the Matisse Picasso and Modern Art in Paris book is a clear example of an exaggerated response as is the banning of the paintings and sculpture of Michelangelo. By contrast, the banning of Manga Comics and the Coppertone® ad are not exaggerated responses.

MANGA COMICS

The comic books are not good literature or even close to it, but that is not the question. The comic books have sophomoric situations which do have a sexual tone. The third comic book is mainly about a teenage boy who gets a female face transplant after a motor vehicle accident and is living life as a teenage girl at a girl's high school. Book 3 contains approximately 200 pages, dealing mostly with situations where the boy is nearly found out to be a boy or gets to hug girls. On page 142 a man tries to sell the boy a pair of fake silicone breasts he can affix to his person. The fake breasts are depicted bare with exposed nipples, but they are torso only. On page 155, the boy is trying out an all body female suit covered with a skimpy one-piece bathing suit when a snake attacks him, crawling between the covered breasts of the suit. The snake is drawn to look like a penis. The female body suit is subsequently pictured holding a limp snake dripping some liquid. Books 4, 5 and 6 are similar to Book 3. Pornographic images do not preponderate in the books but the ongoing sexual tone does preponderate. The voyeurism, other sexual content, and the continued sexual tone which are the feature of these juvenile books do warrant granting Defendants' Motion for Summary Judgment as to the *Pretty Face* manga comics. Pursuant to *Turner* the Court is to conduct an "independent review of the evidence." *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979-986 (8th Cir. 2004). The evidence consists of the books themselves. That review leads the Court to the conclusion that the banning of the Manga Books is not an exaggerated response by Defendants but instead is within their discretion in determining what is sexually explicit. This banning does appear to be reasonably related to legitimate penological interests. *Turner* at 89; *Murchison v. Rogers*, 779 F.3d 882, 885 (8th Cir. 2015).

THE COPPERTONE® ADVERTISEMENT

The ad is at Docket No. 40-10. It is a Coppertone® advertisement for suntan lotion. It features a little girl in pigtails, probably between three to six years of age. She is deeply tanned and

wears a brief bottom but no top (her chest faces away from the viewer and is not visible). A little black dog has her briefs between his teeth and is pulling on them, revealing the upper globes of her pale buttocks. Two ad slogans are visible, one stating "Tan . . . Don't Burn . . . Use Coppertone®." The other slogan says "Don't be a Paleface." *Id.* Coppertone® introduced the ad in 1959. *See* http://www.tvacres.com/admascots.coppertone.htm. Coppertone® changed its ad to be more modest at the turn of the 21st Century. *Id.*

In this instance the Defendants did raise the specific concern of the attraction of this ad to child sexual offenders. Even without a definition of "feature," this ad does not feature nudity. Instead it features the "cuteness" of the scene of a little girl and her puppy as it would appeal to most people. Despite that, the attraction of this ad to the prurient interests of some child sex offenders, be they hands-on or viewers, is obvious. Even though child sexual offenders make up only a portion of the prison population, this is an instance where penological objectives concerning the minority, child sex offenders, must override the position of the majority of prisoners that not being child sex offenders they should be able to view this and other ads that would be neutral to other observers. The current policy ban on this seemingly innocuous ad is, however, reasonably related to a legitimate penological objective. Defendants' Motion for Summary Judgment as to the Coppertone® advertisement is granted.

THRONES OF DESIRE

This book contains fourteen short stories by different authors. The "forward" to the collection correctly explains that the stories have plot and sex, but that the sex in the stories moves the plot along, it is not just a side attraction. Defendants have not addressed how the banning of this written material meets their penological goals. There is only one image, that being a photograph of a scantily-clad woman on the cover of the book. Her genitals, buttocks and nipples are fully covered. If that is the reason for the banning, no rationale is given for how this meets any penological goals. Defendants' Motion for Summary Judgment as to this publication is denied.

PRIDE AND PREJUDICE: THE WILD & WANTON EDITION

This book combines the complete original Pride and Prejudice novel by Jane Austen with

titillating additions by Annabella Bloom. The additions to the original text are printed in bold, helping the reader identify the next addition. There are no visual images. Even though titillating to some persons, Defendants have not shown how the banning of this book is reasonably related to a legitimate penological objective. Defendants' Motion for Summary Judgment as to this book is denied.

MATISSE, PICASSO AND MODERN ARTS IN PARIS

This is simply an art book. There are not any sexual innuendos or sexual themes to it. The book is a companion to the T. Catesby Jones Collections of Art at the Virginia Museum of Fine Arts and the University of Virginia Art Museum. The book contains pages and pages of text, explaining the art and the artists in the collection. The text is interspersed with numerous depictions of various artworks in the Jones Collections. Of these depictions, a very tiny handful have the odd bare breast or exposed buttocks. The nudes, few in number, are like still life paintings. They do not contain any sexually explicit content. None of the paintings depict their subject lewdly or as engaged in any actual or simulated sexual acts, nor is there any suggestion of S&M or other violent acts.

The first sentence of the rejection form states:

> The item depicts pornographic materials or encourages sexual behavior, pornography, nudity or sexually explicit conduct which is criminal in nature and/or may be detrimental to your rehabilitation.

Docket No. 69-13.

Nothing in the book encourages sexual behavior, criminal pornography, criminal nudity or criminal sexually explicit conduct. Thus the denial had to be on the basis that the nudes are considered pornographic. On appeal, Defendant Warden Young rejected the grievance, stating: "All three (3) books you ordered were rejected for sexually explicit content. Two (2) of the books also have nudity in them." Docket 69-17. There is no sexually explicit content in the Matisse book. Sexually explicit is defined under the DOC Policy as "depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation." None of the nudes are shown engaging in such acts, although they are nudes as defined in DOC Policy.

No evidence has been put forward to establish that the ban on this art book is reasonably related to a legitimate penological objective. Defendants' Motion for Summary Judgment in support of their banning the Matisse art book is denied.

This is not to say that all art books that are truly art books are as a group entitled to a free pass to be made available to all prisoners. The Court has visited many art galleries and art museums throughout the country and has probably the most comprehensive collection of modern fine art books in South Dakota. There are very few of those gallery and museum images and books where a case could be made for a banning based on the work being sexually explicit and the banning being reasonably related to a legitimate penological objective. But all of those images and books are not before the Court in this as applied analysis. This book and the Michelangelo Pictures and Sculpture are before the Court and no showing has been made that banning any of them is reasonably related to a legitimate penological objective.

THE MICHELANGELO PICTURES AND SCULPTURES

The reproductions of Michelangelo's works depict portions of various scenes painted by Michelangelo in the Sistine Chapel, drawings for later paintings, or sculptures. One picture is of the sculpture of David from the Old Testament of the Bible. A life size reproduction of the sculpture is in a park in downtown Sioux Falls. Bare buttocks and bare unerect genitalia are visible in the picture. Not everyone gets to see what the genius Michelangelo painted in the Sistine Chapel even though the Court has. Everyone should have that opportunity at least through images. Defendants have denied any inquiry into their application of the stated exception for educational, medical, or anthropological purposes. As a result, in an as applied application, those exceptions do not in reality exist. No basis has been shown that the banning of the Michelangelo Pictures and Sculptures and the bronze by Ghiberti is reasonably related to a legitimate penological objective. The Defendants' Motion for Summary Judgment in support of banning Michelangelo is denied in support of this as applied analysis.

THE EXCEPTIONS TO THE POLICY

There is an exception to the ban on publications containing nudity for nude material that is "illustrative of medical, educational or anthropological content." The exception is permissive, not mandatory, as it contains the word "may." That permissive element could be used where some art should nonetheless be kept out of prison. In briefing, Defendants claimed that the exception cannot apply to nudes that constitute art unless the inmate requesting the nudes is a "serious student of the arts." They urge that the exception is inapplicable to Plaintiff because Mr. Sisney is not in any art classes at SDSP. With that position there would have to be medical, educational, and anthropological classes available to inmates at the various prisons for inmates to take to possibly be awarded the exception. Defendants did not respond as to what, if any, instances there are where any of the exceptions were allowed. The three exceptions are illusory and are of no support to the defense of the DOC Policy.

MISCELLANEOUS MATTERS

Mr. Sisney's due process arguments were previously dismissed by this Court and not pursued on appeal. Accordingly, they will not be dealt with again.

This Court reaches the same conclusions as the Report and Recommendation but cannot adopt the approach of the Report and Recommendation as it first determined that the DOC Policy was constitutionally deficient from a facial analysis. That facial analysis was then used in the as applied analysis. In this opinion on remand, the as applied analysis is the first analysis and stands on its own without regard to any conclusions from an application of a facial challenge. Also, the *King* policy is not relied upon other than to show how it differs from the 2014 DOC Policy in question and as one reasonable alternative.

Mr. Sisney urges that the DOC Policy is unconstitutionally vague. As the policy is in fact applied, it is not vague. The Court does adopt the discussion of vagueness at pages 91 through 93 of the Report and Recommendation (Doc. 105). The short answer is that the application of the DOC Policy in practice is that "feature" now means a one-time appearance of a single nude picture or a single sexually oriented passage in a publication, either of which will result in a banning of that

item. Previously, "feature" was defined to mean a publication which routinely and regularly featured pornography or, in the case of one-time issues, promoted itself based on pornographic content. Although the word "feature" remains in the current DOC Policy, there now is no definition of "feature." Without any definition of "feature" or "features" it can be argued that the policy as stated is vague. However, when considering the policy as applied, there is no vagueness to the current DOC Policy.

Defendants have argued that they need not show any basis for the much more stringent 2014 Policy as compared to the Policy approved by *King* in 2003, nor that they must separately show in this how the 2014 Policy meets the four *Turner* factors. Defendants claim there the *King* decision allows Defendants to simply rely upon other cases and general statements. *King* does not do so, as *King* was a situation where the Defendants moved for summary judgment and the *pro se* Plaintiff did not respond so the representations of the Defendants for summary judgment were admitted.

THE FACIAL CHALLENGE

The Court has now ruled upon the as applied challenges. Plaintiff also raised a facial challenge. There is some question from the Complaint as to whether the facial challenge was a limited challenge or a challenge to all the pornography regulations. Plaintiff was *pro se* until the appeal was taken so the Plaintiff's pleadings must be broadly construed. In addition, throughout the proceedings before this Court the facial challenge has been to all of the pornographic regulation.

The courts can simultaneously consider an as applied as well as a facial challenge as was done in *Thornburgh*. There the prison regulations for prisoner receipt of publications was found to be facially valid but the case was remanded for an individual determination of whether the regulation as applied in banning each of 46 publications was unconstitutional.

The first question is whether the facial challenge should be reviewed now that the as applied challenge has been ruled upon. Footnote 5 of the Eighth Circuit Opinion in *Sisney* noted "*See* Richard H. Falcon, Jr.*, Fact and Fiction about Facial Challenges*, 99 Cal. L. Rev. 915, 925 (2011) (noting that "the Supreme Court routinely speaks of facial attacks on particular provisions . . . . even

when the success of those attacks could have other aspects of multi part enactments [or rules] intact"). This was in support of the Court's observation: "Moreover, even if the as applied analyses did not fully resolve the case, the *Fox* approach might facilitate the severing of constitutionally suspect provisions instead of invalidating the entire policy." *Sisney* at 698.[1]

With those observations in mind, the pornography policy presents two different worlds. One is the prohibition of "sexually-explicit" conduct in the paragraph with the heading "Pornographic materials:" and the paragraph banning "Sexually Explicit:" with deletion of the words "nudity or." Sexually explicit conduct is far removed from simple nudity.

As for sexually explicit materials with the removal of nudity from the definition of sexually explicit, it is clear that such a banning has a reasonable relation to legitimate penological interests. As for the factors underlying that ultimate *Turner* test, the government objective underlying that portion of the regulations is legitimate and neutral, and that portion of the regulations is rationally related to that government objective only with the removal of nudity from the definitions of pornographic material and what is sexually explicit. Without those deletions, the policy is overly broad and in violation of the First Amendment. The same is true for a banning of a written publication that has a single sexual reference.

Secondly, there are no real alternate means of exercising the right to view simple nudity or to read literature that did not feature sexual presentations. There could be monitored reading rooms for such material but to provide that option is within the judgment and discretion of prison administrators and not to be mandated by the courts.

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[1] *Sisney* at 698 referred to *Jacobsen v. Howard,* 109 F.3d 1268 (8th Cir. 1997). That commercial case involved the removal of Mr. Jacobsen's newspaper vending machines at highway rest areas. The as applied analysis found the statutes prohibiting this commercial activity at highway rest stops to violate the First Amendment so no review of facial challenge was necessary. In the present case, some of the bannings were on as applied analysis found to be constitutionally prohibited but other bannings were found to withstand First Amendment challenge. Those various findings warrant a *Fox* facial review which results in portions of the policy being upheld and portions stricken.

Thirdly, accommodating all prisoners to view and possess sexually explicit materials would appear to be detrimental to the order desirable for prison employees and other inmates. But once again, to ban simple nudity, or a single sexual reference in a publication is overly broad and contrary to the First Amendment.

Finally, a limitation upon viewing and possessing sexually explicit materials by inmates is not an exaggerated response to prison concerns. But the policy, both as stated and as applied, is far broader than that and is overly broad and in violation of the First Amendment.

What then about depictions of simple nudity that is not sexually explicit? The regulations banning simple nudity which has no component of being sexually explicit as defined by the policy, has no reasonable relation to any legitimate penological interests. A caveat is demonstrated by the Coppertone® ad. A limitation on nudity of minors would have a reasonable relation to legitimate penological interests.

Secondly, there is no reasonable alternative means of exercising the right to view simple nudity.

Thirdly, the impact of the accommodation of Plaintiff to view simple nudity would have no discernable impact upon others inside the prison such as guards and inmates.

Finally, the banning of simple nudity, nudity which has no component of being sexually explicit, is an exaggerated response to prison concerns.

But what about the written word? The *King* policy did not ban written material. It is a huge leap for the current policy to ban written material with sexual content where the sexual content is a natural part of the written work as opposed to sexual material being the feature of the publication. The present policy bans written material with any sexual content. That means the potential of banning the Bible and much of Shakespeare, not to mention all of the fiction of John Updike, Phillip Roth, Earnest Hemingway, and Gabriel Garcia Marquez, to name a few.

A ban this sweeping has no rational relation to legitimate penological interests. The prisoners have no alternate reasonable means of access to such literature.

The accommodation of the prisoners having access to these written materials would have little impact on others inside the prison. A more nuanced ban on some types of reading material is an easy alternative. A ban this sweeping is an exaggerated response to prison concerns.

Accordingly, that portion of the policy that includes in the definition of "Pornographic Material" the words "nudity or" is overly broad and in violation of the First Amendment. The sentence that remains which does not violate the First Amendment would read:

> **Pornographic Material:**
> Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature "sexually explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publications or material that features photographs, drawings, etchings, paintings, or other graphic depictions of sexually explicit material. "Feature" means a publication which routinely and regularly featured pornography, or in the case of one-time issues, promoted itself based on pornographic content. Graphic depictions of nudity of minors is prohibited.

The words "nudity or" would also be removed from the definition of "Sexually Explicit" as being overly broad and not reasonably related to legitimate penological interests.

One person cannot normally sue on behalf of others. An exception to the rule is a challenge to a statute as overbroad under the First Amendment. *LAPD v. United Reporting Pub. Corp.*, 528 U.S. 32, 38 (1999). "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial jurisdiction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). Here there is no assumption necessary as the record contains numerous examples of banning materials of inmates other than Mr. Sisney.

Facial challenges have been found to be appropriate where, as here, the challenge provides actual instances of overbroad application of a policy, and not just speculation about hypothetical or

imaginary cases. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-450 (2008).

If a facial analysis of the pornography policy is not allowed, then that leaves the policy as virtually unreviewable. *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1320 (Fed Cir. 2002). Few inmates can navigate the rigors of federal litigation *pro se*, and Mr. Sisney has had able court-appointed counsel starting with his appeal.

The above alteration of the current policy allows that which should remain to be in place until the DOC creates whatever in its discretion it chooses, subject to the requirements of the First Amendment and the anticipated appeal.

The failure of the Defendants to support or justify the 2014 Policy should not be a basis for the courts refusing to do a facial review of the policy. If a refusal to justify a policy prevents facial review of claimed First Amendment violations, then there is a new and unbeatable defense to any facial review of a policy no matter how overbroad.

Unconstitutional applications of the current policy do overwhelm legitimate applications. By upholding the legitimate portions of the policy, the balancing of improper banning versus proper need not be made prospectively.

It should also be noted what this facial review does not do. It does not consider the instances of banning for violence which was approved in *Murchison v. Rogers*, 779 F.3d 882 (8th Cir. 2015) "... an overbreadth claim is unique from traditional facial challenges in that it does not require a plaintiff to plead or prove that the law is unconstitutional in every application." *Bell v. Keating*, 697 F.3d 445, 453 (7th Cir. 2012) (citing *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1587 (2020). Instead, Sisney needs to show that the policy's overbreadth is "real [and] substantial ... judged in relation to the [policy's] plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 615. The Penthouse type magazines are clearly to be banned in prison, but the potential banning of much of contemporary fiction is an overbreadth reach of the policy, for beyond its legitimate sweep.

Sisney has shown "'From the test of [the policy] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003). "[T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreath grounds." *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). Sisney has shown actual and substantial overbroad application of the current policy occurring on a regular basis before and during this lawsuit (and continuing, see *Bell v. Young*, 2018 WL 314385 (2018)). The policy is overbroad and goes far beyond what is necessary. There were no "limiting constructions" offered by the Defendants for the Court to consider. See *Kolender v. Lawson*, 461 U.S. 352, 355 (1983).

In addition, this Court should, if possible, interpret the statute to preserve its constitutionality. *Ayotte v. Planned Parenthood*, 546 U.S. 320, 329 ("' partial, rather than facial, invalidation is the required course,' such that a 'statute may ... be declared invalid to the extent that it reaches too far, but otherwise left intact'"). It should do so if the policy is "readily susceptible" to such interpretation. If it is not, the court should "not rewrite [the policy] to conform to the constitutional requirements. *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 397 (1988).

Sisney urges that the entire policy should be invalidated. The first basis is the policy would not have been passed without the unconstitutional portions. Given that the previous *King* policy did not have the present unconstitutional portions, it seems likely the DOC would have passed something similar to the current policy without the unconstitutional portions as that policy is still more restrictive than *King*. Sisney also relies upon the fact that in its previous opinion, this Court declined to separate out or provide an alternative other than noting the existence of the previous *King* policy which had met constitutional challenge. Upon consideration of the Eighth Circuit Opinion, it appears that a couple of simple excisions and a provision regarding minors saved the policy by it now having a reasonable relation to legitimate penological interests and still being more restrictive in some aspects than the previous *King* policy.

IT IS ORDERED:

1. That Defendants' Motion for Summary Judgment, Doc. 67, is granted in part

and denied in part as follows:

a. Defendants' Motion for Summary Judgment on Mr. Sisney's as applied challenge is granted as to the Manga Comics Pretty Face books and granted as to the Coppertone® advertisement.

b. Defendants' Motion for Summary Judgment on Mr. Sisney's as applied challenge is denied as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book, the Michelangelo pictures, and Matisse Picasso and Modern Art in Paris; and

c. Defendants' Motion for Summary Judgment on Mr. Sisney's facial challenge is denied in part and granted in part. "Pornographic Material:" is found to withstand facial challenge with the removal of "nudity or" from the definition and "Sexually Explicit" withstands facial challenge with the removal of "nudity or". "Nudity:" as defined as a basis for banning is unconstitutional as being too broad as is the ban upon all written material that has any sexual content. The following is added to save the policy: "Featured: is defined as a publication which routinely and regularly featured pornography, or in the case of one-time issues, promoted itself based on pornographic content. The depiction of nudity of minors is prohibited."

2. That Plaintiff Charles Sisney's Motion for Summary Judgment, Doc. 92, is granted in part and denied in part as follows:

a. Mr. Sisney's Motion for Summary Judgment on his as applied challenge is denied as to the Coppertone® advertisement and denied as to the Pretty Face Manga comic books.

b. Mr. Sisney's Motion for Summary Judgment on his as applied challenge is granted as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book; the Michelangelo pictures, and Matisse, Picasso and Modern Art in Paris book.

c. Mr. Sisney's Motion for Summary Judgment on his facial challenge is granted in part and denied in part as is stated in 1.c. above. No opinion is stated as to the effect of the current policy on outgoing mail as that question is not now properly

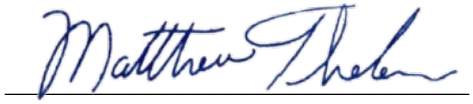
before the Court.

Dated this 29th day of June, 2020.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK



UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

****

CHARLES E. SISNEY,	*	CIV 15-4069
Plaintiff,	*	
vs.	*	
	*	JUDGMENT
DENNY KAEMINGK, in his official capacity as the South Dakota Secretary of Corrections; DARIN YOUNG, in his official capacity as the Warden of the South Dakota State Penitentiary; SHARON REIMANN, in her official capacity as an SDSP designated Mailroom Officer; and CRAIG MOUSEL, in his official capacity as an SDSP designated Property Officer,	*	
Defendants.	*	

****

In accordance with the Memorandum Opinion and Order filed on this date with the clerk,

IT IS ORDERED, ADJUDGED, and DECREED that Judgment is entered as follows:

1. That Defendants' Motion for Summary Judgment, Doc. 67, is granted in part and denied in part as follows:

   a. Defendants' Motion for Summary Judgment on Mr. Sisney's as applied challenge is granted as to the Manga Comics Pretty Face books and granted as to the Coppertone® advertisement.

   b. Defendants' Motion for Summary Judgment on Mr. Sisney's as applied challenge is denied as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book, the Michelangelo pictures, and Matisse Picasso and Modern Art in Paris; and

   c. Defendants' Motion for Summary Judgment on Mr. Sisney's

facial challenge is denied in part and granted in part. "Pornographic Material:" is found to withstand facial challenge with the removal of "nudity or" from the definition and "Sexually Explicit" withstands facial challenge with the removal of "nudity or". "Nudity:" as defined as a basis for banning is unconstitutional as being too broad as is the ban upon all written material that has any sexual content. The following is added to save the policy: "Featured: is defined as a publication which routinely and regularly featured pornography, or in the case of one-time issues, promoted itself based on pornographic content. The depiction of nudity of minors is prohibited."

2. That Plaintiff Charles Sisney's Motion for Summary Judgment, Doc. 92, is granted in part and denied in part as follows:

   a. Mr. Sisney's Motion for Summary Judgment on his as applied challenge is denied as to the Coppertone® advertisement and denied as to the Pretty Face Manga comic books.

   b. Mr. Sisney's Motion for Summary Judgment on his as applied challenge is granted as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book; the Michelangelo pictures, and Matisse, Picasso and Modern Art in Paris book.

   c. Mr. Sisney's Motion for Summary Judgment on his facial challenge is granted in part and denied in part as is stated in 1.c. above. No opinion is stated as to the effect of the current policy on outgoing mail as that question is not now properly before the Court.

Dated this 29th day of June, 2020.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
MATTHEW W. THELEN, CLERK

United States Court of Appeals
For the Eighth Circuit

No. 16-4313

Charles E. Sisney

Plaintiff - Appellee

v.

Denny Kaemingk, in his official capacity as the South Dakota Secretary of Corrections; Darin Young, in his official capacity as the Warden of the South Dakota State Penitentiary; Sharon Reimann, in her official capacity as an SDSP designated Mailroom Officer; Craig Mousel, in his official capacity as an SDSP designated Property Officer

Defendants - Appellants

American Civil Liberties Union of South Dakota

Amicus Curiae

National Coalition Against Censorship

Amicus on Behalf of Appellee(s)

No. 16-4480

Charles E. Sisney

Plaintiff - Appellant

v.

Denny Kaemingk, in his official capacity as the South Dakota Secretary of Corrections; Darin Young, in his official capacity as the Warden of the South Dakota State Penitentiary; Sharon Reimann, in her official capacity as an SDSP designated Mailroom Officer; Craig Mousel, in his official capacity as an SDSP designated Property Officer

Defendants - Appellees

Appeals from United States District Court
for the District of South Dakota - Sioux Falls

Submitted: October 19, 2017
Filed: March 30, 2018

Before GRUENDER and BENTON, Circuit Judges, and TUNHEIM,[1] District Judge.

GRUENDER, Circuit Judge.

Inmate Charles Sisney brought this *pro se* civil rights action against four South Dakota corrections officials, asserting both facial and as-applied challenges to the State's prison-pornography policy. The district court construed Sisney's facial challenges to two distinct provisions of the policy as a single attack on the entire policy, and it granted his motion for summary judgment on this score. After invalidating the policy on its face, the court proceeded to resurrect a prior version of the policy and used it to resolve all but one of the as-applied challenges in Sisney's favor. The prison officials now appeal the partial grant of summary judgment to Sisney, and Sisney cross appeals. For several reasons, we find it prudent to decide

[1]The Honorable John R. Tunheim, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

whether the policy was constitutional as applied to Sisney before reaching his facial challenges. However, the district court erred in its as-applied analysis, so we vacate the summary judgment order and remand for it to consider, in the first instance, Sisney's as-applied claims based on the version of the policy he actually challenged and then to determine whether facial relief remains necessary.

I.

Sisney has been serving a life sentence at the South Dakota State Penitentiary ("SDSP") since 1997. During this time, he has brought several civil rights actions, including two *pro se* suits in South Dakota state court and a free-exercise challenge that was part of a consolidated appeal before this court. *See Sisney v. State*, 754 N.W.2d 639 (S.D. 2008); *Sisney v. Best Inc.*, 754 N.W.2d 804 (S.D. 2008); *Van Whye v. Reisch*, 581 F.3d 639 (8th Cir. 2009). With the benefit of this experience, Sisney now raises a variety of challenges to the 2014 version of the South Dakota Department of Correction ("SDDOC") pornography policy ("2014 Policy").[2]

In relevant part, the 2014 Policy "prohibits the purchase, possession and attempted possession and manufacturing of pornographic materials by offenders housed in [SDDOC] institutions." SDDOC, Policy No. 1.3.C.8, *Pornography* (2014). The term "pornographic material" is defined to include "books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature nudity or 'sexually-explicit' conduct . . . [as well as] photographs, drawings, etchings, paintings, or other graphic depictions of nudity or sexually explicit material." *Id.* "Nudity," in turn, is defined as "a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed," while "sexually explicit" covers both images and writings that depict actual or simulated sexual acts. *Id.* Any material that qualifies as pornography under these definitions—including

[2]Sisney acted *pro se* throughout the proceedings before the district court, but counsel was appointed to represent him on appeal.

both incoming and outgoing correspondence—is treated as contraband and may be confiscated by prison staff. *Id.* Moreover, prisoners found in possession of pornography are subject to disciplinary action. *Id.* Inmates who disagree with a given classification, however, are entitled to appeal the decision through an administrative process. *Id.*

Acting pursuant to the 2014 Policy, SDSP staff rejected a number of items that were mailed to Sisney. The prohibited materials included two erotic novels, *Thrones of Desire* and *Pride and Prejudice: The Wild and Wanton Edition*, as well as four Japanese *manga* comics from a series called *Pretty Face*, nine images of Renaissance artworks depicting nudity, a book on Matisse and Picasso, and a poster featuring the iconic Coppertone suntan-girl advertisement. Sisney went through the prison grievance process to challenge the rejection of each of these items, but he was denied relief with only brief explanations as to why the materials were withheld.

In April 2015, having exhausted his administrative remedies, Sisney filed a *pro se* complaint pursuant to 42 U.S.C. § 1983. His subsequent amended complaint included six claims: (1) a facial challenge to the policy "as it completely bans all sexually explicit material, both pictorial and written"; (2) a facial challenge to the policy "as it bans not only [Sisney] to receive sexually explicit communications, but also prohibits [him] from sending out sexually explicit communications to those in the general public"; (3) a due process claim not raised on appeal; (4) an as-applied challenge concerning the SDSP's "overly broad and exaggerated interpretations of pornography, nudity and sexually explicit material"; (5) an as-applied challenge to the rejection of the three books and four *Pretty Face* comics; and (6) an as-applied challenge to the rejection of the nine Renaissance images and the Coppertone poster. In his prayer for relief, Sisney requested declaratory relief as to the constitutionality of the ban on all "sexually explicit" material and the outgoing-mail regulation, declaratory relief concerning his as-applied challenges, injunctive relief requiring the SDDOC to prohibit only "traditional forms of pornography and obscene materials," and injunctive relief ordering the prison to allow him to receive the rejected items.

Following a limited period of discovery, the corrections officials moved for summary judgment as to all claims. Beyond contesting Sisney's asserted "constitutional right to receive sexually explicit communications," the officials cited a variety of district and circuit court opinions describing the general penological interests served by prison bans on sexually explicit materials, including institutional security, rehabilitation, and the prevention of sex crimes in prison, as well as a reduction in sexual harassment directed at staff. They then emphasized that the district court had found these same interests sufficient to uphold the 2000 version of the SDDOC pornography policy ("2000 Policy") in *King v. Dooley*, CIV. 00-4052 (D.S.D. June 16, 2003), suggesting that this decision was dispositive as to Sisney's "facial challenge" because the 2014 Policy is "essentially the same." The officials provided no explanation, however, for modifying the policy and never suggested that the general penological interests from the cases they cited actually motivated the adoption of the 2014 Policy. Shortly thereafter, Sisney countered with his own motion for summary judgment. In it, he noted that the SDDOC policy had undergone significant revision since it was upheld in *King*. For example, the 2014 Policy banned written sexually explicit materials, expanded the definition of nudity, and extended the policy to outgoing correspondence. Sisney argued that these and other changes rendered the 2014 Policy unconstitutionally overbroad, even considering the legitimate interests promoted by other prison pornography-censorship policies.

The district court referred the cross motions for summary judgment to a magistrate judge, who issued a thorough report and recommendation ("R&R") that found largely in favor of Sisney. First, the magistrate judge concluded that the 2014 Policy "is much more sweeping and comprehensive than its predecessor which was analyzed in *King*." Accordingly, the R&R rejected the defendants' claim that *King* was dispositive as to Sisney's "facial challenge"[3] to the 2014 Policy. The magistrate

[3]Apparently, the fact that the corrections officials construed Sisney's two facial-challenge counts as a single attack on the entire policy rather than more limited challenges to individual provisions led the magistrate judge, and ultimately the district

judge next considered the merits of the facial claims, evaluating the regulations on incoming mail under the Supreme Court's four-factor balancing test from *Turner v. Safley*, 482 U.S. 78 (1987), and the regulations on outgoing mail under the stricter test from *Procunier v. Martinez*, 416 U.S. 396 (1974). Based on these separate analyses, the R&R concluded that "the current [2014] policy must be declared facially invalid" in its entirety because the SDDOC provided no justification for the policy beyond emphasizing its similarity to the 2000 Policy upheld in *King*. Rather than concluding there, however, the magistrate judge proceeded to the as-applied challenges, offering no explanation for doing so beyond an unsupported assertion that the "DOC policy may be enforced insofar as it comports with the policy approved of in *King*." Thus, applying the superseded 2000 Policy, the magistrate judge recommended granting the defendants' motion for summary judgment as to the *Pretty Face* comics and the Coppertone poster, while granting Sisney's motion for summary judgment as to all of the other rejected materials.

Given the breadth of objections to the R&R, the district court reviewed the entire report *de novo*, ultimately adopting the recommendations and findings in nearly all respects. The court first observed that "[t]he basic claim of the Defendants is that the current policy really is no different than the [2000] policy . . . approved in *King*," and it agreed with the magistrate judge's rejection of this argument based on the "significant" differences between the two policies. The district court then held that the "new and overly broad policy goes far beyond what is necessary and is unconstitutional." With respect to the as-applied challenges, the court voiced concern about the R&R's unique approach of resurrecting and applying the 2000 Policy but seemingly accepted it nonetheless:

> [The R&R's] discussion of what is or is not censored under *King* is dicta and is only used to demonstrate some of the differences between the policies approved in *King* and the policies now before the Court. The R&R does not treat the *King* discussion as dicta. This Court does

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court, to adopt the same approach.

> consider the *King* discussions to be dicta because this Court does not believe that what there is of *King* policy in the present policy can be abstracted from the present policy to then apply those abstractions to the as-applied challenges. Nonetheless, this Court has applied the as-applied challenges under the *King* policy.

As we understand it, the district court applied the 2000 Policy despite its misgivings and found for Sisney as to each of the rejected materials except the *Pretty Face* comics. The prison officials then appealed the adverse grant of summary judgment, and Sisney cross-appealed the denial of relief as to the four comic books.

II.

"We review a district court's grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party and giving the non-moving party the benefit of all reasonable inferences." *Murchison v. Rogers*, 779 F.3d 882, 886-87 (8th Cir. 2015). Summary judgment is proper if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). While a prisoner bringing a *pro se* action "is entitled to the benefit of a liberal construction of his pleadings . . . [Rule] 56 remains applicable." *See Quam v. Minnehaha Cty. Jail*, 821 F.2d 522, 522 (8th Cir. 1987) (per curiam).

As the Supreme Court instructed in *Turner*, prisoners' rights cases require courts to strike a balance between two competing principles. 482 U.S. at 84-85. "The first of these principles is that . . . [p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *id.* at 84, "including those of the First Amendment," *Beard v. Banks*, 548 U.S. 521, 528 (2006). At the same time, *Turner* acknowledged that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform." 482 U.S. at 84. From a functional perspective, the Court noted, "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of

government." *Id.* at 84-85. Thus, "separation of powers concerns counsel a policy of judicial restraint" when it comes to reviewing prison regulations. *Id.* at 85. Moreover, "[w]here a state penal system is involved," as it is here and was in *Turner*, federalism serves as an "additional reason to accord deference to the appropriate prison authorities." *See id.* In light of these dueling interests, the Court held that "a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison rules." *Id.* at 81. Namely, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[4] *Id.* at 89.

Like other parties, inmates are permitted to raise both as-applied and facial challenges. *See, e.g.*, *Thornburgh*, 490 U.S. at 403. In the First Amendment context, we recognize a unique species of facial challenge, "under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008) (internal quotation marks omitted). Sisney's two facial claims both fall into the category of overbreadth challenges.

"It is not the usual judicial practice, however, nor do we consider it generally desirable, to proceed to an overbreadth issue unnecessarily—that is, before it is

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[4]As the R&R correctly recognized, the same degree of deference does not extend to prison restrictions on outgoing mail, which are subject to review under the more exacting standard set out in *Martinez*. *See Turner*, 482 U.S. at 85, 87 (distinguishing between restrictions on incoming and outgoing mail and explaining that *Martinez*'s application of heightened scrutiny "turned on the fact that the challenged regulation caused a consequential restriction on the First and Fourteenth Amendment rights of those who are *not* prisoners." (internal quotation marks omitted)); *see also Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989) (providing an independent justification for this distinction because "[t]he implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials").

determined that the statute would be valid as applied." *Bd. of Tr. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 484-85 (1989); *see also Wash. State Grange*, 552 U.S. at 450 (explaining that, even outside the First Amendment context, "[f]acial challenges are disfavored"). As the Supreme Court explained in *Board of Trustees v. Fox*,

> [s]uch a course would convert use of the overbreadth doctrine from a necessary means of vindicating the plaintiff's own right not to be bound by a statute that is unconstitutional into a means of mounting gratuitous wholesale attacks upon state and federal laws. Moreover, the overbreadth question is ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is *substantial*, not only as an absolute matter, but "judged in relation to the statute's plainly legitimate sweep," and therefore requires consideration of many more applications than those immediately before the court. Thus, for reasons relating both to the proper functioning of courts and to their efficiency, the lawfulness of the particular application of the law should ordinarily be decided first.

492 U.S. at 485 (citation omitted). Indeed, the Supreme Court has long recognized that the resort to overbreadth doctrine "is, manifestly, strong medicine," and as such,"[i]t has been employed . . . sparingly and only as a last resort." *Broaderick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Although *Fox* and its progeny do not *require* courts to resolve as-applied challenges before reaching claims of facial unconstitutionality, we conclude that several aspects of this case militate in favor of "resist[ing] the pulls to decide the constitutional issues . . . on a broader basis than the record before us imperatively requires." *See Street v. New York*, 394 U.S. 576, 581 (1969). First, the *Fox* approach appropriately reflects the deference we owe to corrections officials in prisoners' rights cases. As noted above, the need for restraint is only amplified here, given that both federalism and separation-of-powers concerns are implicated. *See Turner*, 482 U.S. at 84-85. Second and relatedly, beginning with Sisney's as-applied challenges could allow for the fashioning of more limited relief. For starters, if Sisney were entitled to

as-applied relief, his claims might be redressed without reaching the overbreadth issue. *See Jacobsen v. Howard*, 109 F.3d 1268, 1274-75 (8th Cir. 1997) (admonishing that "the district court should have first considered the validity of the statutes as applied" because then it "would have found it unnecessary to consider the overbreadth issue"). Moreover, even if the as-applied analysis did not fully resolve the case, the *Fox* approach might facilitate the severing of constitutionally suspect provisions instead of invalidating the entire policy.[5] *See* Fallon, 99 Cal. L. Rev. at 955 ("[I]f the Court determines that a statute would otherwise be substantially overbroad under the First Amendment overbreadth test, it will normally sever the statute and hold it only partially invalid if . . . it can identify a particular, precise way of severing the statute that cures the defect of substantial overbreadth."). Third, as the Supreme Court has cautioned, "[c]laims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Wash. State Grange*, 552 U.S. at 450 (internal quotation marks omitted). Here, Sisney challenges the outgoing-mail provision on its face, but he does not allege that any of his own correspondence was censored under the regulation. Given the speculative nature of his challenge to this provision, we are reluctant to rush into a broad constitutional ruling without a better understanding of how the regulation is actually applied, especially if as-applied relief or a different construction of Sisney's complaint would render such a ruling unnecessary.

In *Jacobsen v. Howard*, another overbreadth appeal involving the grant of both as-applied and facial relief, we similarly resolved to begin our analysis with the as-

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[5]That is, of course, assuming Sisney challenged the entire policy. As mentioned above, it is unclear to us that Sisney's amended complaint raised a facial challenge to the entire policy rather than separate facial challenges targeting the outgoing-mail provision and the definition of "sexually explicit." *See* Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 Cal. L. Rev. 915, 925 (2011) (noting that "the Supreme Court routinely speaks of facial attacks on particular provisions . . . even when the success of those attacks could leave other aspects of multipart enactments [or rules] intact").

applied challenges. *See* 109 F.3d at 1271. Because we held that the challenged statutes in *Jacobsen* were unconstitutional as applied, we went on to vacate the separate finding of facial unconstitutionality as unnecessary and unwarranted. *Id.* at 1274-75. We have taken this approach in other cases, as well. *See, e.g.*, *Harmon v. City of Kansas City*, 197 F.3d 321, 328 (8th Cir. 1999).

Here, however, we cannot adopt the district court's as-applied analysis because it was error to resurrect and apply the 2000 Policy. This was not the policy that Sisney actually challenged, nor was it the authority under which SDSP staff withheld the rejected materials. In fact, once the district court facially invalidated the 2014 Policy, there was nothing left to apply, given that new SDDOC policies supercede rather than amend previous provisions in their entirety.[6] *See, e.g.*, SDDOC, Policy No. 1.3.C.8. Moreover, even if we could take this approach, it would be imprudent to do so. As the district court itself correctly concluded, "the differences [between the two policies] are significant," and further, the hypothetical application of the 2000 Policy is highly speculative in that it requires guessing what the prison would or would not have censured under the old policy.

In light of this error, we believe the best course is to vacate the summary judgment order in its entirety and allow the district court to reevaluate Sisney's as-applied claims based on the 2014 Policy—the version he actually challenged. *See, e.g.*, *Montin v. Estate of Johnson*, 636 F.3d 409, 416 (8th Cir. 2011) ("Out of prudence, we believe it is appropriate to allow the district court to address this issue in the first instance," particularly when a *pro se* plaintiff's filings before the district court "lacked clarity"); *see also Thornburgh*, 490 U.S. at 403-04, 419 (upholding a

[6]Although the district court suggested that it considered the R&R's "discussion of what is or is not censored under *King* [to be] dicta," it nonetheless evaluated Sisney's as-applied challenges under the superceded 2000 Policy. Even if there were some principled distinction between what the court said and did, however, we believe that conducting the as-applied analysis based on the 2014 Policy is a necessary first step in resolving this case.

challenged prison censorship scheme on its face and endorsing the appellate court's decision to remand for the district court to evaluate the as-applied challenges in the first instance). Only after this determination will the district court be able to decide whether and to what extent it is appropriate to consider Sisney's facial challenges, resolve the other issues identified above, and fashion appropriate relief.

III.

Accordingly, we vacate the district court's summary judgment order and remand for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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CHARLES E. SISNEY,

Plaintiff,

vs.

DENNY KAEMINGK, in his official capacity as the South Dakota Secretary of Corrections; DARIN YOUNG, in his official capacity as the Warden of the South Dakota State Penitentiary; SHARON REIMANN, in her official capacity as an SDSP designated Mailroom Officer; and CRAIG MOUSEL, in his official capacity as an SDSP designated Property Officer,

Defendants.

CIV 15-4069

ORDER

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This matter is before the Court on the Report and Recommendation ("R&R") of Magistrate Judge Veronica Duffy dated May 25, 2016, Doc. 105. In the R&R, Magistrate Judge Duffy recommended that the Court grant in part and deny in part Plaintiff's Motion for Summary Judgment, Doc. 91, and grant in part and deny in part Defendants' Motion for Summary Judgment, Doc. 67. All parties filed timely objections to the R&R. According to statute, the Court must conduct a *de novo* review of any portion of the Magistrate Judge's opinion to which specific objections are made. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ.P. 72(b). Given the breadth of the objections, the Court conducted a *de novo* review of the entire R&R. The Court adopts the R&R with certain exceptions that are stated below. Any objection that is not specifically granted is denied.

BACKGROUND

The R&R extensively details the factual history of Sisney's claims and this Court will not repeat that history in full. In brief, Sisney is an inmate at the South Dakota State Penitentiary in Sioux Falls where he is serving a life sentence for first degree murder. Sisney makes both facial challenges and as-applied challenges to the current South Dakota Department of Corrections (DOC) pornography policy. Count V deals with Defendants' rejection of seven specific publications which were to be delivered to Mr. Sisney, those being: Pretty Face manga comics, Volumes 3, 4, 5, 6, a book entitled Thrones of Desire, and another book, Pride and Prejudice: The Wild and Wanton Edition, and an art book entitled Matisse, Picasso and Modern Art in Paris. Count VI deals with Defendants' rejection of nine pictures:

- Paradise by Michelangelo
- The Expulsion from the Garden by Michelangelo (Sistine Chapel ceiling painting, bay 4)
- Statute of David by Michelangelo
- Bronze The Creation of Adam and Eve by Lorenzo Ghiberti
- The Fall and Expulsion from the Garden of Eden by Michelangelo (Sistine Chapel ceiling painting)
- Study of the Resurrection of the Dead by Michelangelo
- Paradise Bronze by Michelangelo

DISCUSSION

Manga Comics

Plaintiff objects to the Report and Recommendation in part because the R&R found that the four Pretty Face manga comics would be censored under King. The Magistrate Judge concluded they presented a close question and that the four manga comic books contained a "sly ongoing joke of a sexual nature." The Court concludes that is not an inaccurate description in part of those four manga comic books but that is not all that they are about. There is no doubt that these comic books

are not good literature and they certainly are filled with sophomoric situations which do have a sexual tone. The books do not feature actual nudity or sexually explicit conduct so the fact that there is a sly ongoing joke which has sexual overtones is not enough to get the books censored under King. However, any discussion of what is or is not censored under King is dicta and is only used to demonstrate some of the differences between the policies approved in King and the policies now before the Court. The R&R does not treat the King discussion as dicta. This Court does consider the King discussions to be dicta because this Court does not believe that what there is of King policy in the present policy can be abstracted from the present policy to then apply those abstractions to the as-applied challenges. Nonetheless, this Court has applied the as-applied challenges under the King policy.

The King policy previously approved by this Court required sexually-explicit conduct or depictions of nudity or sexually-explicit conduct for a book to be censored. The King policy defined Nudity as "a pictorial depiction where genitalia or female breasts are exposed." Sexually Explicit is defined as "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex or masturbation." The four comics are subject to being banned, as they were, under the current policy. Contrary to the R&R, this Court finds that even though it is a close question, in a *de novo* review, the four Pretty Face manga comics should not be banned under King. However, this difference of opinion on these comics points out one of the difficulties on these issues. If these four comics were before this Court on an appeal, it would not be a de novo review. Instead, the finding of the administrative body is entitled to some deference. Given that deference, this Court would not uphold a challenge to a ban of the four manga comics if applying the King standards. Some deference to the administrative body is practically necessary so that the courts are not reviewing every censored item. However, the standard to be applied by the administrative body has to be a constitutional standard, in contrast to the present standard.

OTHER OBJECTIONS

The Plaintiff's objections raised the question of what does it take for female breasts to be exposed. Although that question is not answered in the King policy, one approach was the

Wisconsin prison regulations considered in Aiello v. Litscher, 104 F.Supp. 2d 1068, 1072 (W.D. Wisc. 2000). That regulation prohibited "the showing of the female breast with less than fully opaque covering of any portion below the top of the areola or nipple,".

Another objection by the Plaintiff involves the Coppertone® advertisement which the Magistrate Judge said is a close question but would be banned under the King policy. This Court does not find that the Coppertone® ad promoted itself based upon the nudity content of the ad. Instead, the Court views the Coppertone® ad based upon the "cuteness" of the ad. The Magistrate believes that the ad is "precisely the type of image one would hope to keep out of the hands of a child sexual offender," R&R, p. 85. The Court agrees with that observation but the Coppertone® ad meets neither the nudity nor the sexually explicit definition of the King policy. "Buttocks" being added to the King definition of nudity would meet that issue and provide for banning as was done in the current policy.

The King policy seems to make the best of a difficult question by approaching the problem of appropriate limitations on access and communication with a ban on nudity or sexually explicit representations. Even that ban, however, then does not take into account the world of legitimate art where nudity was commonly depicted in statuary from ancient time. How much viewing of fine art is forfeited when a person goes to prison? Given the wide varieties of depictions even in fine art, surely the privilege of viewing some fine art is forfeited by going to prison. King suggests no separate standard for fine art and the Court is not to legislate or draft legislation or regulations. With 50 states and the federal government all having prisons, there must be standards that have dealt with these difficult issues.

Plaintiff claims that there is a lack of "fair warning" as to what conduct violates prison policy with regard to sexually explicit material to be received by prisoners. The current policy does give fair warning and also does not suffer from being vague. The problem is that the current policy also is unconstitutional. Accordingly, the vagueness challenge of the Plaintiff is denied.

It is not for the Court to rewrite portions of the current policy. However, in adopting in part the R&R of Magistrate Judge Duffy, the Court agrees with Defendants' argument that the use of multiple staff members to screen material is not a portion of a basis for this Court holding that the current policy is unconstitutional. If only one person was reviewing all materials in one prison, there would probably be greater consistency in result, but it is for prison officials to determine whether one person or multiple employees should or even could have sole review responsibility

The basic claim of the Defendants is that the current policy really is no different than the censoring policy that the Court approved in King. That simply is not so as is amply detailed and demonstrated in the Report and Recommendation. The differences are significant. For example, the current policy prohibits manufacturing of images and objects where King did not. The current policy is applicable to written materials and that was not the case in King. The current policy is also applied to outgoing mail while the King policy did not apply censorship standards to outgoing mail. The current policy amounts to an all or nothing policy while King, due to its definition of "features," looked at the item in question in its entirety rather than, for example, censoring an entire book because of one page in the book even if that page was present not for its prurient interest but instead was a part of the narrative in the theme in the book as is, for example, the case of the book Some Luck. Some Luck by Pulitzer prize-winning author Jane Smiley is a 395 page novel published in 2014 as the first of a trilogy dealing with the life of an Iowa farm family starting in 1920. The book was selected by the South Dakota Humanities Council for the 2016 One Book South Dakota. program and thus read by a variety of reading groups. A couple of short scenes in the narrative theme of the maturation of Frank, one of the principal characters, would get the book banned under the current policy. The King policy would not ban the book as those scenes are an integral, albeit brief part of the book and obviously a part of his early experiences and clearly not presented for any prurient purpose.

Although prison policy on access can be restrictive, this new and overly broad policy goes far beyond what is necessary and is unconstitutional.

IT IS ORDERED:

1. That the Magistrate Judge's Report and Recommendation, Doc. 105, is adopted with the exceptions noted above.

2. That Defendants' Motion for Summary Judgment, Doc. 67, is granted in part and denied in part as follows:

   a. Defendants' Motion for Summary Judgment on Mr. Sisney's facial challenge is denied.

   b. Defendants' Motion for Summary Judgment on Mr. Sisney's as-applied challenge is granted as to the Pretty Face books and denied as to the Coppertone® advertisement.

   c. Defendants' Motion for Summary Judgment on Mr. Sisney's as-applied challenge is denied as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book, the Michelangelo pictures, and Matisse Picasso and Modern Art in Paris; and

   d. Defendants' Motion for Summary Judgment on Mr. Sisney's due process claims is granted.

3. That Plaintiff Charles Sisney's Motion for Summary Judgment, Doc. 92, is granted in part and denied in part as follows:

   a. Mr. Sisney's Motion for Summary Judgment on his facial challenge is granted and the current South Dakota Department of Corrections anti-pornography policy applicable to its penal institutions is held to be unconstitutional.

   b. Mr. Sisney's Motion for Summary Judgment on his as-applied challenge is granted as to the Coppertone® advertisement and denied as to the Pretty Face books comic books.

   c. Mr. Sisney's Motion for Summary Judgment on his as-applied challenge is granted as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book; the Michelangelo pictures, and Matisse, Picasso and Modern Art in Paris book; and

d. Mr. Sisney's Motion for Summary Judgment on his due process claims is denied.

4. That the Objections of Plaintiff and Defendants to the Report and Recommendation are granted and denied as stated in the above opinion. The Court notes that the 40 pages of Objections by the Defendants exceeds the 25 page briefing limitation set by Local Rule 7.2 but was nonetheless considered.

Dated this 29th day of September, 2016.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

CHARLES E. SISNEY, Plaintiff, vs. **DENNY KAEMINGK**, IN HIS OFFICIAL CAPACITY AS THE SOUTH DAKOTA SECRETARY OF CORRECTIONS; **DARIN YOUNG**, IN HIS OFFICIAL CAPACITY AS THE WARDEN OF THE SOUTH DAKOTA STATE PENITENTIARY; **SHARON REIMANN**, IN HER OFFICIAL CAPACITY AS AN SDSP DESIGNATED MAILROOM OFFICER; AND **CRAIG MOUSEL**, IN HIS OFFICIAL CAPACITY AS AN SDSP DESIGNATED PROPERTY OFFICER; Defendants.	4:15-CV-04069-LLP REPORT AND RECOMMENDATION ON THE PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT DOCKET NOS. 67 & 92

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INTRODUCTION

Pending before the court is plaintiff Charles E. Sisney's *pro se* complaint pursuant to 42 U.S.C. § 1983, alleging defendants' pornography policies violate his constitutional rights. See Docket Nos. 1 & 8-1. Mr. Sisney is an inmate at the South Dakota State Penitentiary (SDSP) in Sioux Falls, South Dakota. All parties have filed cross-motions for summary judgment. See Docket Nos. 67 & 92. This matter was referred to this magistrate judge pursuant to the October 16, 2014, standing order of the Honorable Karen E. Schreier and 28 U.S.C. § 636(b)(1). The following is this court's recommended disposition of the motions.

FACTS

Plaintiff Charles Sisney is an inmate at the SDSP, serving a life sentence. He is not a sex offender nor has he ever been disciplined during his tenure as an inmate for any sexual misconduct.

The South Dakota Department of Corrections (DOC) has an anti-pornography policy applicable to its penal institutions. This is DOC policy 1.3.C.8 and it provides in pertinent part as follows:

> The Department of Corrections (DOC) prohibits the purchase, possession, and attempted possession and manufacturing of pornographic materials by offenders housed in its institutions.
>
> * * *
>
> Pornographic Material: Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature nudity or "sexually-explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publication or material that features, or

> includes photographs, drawings, etchings, paintings, or other graphic depictions of nudity or sexually explicit material.
>
> Nudity: "Nudity" means a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed. Published material containing nudity illustrative of medical, educational or anthropological content may be excluded from this definition.
>
> Sexually Explicit: "Sexually Explicit" includes written and/or pictorial, graphic depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation. Sexually explicit material also includes individual pictures, photographs, drawings, etchings, writings or paintings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.
>
> Offender: For purposes of this policy, an offender is an inmate (in the custody of the South Dakota DOC institutional system) . . .

See Docket No. 1-2, p. 1.

Under this DOC policy, pornography is contraband. Id. Violation of the DOC policy can result in disciplinary action against an offender and confiscation of the pornography. Id. at p. 2. In addition, violation of the policy constitutes a violation of the STOP Program contract.[1] Id.

The warden of each South Dakota penal institution is authorized to institute procedures at his or her institution to implement the DOC pornography policy. Id. The minimum requirements for those procedures are preventing pornographic materials from infiltrating the institution through correspondence and visits, rejection of all incoming or outgoing pornography,

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[1] STOP is a DOC sex offender program provided at SDSP (among other institutions), to assist the offender with attitudes and behaviors necessary to return to the community and prevent further sex offending behaviors. See DOC Policy 1.4.A.3, p. 2. Mr. Sisney is not a sex offender.

designating staff who will have authority to determine what is pornographic, and creating a system for sharing and coordinating information about pornography between South Dakota penal institutions. Id.

If an offender disagrees with the institution's decision that a particular item is pornography, he may appeal the decision through the administrative remedy process. Id. See DOC policy 1.3.E.2.[2] Prison staff are prohibited from knowingly bringing pornography into a DOC facility. See Docket No. 1-2 at p. 2. The DOC pornography policy is reviewed yearly; sometimes the policy is amended or modified as part of that annual review, and sometimes no changes are made. Id. at p. 3. Mr. Sisney filed his complaint with this court on April 8, 2015. See Docket No. 1. He attached the version of DOC pornography policy in effect at that time, having been approved following annual review on June 10, 2014. See Docket No. 1-2 at p. 3. No changes to the policy were made in 2014, so the version in effect in 2014 is the same as the version finally approved in May, 2013. Id.

The DOC's policy addressing correspondence also contains some provisions touching on pornography. See Docket No. 69-2. Under the DOC mail policy, all outgoing mail must be delivered to the mailroom in unsealed

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[2] The DOC Administrative Remedy Policy requires an inmate to follow a two-step process if he wishes to initiate a complaint concerning the application of any administrative directive, policy, unit rule or procedure or if he wishes to complain about any oversight or error affecting him. See Docket No. 69-2, DOC Policy 1.3.E.2. First, the inmate submits an Informal Resolution Request (IRR). Id. If the issue is not resolved within 10 days of filing the IRR, the inmate must file a Request for Administrative Remedy (AR). Id. An inmate must initiate his administrative complaint within 30 days of the date of the incident. Id.

envelopes and is subject to inspection and reading. Id. at p. 7, ¶ 5-B. Pornography in incoming or outgoing mail may be rejected. Id. at pp. 8-9, ¶ 8-A-2 and 8-A-12.

Mr. Sisney's complaint alleges both facial challenges and as-applied challenges to the DOC pornography policy. See Docket No. 8-1. His claims are as follows:

1. Count I—the DOC policy is unconstitutional on its face because it violates Mr. Sisney's constitutional right to receive sexually explicit communications.

2. Count II—the DOC policy is unconstitutional on its face because it violates Mr. Sisney's constitutional right to send out sexually explicit communications to those in the general public.

3. Count III—the DOC policy violates the Due Process Clause because it denies Mr. Sisney the right to view incoming materials confiscated pursuant to the policy in order to appeal such confiscations and to defend himself at disciplinary proceedings.

4. Count IV—the DOC policy is unconstitutional as applied because SDSP interprets the policy in an overly broad and exaggerated way to ban materials that are not pornographic.

5. Count V—defendants' rejection of seven specific publications which were to be delivered to Mr. Sisney violates his constitutional rights under the First, Fifth and Fourteenth Amendments. The items are:

- Pretty Face Vol. 3 (ISBN 13: 978-1-4215-1370-6)

- Pretty Face Vol. 4 (ISBN 13: 978-1-4215-1547-2)
- Pretty Face Vol. 5 (ISBN 13: 978-1-4215-1644-8)
- Pretty Face Vol. 6 (ISBN 13: 978-1-4215-1645-5)
- Thrones of Desire (ISBN 978-1-57344-815-4)
- Pride and Prejudice: The Wild and Wanton Edition (ISBN 13: 978-1-4405-0660-4)
- Matisse, Picasso and Modern Art in Paris (ISBN 978-0-917046-88-9)

6. Count VI-- defendants' rejection of nine specific pictures which were to be delivered to Mr. Sisney violates his constitutional rights under the First, Fifth and Fourteenth Amendments.[3] The pictures are:

- Paradise by Michelangelo—see Docket No. 40-2
- The Expulsion from the Garden by Michelangelo (Sistine Chapel ceiling painting, bay 4)—see Docket No. 40-3
- Statue of David by Michelangelo—see Docket No. 40-4
- Bronze The Creation of Adam and Eve by Lorenzo Ghiberti—see Docket No. 40-5
- The Fall and Expulsion from the Garden of Eden by Michelangelo (Sistine Chapel ceiling painting)—see Docket No. 40-6
- Study of the Resurrection of the Dead by Michelangelo—see Docket No. 40-7 p.1
- Paradise Bronze by Michelangelo—see Docket No. 40-7 at p. 2

[3] Although Mr. Sisney's complaint says nine pictures were attempted to be sent to him, and his mother's affidavit accompanying the filing of the pictures also recites the number nine, in actuality ten pictures were filed with the court. All ten are listed. Defendants did not photocopy the pictures before sending them back to Mrs. Sisney, but they believe the pictures filed by Mrs. Sisney in this case are the same ones they rejected. See Docket No. 70-17 at p.4, ¶ 10.

- Paradise painting by Michelangelo—see Docket No. 40-8
- The Last Judgment by Michelangelo (Altar wall Sistine Chapel)—see Docket No. 40-9.
- Coppertone® suntan lotion girl advertising—see Docket No. 40-10.

These ten pictures were sent to Mr. Sisney by his mother, Esther Sisney, twice. The first time, in May, 2015. See Docket No. 91 at p. 2-3, ¶¶ 7-12; Docket No. 40. In May, 2015, the DOC employee who rejected the photos as pornographic was Jordan Storevik. See Docket No. 70-17. Esther Sisney then attempted to send the same pictures to Mr. Sisney again in November, 2015. See Docket No. 91 at p. 2-3, ¶¶ 7-12. In November, 2015, the DOC employee who rejected the photos as pornographic was defendant Sharon Reimann. Id.; see also Docket No. 91-3, Rejection Notice dated November 3, 2015, signed by defendant Reimann.

The rejection notices for all of the above items is a check-the-box form. See e.g. Docket No. 91-3. All of the rejection notices for the above items had the box checked for the following formulaic description:

> The item depicts pornographic material or encourages sexual behavior, pornography, nudity or sexually explicit conduct which is criminal in nature and/or may be detrimental to your rehabilitation. Included in this item are pictures, photographs, drawings, etchings, paintings, writings or illustrations depicting or describing sexual behavior, pornography, nudity, sexually explicit conduct, child pornography, bestiality or acts of sexual violence.

See id.

When the first Pretty Face book was rejected, Volume 4, the response to Mr. Sisney's request for an informal resolution stated that the book was

rejected "because there was nudity in several areas of the book. It also has a parental advisory on the cover. You cannot have this item." See Docket No. 68-5. When Mr. Sisney's request for an administrative remedy was denied, defendant Young stated "the book does contain sexually explicit drawings and storylines." See Docket No. 68-7. Volumes 3, 5, and 6 of Pretty Face were different books rejected at different times than Volume 4, addressed above. See Docket Nos. 68-8 (Vol. 3 Rejection Notice dated March 10, 2015); 68-13 (Vol. 6 Rejection Notice dated March 11, 2015); 68-18 (Vol. 5 Rejection Notice dated March 12, 2015). Although these were all separate books, delivered separately, when Mr. Sisney filed his administrative grievances for each book, defendants did not address the merits of those grievances at the initial review level; instead, each grievance was initially rejected on the grounds that Mr. Sisney had "already grievance [sic] this issue and are only allowed to grievance [sic] this issue once. Your request has been denied." See Docket Nos. 68-10, 68-15, and 68-20. On appeal from the initial review level, however, defendant Young appears to have addressed the merits of the grievance. See Docket Nos. 68-12, 68-17, and 68-20. Defendant Young rejected all four volumes on the basis of sexually explicit drawings and storylines. Id.

The three books, Thrones of Desire, Pride and Prejudice: The Wanton Edition, and Matisse, Picasso and Modern Art in Paris were all delivered together and rejected in one rejection notice. See Docket No. 69-13. At the initial IRR level, the explanation provided to Mr. Sisney by defendants for the rejection was "these books violate policy and will not be allowed. The

explanation of rejection is listed on your rejection notice." See Docket No. 69-15. Defendant Young, on appeal, rejected the grievance with the following statement: "All three (3) books you ordered were rejected for sexually explicit content. Two (2) of the books also have nudity in them." See Docket No. 69-17.

The Michelangelo pictures and the Coppertone® suntan lotion advertisement were all delivered and rejected together. See Docket Nos. 70-6 and 91-3. The grievance was denied on the basis that "the photos are clearly nude." See Docket No. 70-8. Defendant Young denied the appeal of the grievance solely on the basis of the presence of nudity. See Docket No. 70-10. No mention was made in the denials of the Matisse art book or the Michelangelo pictures that Mr. Sisney was required to be enrolled in an art class in order to receive the material. See Docket Nos. 69-17 and 70-10. In fact, the exception to the pornography policy is not mentioned in these, or any other, administrative documents generated by defendants.

Mr. Sisney went through the prison grievance process on each of his as-applied challenges to defendants' actions as well as his facial challenge to the DOC policy itself.

Mr. Sisney filed three rejection notices signed by defendant Reimann in 2013 for materials attempted to be delivered to him. See Docket No. 1-4 at pp. 5-7. These notices rejected the June, July, and August, 2013, issues of *Glamour* magazine. Id. No claim is asserted in the complaint based on the

rejection of *Glamour* magazines sent to Mr. Sisney. The magazines were addressed to Mr. Sisney, as were the rejection notices. Id.

Mr. Sisney also filed declarations from various other inmates at the SDSP setting forth materials defendants allegedly prevented the declarants from receiving. See Docket No. 1-3. The declarants are thirteen different inmates at SDSP who allege various publications were withheld from them at various times. Id. The documents listed range from the *Smithsonian* magazine, *National Geographic* magazine, *Mad Magazine*, various fashion magazines, and medical manuals, to travel publications and gossip magazines such as *U.S. Weekly* and *Island*. Id. One book, Guns, Germs & Steel, by Jared Diamond, was listed as rejected.[4] The dates of the alleged withholdings range from 2004 to 2015. Id. None of the materials allegedly withheld have been provided to the court. Furthermore, none of the declarations pinpoint what page of the publications defendants found violative of the DOC pornography policy. Id. Many of the declarations are vague as to the date on which the rejection occurred. Id.

Additional declarations which are of more relevance were provided by Mr. Sisney in support of his summary judgment briefing. Those declarations are accompanied by the prison administrative documents generated in

[4] Guns, Germs & Steel is a Pulitzer-prize winning non-fiction book about why Eurasion civilizations have survived while other societies have perished or failed to thrive. The thesis of the book is that the favorable influence of geography on societies and culture position those social groups to succeed. See http://www.pbs.org/gunsgermssteel/show/index.html . Last checked May 2, 2016.

connection with the prison's censorship. Thus, as to these rejections, the court's record reflects a specific date of rejection and defendants' administrative explanation for what portion of the publication was found offensive and why. See Docket Nos. 95-14, 95-15, 95-16, 97 and 98.

These declarations show that Corey De Hoff, an inmate at SDSP, had two magazines rejected by defendants pursuant to the policy. See Docket No. 97. They were the April, 2016, issue of *Hot Bike* magazine, which was rejected by defendant Reimann on February 2, 2016, for sexually explicit content on page 72 of the magazine. See Docket No. 97-1. The other magazine rejected was the March, 2016, issue of *Men's Fitness* magazine, which was rejected by defendant Reimann on February 12, 2016, for a sexually explicit article on page 90. See Docket No. 97-2.

Jeremy Bauer, also an inmate at SDSP, had two magazines rejected as well. See Docket No. 98. Rejected was the March, 2016, issue of *Esquire* magazine, which was rejected by defendant Reimann on February 16, 2016, for sexually explicit content on page 108. See Docket No. 98-1. The other magazine of Bauer's which was rejected was the same issue of *Men's Fitness* mentioned above, rejected by defendant Reimann on February 12, 2016, for the same reason stated above. See Docket No. 98-2.

In addition, Mr. Sisney provided rejection notices signed by defendant Reimann and Jordan Storevik as to inmate Michael Larson rejecting the December, 2015, issue of *Glamour* magazine and the January and December, 2015, issues of *Cosmopolitan* magazine. See Docket Nos. 95-14 through 95-16.

The versions of the DOC pornography policy have changed throughout the years covered by these inmate declarations. The definition of "pornographic material" was changed in June, 2009, and definitions of "nudity" and "sexually explicit" were added. See Docket No. 1-2 at p.3. In June, 2011, the definitions of "pornographic material," "nudity," and "sexually explicit" were expanded. Id. In June, 2012, a new provision regarding the STOP contract was added and a new section about incoming and outgoing documents being rejected was added. Id. Finally, changes made in May, 2013, altered the definitions of "pornographic materials" and "sexually explicit" and redefined the statement of the conduct prohibited by the policy. Id. The rejection notices issued to Michael Larson, Corey De Hoff and Jeremy Bauer were all issued under the current version of the DOC pornography policy because each rejection occurred after May, 2013. See Docket Nos. 95-14, 95-15, 95-16, 97 and 98.

Defendants apply their policy in an all-or-nothing manner. If a book, magazine, or pamphlet contains a portion that offends the DOC pornography policy, the entire publication is rejected. See Docket No. 95-5, p. 8, RFA #2 to Sharon Reimann; Docket No. 95-6, p. 8, RFA #2 response by defendant Reimann. See also Docket No. 95-5, p. 3, RFA #13; Docket No. 95-6, p. 4, Kaemingk's answer to RFA #13 (defendants refusal to admit that a publication with one or two nude pictures does not "feature" nudity). No attempt at dissection of the publication is made. Id.

Prior to June, 2009, the DOC pornography policy banned publications that "feature" pornography and it defined "feature" as containing pornography on a routine and regular basis or promoting itself based upon pornographic content. See Appendix 1. The current DOC pornography policy eliminated the definition of "feature," although the policy still uses the word "feature." See Appendix 2.

Defendants insist their policy is not a complete ban on pornography, that it only bans publications that "feature" pornography. While that is literally true, defendants are equivocal as to the definition of "feature" in the current policy. Defendant Kaemingk states he has no knowledge as to why the definition of "feature" which was previously part of the policy was removed. See Docket No. 95-1, p. 4, Interrogatory No. 5 to Denny Kaemingk; Docket No. 95-3, p. 5, Kaemingk's answer to Interrogatory No. 5. Kaemingk objected to providing a definition of what "feature" means in the current policy. See Docket No. 95-3, p. 6-7.

In a request to admit, defendant Kaemingk "denied" the definition of "feature" in the current DOC pornography policy is the same as the definition of "feature" that was previously explicitly provided in the policy. See Docket No. 95-5, pp. 2-3, RFA #10; Docket No. 95-6, p. 4, Kaemingk's answer to RFA #10. When asked to admit that a publication containing one or two nude pictures did not violate the DOC policy because the publication did not "feature" nudity, Kaeming denied that was true. See Docket No. 95-5, p. 3, RFA #13; Docket No. 95-6, p. 4, Kaemingk's answer to RFA #13.

Mr. Sisney asked defendants in discovery for a list of various magazines and publications which defendants had rejected under the DOC policy since January 1, 2012. See Docket No. 95-2, p. 3-4, Interrogatory # 7 to Defendant Young. Defendant Young refused to answer the interrogatory on the grounds that Mr. Sisney's complaint presented an "as applied" challenge only. See Docket No. 95-5, p. 5, Young's response to Interrogatory #7.

Mr. Sisney also asked Defendant Young whether there are exceptions to the DOC policy; whether any actual exceptions have been made since January 1, 2012; and the circumstances surrounding the actual exceptions made, if any. See Docket No. 95-2 at p. 4-5, Interrogatory #9 to Defendant Young. Defendant Young's answer was that the exception in the policy was "self-explanatory." See Docket No. 95-4 at p. 6, Young's answer to Interrogatory #9. Young ignored the portion of interrogatory number 9 that asked whether any actual exceptions to the policy were recognized by SDSP from January, 2012, to present and, if so, the circumstances surrounding those exceptions. Id. Defendants objected to answering any questions about the rehabilitation opportunities available to inmates in general, or to rehabilitation opportunities available specifically to inmates serving life sentences like Mr. Sisney, reiterating defendants' assertion that only an as-applied challenge was presented by Mr. Sisney's complaint. See Docket No. 95-1, p. 4, Interrogatory # 11 to Defendant Kaemingk; Docket No. 95-3, p. 6-7, Defendant Kaemingk's answer to Interrogatory #11. See also Docket No. 95-5,

p. 4, RFA #18 to Defendant Kaemingk; Docket No. 95-6, pp. 4-5, Defendant Kaemingk's answer to RFA #18.

Mr. Sisney filed an affidavit with his original complaint in this matter. See Docket No. 1-2. In that affidavit, he recounts a conversation he had on March 20, 2015, with Corrections Officer ("CO") Hall, who was a chapel officer at the time. Id. CO Hall told Mr. Sisney s/he works periodically in the mail room at the SDSP. Id. CO Hall stated mail was rejected as pornography if the picture showed any type of definition in the breast or groin area, even if the breast or groin was fully clothed. Id. CO Hall also said mail was rejected as pornography if an excessive amount of inner thigh, breast or buttock was shown. Id.

Defendants filed affidavits in connection with the pending summary judgment motions in which they state generally that the penological interests served by the current DOC pornography policy are the same interests discussed in Salinas (which case is discussed in detail below). See, e.g. Docket No. 70-13, p. 5, ¶ 16 (Affidavit of Catherine Schlimgen, attorney); Docket No. 70-15, p. 5, ¶¶ 15-16 (Affidavit of Denny Kaemingk). Defendant Kaemingk states in his affidavit that the SDSP has a "zero-tolerance" policy for sexual abuse/harassment of offenders. See Docket No. 70-15 at p. 5, ¶ 15. He states, "[t]he introduction of pornography into a correctional environment *could very well* lead to an increase in sexual behaviors committed by offenders." Id. (emphasis added). These affidavits provided by defendants do not acknowledge--or address--the changes between the DOC policy at issue in King

(also discussed below) and Salinas and the current DOC policy challenged by Mr. Sisney. Id.

In his complaint, Mr. Sisney seeks declaratory relief as follows: that the DOC pornography policy is unconstitutional on its face because it bans all sexually explicit material both pictorial and written; that the policy is facially unconstitutional because it bans outgoing pornography; that the policy is unconstitutional as applied because it is interpreted in an overly broad and exaggerated way by SDSP; and that the policy is unconstitutional because it denies offenders a chance to review the material being withheld. See Docket No. 8-1 at pp. 11-12. Mr. Sisney also seeks injunctive relief as follows: ordering defendants to deliver to him the books and pictures listed above and ordering defendants to enforce its pornography policy only against "traditional forms of pornography and obscene materials." Id. Mr. Sisney also seeks an award reimbursing him for costs, fees, and expenses incurred in bringing this lawsuit. Id. He is not seeking monetary damages. Id. All defendants are sued in their official capacities only. Id. at pp. 1-3.

DISCUSSION

A. Summary Judgment Standard

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate where the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

The court must view the facts, and inferences from those facts, in the light most favorable to the nonmoving party. See Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)); Helton v. Southland Racing Corp., 600 F.3d 954, 957 (8th Cir. 2010) (per curiam). Summary judgment will not lie if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Allison v. Flexway Trucking, Inc., 28 F.3d 64, 66 (8th Cir. 1994).

The burden is placed on the moving party to establish both the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). Once the movant has met its burden, the nonmoving party may not simply rest on the allegations in the pleadings, but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Anderson, 477 U.S. at 256; FED. R. CIV. P. 56(e) (each party must properly support its own assertions of fact and properly address the opposing party's assertions of fact, as required by Rule 56(c)).

The underlying substantive law identifies which facts are "material" for purposes of a motion for summary judgment. Anderson, 477 U.S. at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. (citing 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRACTICE &

PROCEDURE § 2725, at 93–95 (3d ed. 1983)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Id. at 247–48.

Essentially, the availability of summary judgment turns on whether a proper jury question is presented: "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Id. at 250.

Though *pro se* litigants like Mr. Sisney are entitled to a liberal construction of their pleadings, Fed. R. Civ. P. 56 remains equally applicable to them. Quam v. Minnehaha Co. Jail, 821 F.2d 522, 522 (8th Cir. 1987). The mere fact that both parties have filed cross-motions for summary judgment does not necessarily mean that no genuine dispute of a material fact exists; nor do cross-motions constitute a stipulation to the court's disposition of the case by motion. Wermager v. Cormorant Twp. Bd., 716 F.2d 1211, 1214 (8th Cir. 1983); Barnes v. Fleet Nat'l. Bank, 370 F.3d 164, 170 (1st. Cir. 2004). Rather, cross-motions require the court to evaluate each motion independently and determine whether that movant is entitled to judgment as a matter of law. C. Line, Inc. v. City of Davenport, 957 F. Supp. 2d 1012, 1024-25 (S.D. Iowa 2013); St. Luke's Methodist Hosp. v. Thompson, 182 F. Supp. 2d 765, 769 (N.D. Iowa 2001).

B. First Amendment

Under the First Amendment a private citizen may not be criminally prosecuted for mere possession of obscene material in the privacy of his own home, although *distribution* of obscene material may be prohibited by the state. Stanley v. Georgia, 394 U.S. 557, 568 (1969). Obscenity is not protected by the First Amendment. Miller v. California, 413 U.S. 15, 23 (1973). However, sexually explicit materials *are* protected by the First Amendment. Stanley, 394 U.S. at 568. See also Ashcroft v. Free Speech Coalition, 535 U.S. 234, 240 (2002) (holding the First Amendment generally protects non-obscene pornography for non-prisoners); Reno v. Amer. Civil Liberties Union, 521 U.S. 844, 875 (1997) (stating "In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment."). The allegation that obscene material may provoke the viewer to engage in antisocial behavior, or that indecent material may inappropriately fall into the hands of minors, is insufficient reason to justify a too-broad suppression of free speech. Reno, 521 U.S. at 875; Stanley, 394 U.S. at 566-67. Nor can mere possession of obscenity be criminalized as a necessary incident to enforcing laws prohibiting distribution of obscene materials. Stanley, 394 U.S. at 567. Were Mr. Sisney a private, free citizen, he would undoubtedly have a right to possess pornographic material. Reno, 521 U.S. at 875.

However, "incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the

considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285 (1948) abrogated on other grounds by McCleskey v. Zant, 499 U.S. 467, 495 (1991). Courts have struggled over the decades with how to apply the First Amendment's guaranty of freedom of speech in the context of prison life. The court discusses three important United States Supreme Court decisions below as the foundation for the court's evaluation of the issues presented in this case.

1. Martinez, Turner and Thornburgh

a. Martinez

Under Procunier v. Martinez, 416 U.S. 396, 413-14 (1974), the Court held a prison regulation of mail between inmates and noninmates was required to "further an important or substantial governmental interest unrelated to the suppression of expression" in order to satisfy Constitutional mandates. Martinez, 416 U.S. at 413-14. The means used to further this governmental interest must be "no greater than is necessary or essential to the protection of the particular governmental interest involved." Id. In addition, prison officials were required to notify the inmate and the noninmate if they rejected a letter. Id. at 418. The prison regulation at issue in Martinez allowed censorship of letters that "unduly complain," "magnify grievances," or "express inflammatory political, racial, or religious or other views or beliefs." Id. at 399. The regulation allowed censorship of both outgoing and incoming mail. Id. at 416. As with other areas of the law dealing with prison administration and

prisoners' rights, however, the pendulum began to swing in the other direction after Martinez.[5]

b. Turner

In Turner v. Safley, 482 U.S. 78, 81-82 (1987), inmates challenged prison regulations which restricted correspondence between inmates at different state prisons. Correspondence between inmates who were immediate family members was allowed, as was correspondence about legal matters. Id. at 81. However, other correspondence could be prohibited if deemed in the best interests of the parties involved. Id. at 82. In practice, all inmate correspondence between inmates at different prisons was prohibited if it was not between immediate family members. Id.

The Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Id. at 89. The Court rejected the earlier standard applied in Martinez. Id. at 83. The reasonable relation test was more appropriate, according to the Turner Court, because separation of powers counseled that the administration of prisons was largely a function of the legislative and executive branches of government. Id. at 85. Also, an added degree of deference applied when a federal court was reviewing a state penal system. Id. "Running a prison is an inordinately difficult undertaking that

[5] See e.g. Wolff v. McDonnell, 418 U.S. 539, 563-65 (1974) (holding due process protections applied to all prison disciplinary procedures), with Sandin v. Conner, 515 U.S. 472, 483-84 (1995) (holding 21 years later that the due process analysis did not apply to prison discipline unless the discipline imposed "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life").

requires expertise, planning, and the commitment of resources," the Court wrote. Id. at 84-85. Also, "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." Id. at 84.

The Turner reasonable relation standard requires the court to evaluate four factors:

1. whether the governmental objective underlying the regulations is legitimate and neutral, and whether the regulations is rationally related to that governmental objective;

2. whether there are alternative means of exercising the right that remain open to prisoners;

3. what impact the accommodation of the plaintiff's asserted constitutional right will have on others (guards and inmates) inside the prison; and

4. whether there are obvious, easy alternatives whose existence show that the regulation in question is not reasonable, but is an "exaggerated response" to prison concerns.

Id. at 89-91.

The Court upheld the policy barring inmate-to-inmate correspondence. Id. at 91. The court accepted defendants' articulation of the need for the ban to prevent communication about escape plans, assaults, and other violent acts, especially with regard to prison gangs living at different institutions. Id. Also, the prison in question was used for protective custody and this use would have been vitiated if correspondence was allowed that leaked information about inmates in protective custody at the facility. Id. The Court also found defendants' objectives were neutral and reasonably related to the ban. Id. at 91-92.

As to the second factor, the Court noted that inmates' right to freedom of speech was not completely deprived by the ban—that right was only infringed as to "a limited class of other people with whom prison officials have particular cause to be concerned"—i.e. inmates at other prisons. Id. The third factor also favored defendants because core functions of prison administration, safety and internal security would be impacted, leading to less security and less liberty for everyone else, both guards and inmates. Id. at 92.

As to the fourth factor, no easy alternatives to the policy were apparent. Id. at 93. Other similarly-situated prisons had adopted similar policies. Id. And monitoring the content of inmates' correspondence would impose a great burden on prison officials, and could be evaded by the use of jargon or code in letters.[6] Id. The burden of establishing the existence of easy obvious alternatives is on the inmate, not the prison. See O'Lone v. Estate of Shabazz, 482 U.S. 342, 350 (1987).

c. Thornburgh

The Turner factors were applied two years later in Thornburgh v. Abbott, 490 U.S. 401 (1989). At issue in Thornburg was a federal Bureau of Prisons (BOP) regulation that allowed the prison warden to reject outside publications

[6] The Turner Court also decided the question of whether a ban on marriages by inmates was valid. The portion of the Turner decision—not applicable here—dealing with prison regulation of inmate marriages was legislatively impacted by the passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc, et seq. After passage of RLUIPA, constitutional claims premised on the First Amendment free exercise of religion clause continue to be governed by the Turner standard, however claimants can now bring a claim under RLUIPA, which imposes a stricter standard on prison regulations affecting religion. See Gladson v. Iowa Dept. of Corrections, 551 F.3d 825, 831-32 (8th Cir. 2009).

mailed to a prisoner if the publication was deemed to be detrimental to the "security, good order, or discipline of the institution or if it might facilitate criminal activity." Id. at 403 n.1. The regulations forbid the rejection of a publication "solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant." Id. at 405.

Publications could not be black-listed categorically under the regulation; rather, each issue had to be reviewed separately. Id. Staff of the warden could screen and approve publications, but only the warden could reject a publication. Id. at 406. If the warden rejected a publication, he was required to immediately notify the inmate in writing of the rejection and the reasons therefor, including a reference to the specific part of the publication deemed objectionable. Id. The sender could obtain review of such a decision by the regional director of the BOP; the inmate could submit a grievance of the issue through the prison administrative remedy process. Id. The inmate could review the rejected publication unless allowing such review would "provide the inmate with information of a nature which is deemed to pose a threat or detriment to the security, good order or discipline of the institution or to encourage or instruct in criminal activity." Id.

A program statement was published providing guidance on sexually explicit material. Id. Explicit heterosexual material was ordinarily admissible at BOP facilities. Id. at 405 n.6. Homosexual, sado-masochistic, bestiality, and sexually explicit materials involving children were generally banned. Id. Other explicit material was admissible if it had scholarly, general social, or

literary value. Id. Homosexual material that was not sexually explicit was admissible, such as publications covering the activities of gay-rights groups or gay religious groups, and literary publications with homosexual themes or references were admissible. Id.

The Thornburgh Court held First Amendment concerns were implicated—both for the inmates and for the persons sending mail to the inmates—by prison officials' interference with inmates' incoming mail, but that such rights "must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration." Id. at 407 (quoting Turner, 482 U.S. at 85). The Court noted many people on the "outside" have an interest in access to those on the "inside" of prisons, but certain such interactions, though "seemingly innocuous to laymen," may pose "potentially significant implications for the order and security of the prison." Id. Noting the judiciary was "ill equipped" to administer the "difficult and delicate problems of prison management," the Court held "considerable deference" would be afforded the regulations of prison administrators. Id. at 407-08.

In adopting its standard of reasonable relation to legitimate penological interests, the Court rejected the Martinez standard which required the state to show that the regulation furthered an important or substantial governmental interest in the least restrictive way. Id. at 408-09. The Court held the Martinez standard did not accord "sufficient sensitivity to the need for discretion in meeting legitimate prison needs." Id. at 410. In doing so, the Thornburgh Court suggested that a key difference distinguishing the holding in Martinez

from the holding in Thornburgh was that the Martinez prison policy affected incoming *as well as outgoing* prisoner mail. Id. at 411-12. Outgoing mail addressed to nonprisoners "cannot reasonably be expected to present a danger to the community *inside* the prison" the Court stated. Id. at 411-12, and 410 n.10. The Court concluded the Turner standard applied in Thornburgh while the Martinez standard applied to regulations concerning outgoing correspondence. Id. at 413.

Applying the Turner factors to the regulation, the Thornburgh Court held the prison mail policy was undergird by a legitimate and neutral objective, and that the regulation bore a rational relation to that objective. Id. at 414. In discussing this first factor, the Court acknowledged that "neutrality" under Turner was not the traditional notion of content-neutral laws usually discussed in First Amendment jurisprudence. Id. at 415. Rather, what Turner neutrality requires is that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." Id. (quoting Martinez, 416 U.S. at 413). Where the prison regulation at issue distinguishes based on content solely because of the "potential implications for prison security, the regulations are 'neutral' in the technical sense in which we meant and used that term in Turner." Id. at 415-16. A rational relationship existed between the prison's neutral goal and the means used to enforce that goal—especially because the duty to reject a publication was a nondelegable duty of the warden's and because publications

could not be categorically banned. Id. at 416-17. Thus, there would not be "shortcuts that would lead to needless exclusions." Id. at 417.

The second Turner factor—alternative means of exercising the right—also favored the BOP regulation. Id. at 417-18. In this regard, the Court noted that the "right" at issue was to be defined "sensibly and expansively." Id. at 417. Thus, the right at issue in Turner was not the right to communicate with inmates at other institutions (a very narrow definition), but rather the right to exercise other means of expression. Id. at 417-18. Likewise, in a case involving participation in a Jumu'ah religious ceremony, the right was participation in Muslim religious ceremonies, not participation in the exact ceremony at issue, a Jumu'ah. Id. at 418 (discussing O'Lone, 482 U.S. at 351-52). Here, prisoners remained free to send and receive other forms of mail and publications. Id.

The Thornburgh Court also held the third Turner factor—impact that accommodation of the right would have on others—to be satisfied. Id. Like the situation in Turner, the Court held that the restricted publications could only be allowed to circulate in the prison at great cost to the safety and liberty of other prisoners and guards. Id.

Finally, the fourth Turner factor—existence of obvious, easy alternatives to the regulation—also favored the BOP regulation. Id. The plaintiffs in the suit argued that the warden could just tear out offending pages of publications and give the remaining publication to inmates; that the warden's all-or-nothing rejection of publications was an exaggerated response to the threat. Id. at 418-

19. Prison officials responded that testimony in the record supported the conclusion that tearing out portions of publications would create more discontent among inmates than the current practice. Id. The court held where prison officials' fears about an alternative practice are reasonably founded, the alternative is not a viable alternative. Id. at 419.

2. Cases Dealing with South Dakota DOC Pornography Policies

The South Dakota DOC's pornography policy has been a popular subject of litigation among the male inmates at South Dakota's penitentiaries. Several lawsuits challenging the policy in its various iterations have been filed over the years, including this one. Before delving into the parties' arguments, it is helpful to have clearly in mind what the prior cases litigated and what was decided.

a. Carpenter v. South Dakota

At the time the Carpenter lawsuit was filed, the South Dakota Board of Charities and Corrections had a censorship policy that allowed them to censor any publication or portion thereof if it "presents a clear and present danger to security, order and rehabilitation." Carpenter v. South Dakota, 536 F.2d 759, 760 n.2 (8th Cir. 1976). If penitentiary officials censored material, they were required to give notice of the censorship to the inmate, who then had a right to request a hearing to determine whether the penitentiary's interests of security, order, or rehabilitation were implicated by the censored material. Id. Inmates of the SDSP filed suit challenging the prison's censorship of mail order

catalogues containing "marital aids" and that depicted couples in various sexual poses. Id. at 760, 762.

The district court dismissed the lawsuit as frivolous without requiring defendants to respond to the complaint. Id. at 761. The Eighth Circuit affirmed. Id. at 763. The court acknowledged that nonprisoners have a right to receive sexually explicit materials under the guarantee of freedom of speech provided by the First Amendment. Id. at 761 (citing Stanley, 394 U.S. 557). However, the court also recited the "familiar proposition" that "incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Id. (quoting Price, 334 U.S. at 285). First Amendment rights survive incarceration so long as those rights are not inconsistent with the citizen's status as a prisoner or "the legitimate penological objectives of the corrections system." Id.

The court applied the Martinez least-restrictive-means test, placing the burden on prison officials to justify the censorship.[7] Id. at 762. The court examined the materials the prisoners had provided from their administrative hearings in the prison and concluded that the censorship was justified. Id. In particular, prison officials had written in those hearings that the "materials would tend to make inmates more unsettled in their surroundings and less capable of availing themselves to the rehabilitation programs." Id. Also, that the "materials would lead to abnormal arousal and tend to lead to deviate

[7] Carpenter was decided after Martinez but before Turner, so its application of the Martinez standard was appropriate.

sexual behavior on the part of some inmates." Id. The prison officials found no or questionable "literary, educational or moral value in the material" and that their "primary purpose . . . is for sexual arousal." Id. at 762-63.

The prisoners did not dispute the characterization of the materials at issue, but argued the materials did not "present a clear and present danger to the penal institution or its security, order and rehabilitation." Id. at 763. The court rejected this argument, holding that the prison's decision that the materials "would have a detrimental effect upon rehabilitation was well within the discretion of the board and requires no further review by the courts." Id.

Judge Lay filed a dissent. Id. at 763-65. He argued the courts were not bound by the conclusory allegations of detriment voiced by defendants in the administrative materials. Id. at 764. Judge Lay stated the majority opinion abdicated the courts' role to investigate whether a constitutional right was being violated. Id. He would have remanded the matter and required defendants to establish their bases for believing the censored materials were detrimental in prison. Id. at 765.

b. Thibodeaux v. South Dakota

Floyd Thibodeaux brought a § 1983 suit alleging officials at the SDSP violated his First Amendment rights by refusing to allow him to receive a magazine called *Mature*, described by defendants as a "club" magazine advertising gay life, swinging, swapping, S & M, AC-DC and discipline. Thibodeaux v. South Dakota, 553 F.2d 558, 559 (8th Cir. 1977). The district court, as in Carpenter, had dismissed the complaint as frivolous without

requiring defendants to answer. Id. The Eighth Circuit held its decision in Carpenter was not dispositive and reversed. Id. at 559-60.

The reason proffered by defendants in the administrative hearing for censoring *Mature* was that the document "had no rehabilitative value." Id. at 559. The prison's own censorship standard, however, covered only those materials that "present a clear and present danger to security, order and rehabilitation." Id. at 560. The fact that *Mature* did not *advance* rehabilitation was not the same as a finding that *Mature endangered* rehabilitation. Id. Calling the censorship board's findings in Thibodeaux's case "deficient," the court reversed and remanded. Id. Carpenter, the court held, stood for the proposition that the First Amendment allowed prison officials to censor materials if they had a detrimental effect upon rehabilitation. Id. at 559. Because there was no finding by defendants in the administrative hearing that *Mature* was actually detrimental to rehabilitation, the existing record did not show that defendants' actions were constitutional. Id. at 559-60.

c. King v. Dooley

In King v. Dooley, 4:00-cv-04052-LLP, Docket No. 34 (D.S.D. June 16, 2003), the court examined whether the DOC policy in effect in 1999-2000 violated King's First Amendment rights. Id. at p. 1. King argued that magazines banned pursuant to the policy such as *Out Law Biker, Easy Rider, Penthouse* and *Hustler*, while they contained pornographic material, also contained written articles relevant to inmate life. Id.

The DOC policy examined in King prohibited pornography defined as: "books, pamphlets, periodicals, or any other publications that graphically feature nudity or sexually-explicit conduct." See id. at Docket No. 31, p. 2, ¶ 6. "Nudity" was defined as "a pictorial depiction where genitalia or female breasts are exposed." Id. "Feature" meant "the publication contains depictions of nudity or sexually explicit conduct on a routine basis or promotes itself based upon such depictions in the case of individual one-time issues." Id. "Sexually explicit" was at that time defined as "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex or masturbation." Id. at pp. 2-3, ¶ 6.

King's official capacity claims were dismissed because he had been paroled, thus mooting the issue of whether injunctive relief could issue; damages were held unavailable to King for an official capacity claim. Id. at Docket No. 34, pp. 4-5. The court examined the DOC pornography policy under the Turner factors. Id. at pp. 6-9. First, the court found a rational connection between the DOC policy and a legitimate, neutral governmental interest. Id. at pp. 6-8. The governmental interest was security at the prison and rehabilitation of inmates. Id. Pornography in the prison interfered with these twin interests because inmates fought over pornographic materials; the materials found their way into the hands of sex offenders to whom the materials were detrimental; inmates sold, rented and bartered the materials in contravention of other DOC policies; and inmates hid pornographic materials in envelopes marked "legal mail," in the chapel, and in the school. Id. at p. 2.

Second, the court noted alternative avenues of exercising the right to sexually explicit materials were open to inmates. Id. at pp. 8-9. Specifically, the DOC policy did "not ban the receipt of sexually explicit written materials, or provocative, but clothed, depictions of females." Id. at p. 8. The court noted an interpretation of the DOC policy which prohibited depictions of décolletage or photos of partial, but not complete, exposure of female breasts "might not pass constitutional muster." Id. at p. 8 n.5. Because neither party argued the DOC policy went this far, the court reserved the issue of the constitutionality of such a far-reaching ban "for another day." Id.

Third, the King court found allowing inmates access to pornography and imposing the burden of policing such "appropriate" use of pornography on prison officials "would surely drain prison resources." Id. at p. 9. Finally, the court found no ready alternatives to the ban; defendants showed their prior policy of allowing some inmates to possess some pornography was "simply unworkable for security and rehabilitative reasons." Id. Accordingly, every Turner factor being in defendants' favor, the court granted defendants summary judgment on King's complaint. Id. at p. 10.

d. Salinas v. Janklow

In Salinas v. Janklow, 4:99-cv-04204-LLP, Docket No. 28 (D.S.D. June 16, 2003), the court disposed of another challenge to the DOC pornography policy on the same day as King and with identical reasoning. Id. at pp. 7-11. Salinas challenged defendants' denial of access to a pornographic magazine called *Leg World*. Id. at p. 3. He alleged a violation of his First Amendment

rights. Id. The Salinas opinion incorporated by reference the reasoning from the King opinion. Id.

e. Kaden v. Slykhuis

In Kaden v. Slykhuis, 651 F.3d 966, 967-68 (8th Cir. 2011), the district court had, on initial screening pursuant to 28 U.S.C. §§ 1915 & 1915A, dismissed Kaden's § 1983 suit challenging the DOC policy prohibiting violent media. At issue was defendants' rejection of a Japanese comic book called Shonen Jump. Id. at 968. Applying Turner, the Eighth Circuit remanded. Id. at 969. Because defendants had never been required to respond to Kaden's complaint, the court was unable to discern whether defendants' response to the comic book was "appropriate, or an exaggerated response to prison concerns." Id. The record after remand indicates that defendants subsequently settled with Kaden and his complaint was dismissed pursuant to the settlement. See Kaden v. Slykhuis, 4:10-cv-04043-LLP, Docket No. 60 (D.S.D. Apr. 5, 2012).

f. Hughbanks v. Dooley

In Hughbanks v. Dooley, 2012 WL 346673 at *1, *14 (D.S.D. Feb. 2, 2012), Hughbanks brought suit against defendants in both their individual and official capacities, alleging the DOC pornography policy—as applied—violated his First Amendment rights. At issue was defendants' rejection of two books, Dirty Spanish and The Quotable Bitch. Id. The court examined Hughbanks' as-applied challenge under the May, 2011, DOC pornography policy. See Hughbanks, 4:10-cv-04064-KES at Docket No. 61-2.

The court dismissed Hughbanks' official capacity claims, holding that Hughbanks had not alleged sufficient facts to show a policy or custom on the part of defendants. Id. at *14. The two incidents alleged by Hughbanks involving the two identified books were insufficient to establish a policy or custom. Id. Alternatively, the court held if Hughbanks could show the Secretary of the Department of Corrections was involved in the rejection of his books, he might establish the requisite policy or custom because the Secretary's action would be "taken by the highest officials responsible for setting policy." Id. at *15. However, Hughbanks never alleged the Secretary was involved in rejecting the books. Id.

As to Hughbanks' individual capacity claims, the court applied the Turner factors. Id. at **17-20. Defendants argued Dirty Spanish was sexually explicit. Id. at *18. Applying a definition of "sexually explicit" that was substantially similar to the definition applicable in Mr. Sisney's case, the court agreed.[8] The court found prohibiting Hughbanks access to this depiction was

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[8] The definition of "sexually explicit" in the DOC policies is as follows. Words which appear in Mr. Sisney's version of the DOC policy are underlined and did not appear in the Hughbanks version of the policy:

"Sexually explicit" includes written and pictorial, graphic depiction of actual or simulated sexual acts including but not limited to sexual intercourse, oral sex or masturbation. Sexually explicit material also includes individual pictures, photographs, or drawings, etchings, writings or paintings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.

Compare Docket No. 1-2 with Hughbanks, 4:10-cv-04064-KES, Docket No. 61-2. The example of a "sexually explicit" depiction from Dirty Spanish was a man burying his face in a woman's cleavage, with both parties fully clothed and the caption, "Could I motorboat your . . . ?" Hughbanks, at *18.

reasonably related to the underlying penalogical goal of security, order and rehabilitation. Id. Regarding The Quotable Bitch, the court rejected defendants' assertion that it was sexually explicit, but agreed that portions of the book were not conducive to Hughbanks' rehabilitation as a sex offender. Id. at *19.

As to the second Turner factor, the court found alternative means of exercising Hughbanks' First Amendment rights were available because he could obtain a Spanish grammar book that was not sexually explicit and there were other books in the prison library available to him. Id. The court found the third Turner factor in defendants' favor because they alleged, and Hughbanks did not contradict, that allowing sexually explicit materials into the prison would be detrimental to prison security and order. Id. The fourth Turner factor of "ready alternatives" was decided in defendants' favor because Hughbanks did not articulate any ready alterntives. Id. The court then granted summary judgment to defendants on Hughbanks' First Amendment as-applied challenge to the DOC pornography policy.

g. Cochrun v. Weber

Dean Cochrun, an inmate at the SDSP, filed a § 1983 lawsuit April 13, 2012, which, in Count VII, challenged the DOC's pornography policy. Cochrun v. Weber, 2012 WL 2885565, at *7 (D.S.D. July 13, 2012). Cochrun's claim appeared to present a facial challenge to the policy. See Cochrun v. Weber, 4:12-cv-04071-KES, Docket No. 1 at p. 10. The district court dismissed this claim upon screening under 28 U.S.C. § 1915, stating only that the court had

already found the SDSP pornography policy to be constitutional in King and Salinas. Cochrun, 2012 WL 2885566 at *7. No discussion or analysis is contained in the opinion as to changes in the DOC policy between the time King and Salinas were decided and the time the court was evaluating Cochrun's claim. Id. Cochrun did not file a copy of the then-current DOC pornography policy with the court. See Cochrun v. Weber, 4:12-cv-04071-KES. The policy does not otherwise appear of record in the case. Id.

3. Facial Challenge to 2015 Version of DOC

a. Whether King and Salinas are dispositive

Defendants herein argue this court should not entertain Mr. Sisney's facial challenge to the DOC pornography policy in effect when this lawsuit was filed. They argue this court has already decided the DOC pornography policy is facially valid in King and Salinas, and the current policy is "essentially the same" as the policy approved of in King and Salinas. See Docket Nos. 70-13 at p. 3, ¶9; 70-15 at p. 3, ¶ 8. Mr. Sisney resists this argument, stating the policy has substantially changed since those decisions.

The King and Salinas decisions were authored by this district in 2003 concerning a DOC pornography policy effective as of April 1, 2000. See King, 4:00-cv-04052-LLP, Docket No. 32-1. Mr. Sisney's complaint concerns a DOC pornography policy effective as of June 10, 2014. See Docket No. 1-1 at p.1. A side-by-side comparison of the two policies is as follows:

SISNEY DOC POLICY **See Appendix 2**	**KING DOC POLICY** **See Appendix 1**
Policy	**Policy**
The Department of Corrections (DOC) prohibits the purchase, possession and attempted possession and manufacturing of pornographic materials by offenders housed in its institutions.	The Department of Corrections prohibits the purchase, possession and attempted possession of pornographic materials by inmates housed in South Dakota Department of Corrections institutions. This version of policy 3C.5 supercedes the Feb. 29, 2000 version of policy 3C.5.
Definitions	**Definitions**[9]
Pornographic Material: Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature nudity or "sexually explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publication or material that features, or includes photographs, drawings, etchings, paintings, or other graphic depictions of nudity or sexually explicit material. **Nudity:** "Nudity" means a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed. Published material containing nudity	**Pornographic Material:** Books, pamphlets, magazines, periodicals, or any other publications that graphically feature nudity or sexually-explicit conduct. **"Nudity"** means a pictorial depiction where genitalia or female breasts are exposed. **"Features"** 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. Publications containing nudity illustrative of medical, educational or

[9] In the 2000 version of the DOC policy examined in King, the only definition set out in boldface type was "pornographic material." The other terms defined in the King policy were merely set off by quotation marks. To facilitate comparison between the two policies, the court added boldface to the other terms defined in the King version and also set them off with a stand-alone sentence. Other than these cosmetic changes, no other changes were made.

illustrative of medical, educational or anthropological content may be excluded from this definition. **Sexually Explicit:** "Sexually Explicit" includes written and/or pictorial, graphic depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation. Sexually explicit material also includes individual pictures, photographs, drawings, etchings, writings or paintings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication. **Offender:** For purposes of this policy, and offender is an inmate (in the custody of the South Dakota DOC institutional system), a Community Transition Program parolee or detainee (See DOC policy 1.5.G.2 *Community Transition Program*), or a juvenile housed at the State Treatment And Rehabilitation (STAR) Academy.	anthropological content may be excluded from this definition. **"Sexually Explicit"** means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex or masturbation. Pornographic material also includes individual pictures, photographs, or drawings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.
Procedures:	**Procedural Guidelines:**
1. Purchase, Possession and/or Attempted Possession of Pornographic Material: A. Any pornographic material is considered contraband. B. The purchase, possession, attempted possession or manufacturing of pornographic material by an offender is a violation of certain Offenses in Custody (See DOC *Inmate Living Guide* and STAR OM 5.3.C.1 *Youth Standards of Conduct*	**I. Purchase, Possession and/or Attempted Possession** A. Any pornographic material is considered contraband. B. The purchase, possession and/or the attempted possession of pornographic material by an inmate is a violation of Prohibited Act 3-18. 1. Any inmate who violates the procedures in this policy is subject to disciplinary action (See DOC Policy 3C.3 Inmate Discipline System).

1. Any offender found in violation of this policy may be subject to disciplinary action (See DOC policy 1.3.C.2 *Inmate Discipline System* or DOC policy 1.3.C.3 *Juvenile Discipline System*).

2. Materials are believed to be in violation of this policy may be confiscated and used as evidence during the disciplinary process.

3. Additionally, the purchase, possession, attempted possession or manufacturing of pornography by a sex offender is a violation of the STOP Program contract (See DOC Policy 1.3.C.9 *Sex Offender Restrictions*).

2. Institutional Guidelines:

A. Each institution's Warden/Superintendent will ensure procedures are in place to prevent pornographic material from being brought into the institution(s) under their authority. Such procedures will encompass at a minimum:

1. Prevention of pornographic material through correspondence and visits (See DOC policy 1.5.D.1 *Inmate Visiting*, 1.5.D.2 *Juvenile Visitation and Telephone Contact* and 1.5.D.3 *Offender Correspondence*).

a. [sic] All incoming and outgoing correspondence or publications depicting pornography or containing pornographic material will be rejected (See DOC policy 1.5.D.3 *Offender Correspondence*).

2. Designated staff who have the authority to determine if a particular

2. Materials that are believed to be in violation of this policy may be confiscated and used as evidence during the disciplinary process (See DOC Policy 3C.3 Inmate Discipline System).

C. Staff will not knowingly bring pornographic material into a facility.

D. Each adult facility will promulgate procedures to ensure that pornographic material is not allowed into their facility. Such procedures will include, at a minimum:

1. Specific reference to operations memorandums on correspondence and visiting;

2. The appointment of a single staff member to determine if a particular item is included in the definition of pornographic material; and

3. The requirement that decisions made under section D.2 be shared, coordinated and consistent with the decisions made regarding the same or similar material in the other adult facilities of the SD DOC.

item is included in the definition of pornographic material. 3. A procedure/system in place to allow each institution/unit to share and coordinate information regarding pornography in the effort to keep standards consistent between institutions. B. If an offender disagrees with the decision that a particular item meets the definition of pornographic material, he/she may appeal the decision through the administrative remedy process (See DOC policy 1.3.E.2 *Administrative Remedy for Inmates* or 1.3.E.3 *Juvenile Administrative Remedy Procedure*). C. Staff will not knowingly bring or receive pornographic material (see definition) inside a DOC facility or on the grounds of a DOC facility (See DOC policy 1.3.A.10 *Restrictions on Electronic Equipment*).	

As can be seen from the above comparison, the current version of the DOC pornography policy is much more sweeping and comprehensive than its predecessor which was analyzed in King. The current policy prohibits the creation ("manufacture") of pornography where the King policy did not. The current policy bans any items that "feature" nudity or sexually explicit content whereas the King policy banned only items that "graphically" featured such material. The King policy defined "features" to mean that nudity and sexually explicit content were contained in the item "on a routine or regular basis" or, if a one-time issue, "promotes itself based upon" nudity and sexually explicit

content. The current policy bans all items that "feature" nudity or sexually explicit material regardless of whether that is done routinely, regularly, or whether the product is promoted as featuring such content. No definition of "feature" is contained in the current DOC policy.

Nudity under the current policy added the terms "pubic area," "buttocks," and "male genitalia" to the definition contained in the King policy. The King policy limited "sexually explicit" to pictorial representations, while the current policy includes pictures, written material, and graphic depictions. The King policy defined "sexually explicit" as sexual intercourse, oral sex or masturbation, actual or simulated. The current policy defines "sexually explicit" as those same items, but "not limited to" those items.

Under the King policy, a single staff member at each institution was responsible for determining if a particular item fell within the policy. Under the current policy, multiple staff members may be so designated. The current policy specifies the availability of the prison's administrative remedy procedures for disgruntled inmates who disagree with a decision that an item is pornographic. The King policy did not so specify, but the prison's administrative remedy is of long standing and existed side-by-side with the King pornography policy.

Under the King policy, only the possession or attempted possession of pornography was banned. Under the current policy, the manufacture of pornography is additionally banned. Since inmates may not create written or pictorial pornography ("manufacture" it), it follows that they may not create

such items and send them out to persons outside the prison, be they spouses, family members or others. Thus, the current DOC policy affects outgoing mail as well as incoming mail while the King policy affected only incoming mail.

Interestingly, while society's standards regarding nudity and sexually explicit conduct have become more liberal—or more coarsened, according to one's point of view—over the last 16 years, the SDSP policy has grown more Victorian and strict over that period, rather than being influenced by the mores of the society in which the SDSP exists. In any event, the above comparison demonstrates that Mr. Sisney has the better argument here: the policy over which the district court passed benediction in King is substantially different from the current DOC policy the constitutionality of which is at issue here. Because of the differences between the two policies, neither King nor Salinas is dispositive of the facial constitutionality of the DOC policy at issue here. The provisions of the policy that existed at the time of King are constitutional under established law; the expansion of those provisions is, at this juncture, an unsettled question.

Defendants rely on Semler v. Ludeman, 2010 WL 145275 (D. Minn. 2010), for the assertion that once the facial validity of the DOC pornography policy was decided, it is decided for all future cases. The reliance on Semler is unavailing. In Semler, the court rejected a facial challenge to a pornography censorship policy on the basis of Ivey v. Mooney, 2008 WL 4527792 (D. Minn. 2008), decided just two years earlier. Semler, 2010 WL 145275 at *8. There was no evidence before the court the pornography policy in question had

changed in any respect in the intervening two years. Id. Here, 13 years have intervened between the issuance of the decisions in King and Salinas and, as shown above, substantial changes in the policy were made in the intervening period. Semler does not, therefore, stand for the proposition that once a facial challenge is made and rejected the policy can never again be challenged facially.

Defendants also suggest this court, in screening Mr. Sisney's complaint pursuant to 28 U.S.C. § 1915, dismissed his facial challenge to the current DOC policy. Again, Mr. Sisney has the better argument. As he points out, a magistrate judge has no power (absent consent of all parties) to dismiss a claim. See 28 U.S.C. § 636(b)(1)(B). Although this court expressed skepticism regarding Mr. Sisney's facial challenge, no order by the district court was entered dismissing the facial challenge and no report and recommendation was made by this magistrate judge recommending dismissal of the facial challenge. The result is Mr. Sisney's facial challenge is alive and well. The court will therefore address it.

b. Application of Turner Factors to Incoming Mail

The Turner four-factor analysis applies to facial challenges to the constitutionality of a policy affecting incoming mail as well as to as-applied challenges. Bahrampour v. Lampert, 356 F.3d 969, 975 (9th Cir. 2004); Flagner v. Wilkinson, 241 F.3d 475, 484 n.5 (6th Cir. 2001). See also United States v. Reid, 369 F.3d 619, 626 (1st Cir. 2004); Lindell v. Huilbregtse, 205 F. App'x. 446, 448-49 (7th Cir. 2006). To briefly review, the four factors are:

1. Whether the policy is supported by a neutral, legitimate governmental objective and whether that objective is reasonably related to the policy;

2. Do inmates have alternative means of exercising the right under the status quo;

3. What are the potential "ripple effects" on other inmates, prison Staff, and prison resources if the right is accommodated; and

4. Whether there are obvious, easy alternatives to the policy whose existence show that the policy in question is not reasonable, but is an "exaggerated response" to prison concerns.

Turner, 482 U.S. at 89-91. The court now analyzes these factors as against Mr. Sisney's facial challenge.

Before doing so, the court notes that that although Mr. Sisney has brought both facial and as-applied challenges to the DOC policy, the analysis of the two are not completely distinct. When interpreting the meaning of a policy in the context of the facial challenge, it is informative to examine how prison officials have actually interpreted the policy in the real-life application of the policy to specific materials. See Amatel v. Reno, 156 F.3d 192, 195 (D.C. Cir. 1998) (holding that rather than interpret the statute at issue—the Ensign Amendment—the court would examine the actual implementing regulations and the definitions they employed so as to avoid giving an advisory opinion). It is especially important to adhere to the real-life interpretation and application of a policy by prison officials when there is no suggestion in the record that a warden has or will apply the policy as it *might* be interpreted as opposed to how it *is* interpreted. Id. In the context of a First Amendment facial challenge, such an approach is necessary to ensure there is a "real and substantial" justiciable

controversy rather than a fanciful controversy based on a theoretical interpretation. Id. Phrased alternatively, there is no standing to rule on the facial constitutionality of an interpretation of a statute that is not likely ever to be enforced in reality. Id. Therefore the court's interpretation of the DOC policy at issue here is guided by the actual language of the policy, as it must be, but also by how defendants have interpreted that policy and applied it in day-to-day life at the SDSP.

i. Neutrality and Rational Relationship

A policy is neutral, in the sense that the Turner and Thornburgh Courts defined neutrality, if "the regulation or practice in question . . . further[s] an important or substantial governmental interest unrelated to the suppression of expression." Thornburgh, 490 U.S. at 414 (quoting Martinez, 416 U.S. at 413). Here, there is nothing about the DOC's current policy that would indicate it is related to the suppression of expression. The governmental interests—security within the prison and ensuring optimal rehabilitation circumstances—are important governmental interests. As discussed in King, defendants therein stated that bartering pornographic material between inmates, trying to keep pornographic material out of the hands of sex offenders, fights over pornographic material, and potential sexual harassment of female corrections officers were the deleterious effects pornography had or would likely have in the SDSP. King, 4:00-cv-04052-LLP, Docket No. 34 at pp. 2, 6-8.

Does the current DOC policy bear a rational relationship to those interests? Insofar as the portion of the policy that was in existence when King

and Salinas were decided, the court agrees those portions of the policy are rationally related to the governmental interests. Id.

The portions of the current DOC policy that differ from the policy examined in King are: the prohibition on "manufacturing" pornography; the inclusion of written sexually explicit materials in the ban; the expansion of "nudity" to include "pubic area," "buttocks," and specifying male genitalia; the elimination of the definition of "feature" as part of the definition of pornography; and the allowance of multiple staff members to screen incoming materials as opposed to a single staff member. Compare Appendix 1 with Appendix 2. Defendants herein do not recognize nor address these changes to the policy in their affidavits, stating that they are relying on the interests discussed in King. See Docket Nos. 70-13 at p. 5, ¶ 16; 70-15 at p. 5, ¶ 15. Defendant Young offers the additional observation that pornography "could very well" increase sexual behaviors committed by inmates. See Docket No. 70-15 at p. 5, ¶ 15.

Defendants' brief relies exclusively on case law rather than affidavit or other evidence to support the existence of its governmental goals and the relationship of those goals to the policy. See Docket No. 68 at pp. 4-7, 9. This approach is unhelpful for none of the cases cited by defendants evaluate a policy with the same terms as the DOC policy in this case. Defendants do not, therefore, state which governmental interests are supported by the current DOC pornography policy in its broadened form nor do defendants state how

those governmental interests are rationally furthered by the new, broader provisions.

These changes are not "insignificant," as defendants would have this court hold. Rather, the changes are relatively sweeping. Previously, a publication could only be deemed "pornographic" if it regularly or routinely contained nudity or sexually explicit material. See Appendix 1. Now, publications can be considered "pornographic" on the basis of a single nude depiction in a single issue. See Appendix 2; Docket No. 95-5 at p. 8, RFA #2 to defendant Reimann; Docket No. 95-6 at p. 8, RFA #2 Reimann's response.

Previously, written passages containing sexually explicit descriptions were not banned. See Appendix 1. Now they are. See Appendix 2. Previously, there was no ban on an inmate writing sexually explicit material or drawing pictorial depictions of nudity or sexually explicit material. See Appendix 1. Now there is. See Appendix 2. Although Mr. Sisney concedes that child pornography, bestiality, and sado-masochistic materials have the potential to jeopardize security and the rehabilitation of some offenders, he points out the policy goes far further than banning these obviously deleterious materials. See Docket No. 93 at pp. 6-7. He suggests the policy would result in banning sections of the Bible and Walt Whitman's Leaves of Grass. Id. at p. 7 (citing 2 Samuel 11:1-5; Song of Solomon 7:1-10; Genesis 34:2; Leaves of Grass at p. 127). Clearly, defendants believe nude works of Michelangelo, Matisse, and Picasso are banned under the policy. See Docket Nos. 69-13, 69-15, 69-17, 70-6, 70-10, and 91-3.

The court, left to its own devices, might cast about and conjure up reasons in support of the newer, more sweeping provisions of the DOC pornography policy. However, though the Turner standard is lenient and deferential toward prison officials, it is not "toothless"; it does not contemplate that the court would "go to bat" for defendants and explain the rationale for the pornography policy on their behalves. Salaam v. Lockhart, 905 F.2d 1168, 1171 (8th Cir. 1990). Deference to prison authorities does not mean "that it is appropriate for [courts] to defer completely to prison administrators." Caldwell v. Miller, 790 F.2d 589, 596-97 (7th Cir. 1986). Although an interest in preserving order and internal security in a prison is "self-evident," "prison authorities cannot rely on general or conclusory assertions to support their policies. Id. Murphy v. Missouri Dept. of Corrections, 372 F.3d 979, 988 (8th Cir. 2004) (defendants must do more "than merely assert a security concern."). Rather, they 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. An evidentiary showing is required as to each point." Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990). See also Murphy, 372 F.3d at 988-89.

Several courts have refused dismissal of a plaintiff's claim on the grounds that defendants did not adequately (or at all) articulate their reasons in support of the policy and how the policy furthered those reasons. See Kaden, 651 F.3d at 967-68; Thibodeaux, 553 F.2d at 559-60. "It is critically

important . . . that the record reveal the manner in which security considerations are implicated by the prohibited activity." Caldwell, 790 F.2d at 597.

In most decisions, prison officials produced affidavits or expert evidence showing the link between the actual terms of the prison policy, the goals of prison administration, and the relation between those goals and the policy. See Bahrampour, 356 F.3d at 972 (affidavits from prison supervisor, superintendent, and expert witness establishing the effect of sexually explicit materials in the Oregon prison); Mauro v. Arpaio, 188 F.3d 1054, 1061 (9th Cir. 1999) (affidavits from female corrections staff that male inmates compared their anatomy to that of nude women in magazines, that inmates invited officers to look at the nude pictures, that inmates asked officers their opinion on shaved genitalia, that inmates masturbated in front of female officers while perusing nude magazines, that an inmate told a female officer he was mentally having anal intercourse with her, and that these types of behavior took place daily to weekly); King, 4:00-cv-04052-LLP Docket No. 32 (detailing incidents at SDSP before pornography policy was adopted to include inmates bartering pornographic magazines, threats related to use or return of such materials, hiding such materials in envelopes marked "legal mail," and hiding such materials in common areas such as the chapel and the school).

It is true that defendants need not produce "sophisticated multiple regression analyses" or "other social science data" to support their beliefs that their policy furthers their goal. Amatel, 156 F.3d at 199. But it is also true

that defendants must articulate some rationale and produce some evidence in support thereof. See Kaden, 651 F.3d at 967-68; Thibodeaux, 553 F.2d at 559-60. See also Walker, 917 F.2d at 386; Caldwell, 790 F.2d at 596-97. They cannot rely on "conclusory statements and post hoc rationalizations for their" policy. Murphy, 372 F.3d at 988. Where, as here, defendants do not address the differences between the policy at issue in King and the expansion of the policy before this court at this time, their silence fails to advance their cause. This court concludes the first Turner factor does not favor defendants as to the expansion of the DOC policy beyond what was covered by the King policy.

ii. Alternative Means of Exercising the Right

The second Turner factor asks whether inmates have an alternative means of exercising the right in question under the status quo. Defendants do not address at all the second Turner factor in connection with Mr. Sisney's facial challenge. See Docket No. 68 at pp. 2-10.

The "right" in question should be defined "sensibly and expansively." Thornburgh, 490 U.S. at 417. The right should not, however, be defined ridiculously as the right to "read" and to "look at pictures." In Arpaio, 188 F.3d at 1061, both the district court and the appeals court defined the right in question to be "the right to receive sexually explicit communications." See also Dawson v. Scurr, 986 F.2d 257, 261 (8th Cir. 1993) (discussing "alternative means" and stating "inmates are allowed to keep many sexually explicit materials in their cells . . . [u]nlike a complete prohibition"). But cf. Amatel, 156 F.3d at 201, 201 n.7, 202 (stating "unless there is some minimum

entitlement to smut in prison, the origins of which must be obscure," the failure to allow alternative means of exercising the right "can hardly be fatal"—though the court also acknowledged that the policy at issue allowed inmates to read any written form of "smut" they wished).

In discussing other prison pornography policies, many other courts make clear in context that they also defined the right as the right to receive sexually explicit material, because these courts point to circumstances under which inmates were permitted to view nude or sexually explicit material even under the policy as written. See e.g. Bahrampour, 356 F.3d at 976 (noting inmates could still receive nude publications if the persons depicted pictorially were not engaging in or simulating sexual acts or behaviors); Arpaio, 188 F.3d at 1061 (noting inmates could still receive and send sexually explicit letters and articles and photographs of clothed females); Amatel, 156 F.3d at 201 n.7, 202 (stating prisoners could still enjoy written sexually explicit materials); Dawson, 986 F.2d at 261 (certain inmates could view sexually explicit materials in a reading room and some sexually explicit material would be kept in inmates' cells); and King, 4:00-cv-04052-LLP Docket No. 34 at p. 8 (inmates could read sexually explicit written materials and view provocative, though clothed, pictures).

Defining the "right to be exercised" as the right to receive sexually explicit materials is in keeping with other precedent. In Murchison v. Rogers, 779 F.3d 882, 891 (8th Cir. 2015), the right was defined as the right to read about drug cartels, free press issues in Mexico, and the right to read some content dealing with violence, not the right to simply "read." In O'Lone, the right was defined

as the right to practice the Islamic faith, not the right to worship generally or to practice any other type of religion. O'Lone, 482 U.S. at 351-52. Similarly, in Murphy, 372 F.3d at 983-84, the right was defined as the right to worship specifically in the Christian Separatist Church Society rather than the right to worship generally. The regulations in Murchison, O'Lone and Murphy were upheld because, although the inmates were denied the right to exercise their right in some respects (no photographs of murder in Murchison, no group services in Murphy, no Jumu'ah ceremony in O'Lone), the inmates were free to exercise their right to practice their specific reading interest or specific religion in a multitude of other ways. Murchison, 779 F.3d at 891; O'Lone, 482 U.S. at 351-52; and Murphy, 372 F.3d at 983-84.

Here, the current DOC policy appears to be structured so as to eliminate all forms of nude or sexually explicit materials, whether written or pictorial. See Appendix 2. In this regard, it is far more sweeping in its scope than any of the policies reviewed in the cases this court has examined. For example, in Amatel, the BOP regulation therein specifically allowed written sexually explicit materials and allowed certain publications categorically such as *National Geographic*, Our Bodies Our Selves, *Sports Illustrated* (Swimsuit Edition), and the *Victoria's Secret Catalog*. Amatel, 156 F.3d at 202. In Bahrampour, inmates could receive nude photos or pictures as long as the persons in the pictures were not engaged in a sexual act or simulating such an act. Bahrampour, 356 F.3d at 976. In Arpaio, prisoners could still read sexually explicit written material. Arpaio, 188 F.3d at 1061. In Dawson, inmates could

read and look at sexually explicit materials in a special reading room restricted to those inmates psychologically fit to view the materials; other sexually explicit materials could be kept by inmates in their cells. Dawson, 986 F.2d at 259, 261. See also Smith v. Roy, 2012 WL 1004985 at **2, 10 (D. Minn. Jan. 25, 2012)[10] (banning publications only if they featured nudity or sexually explicit content on a routine basis or promoted themselves based upon such content); Baasi v. Fabian, 2010 WL 924384 at *13 (D. Minn. Mar. 11, 2010), aff'd 391 Fed. Appx. 571 (8th Cir. 2010) (banning only publications that feature nudity or sexually explicit content on a routine basis or promote themselves based upon such content).

The DOC policy at issue here contains no like exceptions. See Appendix 2. Nude photos are not allowed, even if they are a single photo in a multi-page publication. Id.; see also Sisney's RFA #2 to defendant Reimann, Docket No. 95-5 at p. 8; Reimann's Answer to RFA #2, Docket No. 95-6 at p. 8. Sexually explicit writing without any photos or pictures is banned, as are pictorial sexually explicit materials. See Appendix 2. Furthermore, publications are banned even if they do not routinely contain nude or sexually explicit content or promote themselves based on that content. Id.; see also Sisney's RFA #2 to defendant Reimann, Docket No. 95-5 at p. 8; Reimann's answer to RFA #2, Docket No. 95-6 at p. 8.

Defendants point to the fact the policy only bans a publication if it "features" nudity or sexually explicit content, but they clearly testified that they

[10] The magistrate judge's report and recommendation in Smith was adopted by the district court. See Smith v. Fabian, 2012 WL 1004982 (D. Minn. 2012).

do not define "feature" to mean routinely contains pornography or promotes itself based on pornographic content. See Docket No. 95-3, p. 6-7; Docket No. 95-5, pp. 2-3, RFA #10; Docket No. 95-6, p. 4, Kaemingk's answer to RFA #10. Defendants have refused to provide a definition of what "feature" now means in the current DOC policy. Id. When asked to admit that a publication containing one or two nude pictures did not violate the DOC policy because the publication did not "feature" nudity, defendant Kaeming denied that was true. See Docket No. 95-5, p. 3, RFA #13; Docket No. 95-6, p. 4, Kaemingk's answer to RFA #13.

Therefore, the court must turn to defendants' application of the policy to determine how they define "feature." Amatel, 156 F.3d at 195. It is clear defendants define "feature" to mean any document that contains even one nude picture, among hundreds of pages, even if that picture is a tasteful piece of art or a cartoon line drawing. See Rejection Notices of Matisse book, Michelangelo pictures, and Pretty Face books; Docket Nos. 68-3, 68-8, 68-13, 68-18, 69-13, 70-6, and 91-3. See also Docket Nos. 1-4 at pp. 5-7; 95-14, 95-15, 95-16, 97 and 98 (all rejecting magazines of general circulation, mostly fashion magazines, for a single objectionable images or article).[11] It is also clear that any form of sexually explicit content, written or pictorial, is banned.

[11] The court, where it was able to, looked up each of these magazines and examined the objectionable page. See Order Granting Plaintiff's Motion for *In Camera* Review, filed this same date. Each example did indeed have an image or photo of a bare breast or buttock or contained a sexually explicit writing. In most cases, the rest of the magazine was unobjectionable. Photographs of the objectionable pages which were able to be located are preserved for the record and attached as Appendix 3, filed herewith under seal.

See Appendix 2. Also, it is clear any nude or sexually explicit content in outgoing mail is banned. See Appendix 2 (manufactured pornography banned); Docket No. 69-2 at pp. 8-9, ¶¶ 8-A-2 and 8-A-12 (DOC mail policy 1.5.D.3 explicitly providing defendants may seize any pornography in outgoing mail). Defendants have, in the name of the policy, rejected any number of magazines of general circulation such as *Glamour*, *Esquire* and *Men's Fitness*. See Docket Nos. 1-4 at pp. 5-7; 95-14, 97-2, 98-1, and 98-2.

The King court upheld the version of the DOC policy in effect at that time in part because inmates had alternative avenues of receiving sexually explicit content: they could receive sexually explicit written materials and provocative, but clothed, depictions of females. King, 4:00-cv-04052-LLP, Docket No. 34 at pp. 8-9. The King court expressly reserved "for another day" the question whether a complete ban on nude and sexually explicit materials would pass constitutional muster. Id. at p. 8 n.5.

Mr. Sisney asserts that defendants' agent has told him the DOC policy bans pictures of fully clothed breasts or groins if the picture shows "definition." See Docket No. 1-2. He also asserts defendants' agent stated the DOC policy bans any picture that shows an excessive amount of inner thigh, breast or buttock. Id. The court rejects this affidavit of Mr. Sisney's for several reasons. Affidavits submitted in connection with a summary judgment motion must be made upon personal knowledge, set out facts that would be admissible in evidence, and show the affiant is competent to testify on the matters stated. See FED. R. CIV. P. 56(c)(4). The affidavit purports to recite what another

person, CO Hall, said, so the information in the affidavit is hearsay which is not generally admissible evidence. [12] See FED. R. EVID. 802; Miller v. Solem, 728 F.2d 1020, 1026 (8th Cir. 1984) (rejecting affidavit submitted in support of summary judgment motion because it contained hearsay). Also, the affidavit states CO Hall is the chapel officer; as such, the affidavit does not establish conclusively that Hall is competent to testify to defendants' interpretation and application of the DOC pornography policy in the mailroom. See Docket No. 1-2.

The affidavit is of little value to the court in the current cross-motions for summary judgment for a final reason: the affidavit involves a question of law—how to interpret the DOC pornography policy. That is a question uniquely reserved for the court to determine. United States v. Picardi, 739 F.3d 1118, 1126 (8th Cir. 2014). In addition, the interpretation of the policy offered by Mr. Sisney in the affidavit, ostensibly through CO Hall, does not appear to be borne out by the court's examination of the materials defendants rejected in the name of the policy. For each rejection that the court was able to verify by actually examining the material rejected under the policy, there was indeed a bare breast, buttock, or genitalia or, in the case of written materials, there was

[12] The statement by a party's agent offered against that party is definitionally not hearsay. See Fed. R. Evid. 801(d)(2)(D). However, the mere fact that an agent made a statement does not establish the existence or scope of the agency relationship. Id. Because Mr. Sisney recites the agent, CO Hall, was the chapel officer rather than regular mailroom staff, the affidavit does not conclusively establish Hall's agency for purposes of interpreting the DOC pornography policy.

a writing describing a sex act.[13] The court has found no instance in which defendants rejected a publication on the basis of a fully clothed breast, buttock or genitalia that showed "definition." The court has found no instance in which defendants rejected a publication on the basis that an "excessive" amount of inner thigh, breast or buttock was shown. For all these reasons, then, the court holds that Mr. Sisney's affidavit at Docket 1-2 fails to establish the claimed interpretation of the current DOC pornography policy.

The DOC policy itself contains an exception to the ban for certain "nude" pictures, but there is no exception for any sexually explicit materials. See Appendix 2. A publication containing a nude picture may be excluded from the definition of "nudity" if it is illustrative of medical, educational or anthropological content. Id. However, defendants rejected Mr. Sisney's pictures of scenes from Michaelangelo's Sistine Chapel (more about that in the as-applied challenge discussed below). Furthermore, they have taken the position that only "serious students of the arts" can qualify for the exception provided in the DOC policy.[14] Finally, they have steadfastly refused to provide information about whether rehabilitation resources such as art, medicine, or anthropology classes are available to inmates at SDSP and, if so, whether

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[13] See Footnote 11, *supra*. The court examined as many as it could find of the materials rejected by defendants but not part of Mr. Sisney's as-applied challenge. See Order Granting Plaintiff's Motion for *In Camera* Review filed this same date.

[14] Defendants state the exception is "self-explanatory." See Docket No. 95-4 at p. 6, Young's Answers to Interrogatory No. 9. Then defendants argue the exception requires an inmate to be enrolled in a class in order to qualify for the exception. The class-enrollment requirement is not stated on the face of the policy. The court rejects defendants' assertion that the exception is "self-explanatory."

inmates such as Mr. Sisney serving life sentences are eligible for such classes. They also refused to answer Mr. Sisney's questions about whether any nude pictures have been allowed to any SDSP inmate since January 1, 2012, under the exception to the DOC policy. Because defendants refuse to provide any information about the exception and whether means are available for inmates to qualify for the exception—except to say the exception is "self explanatory"—the court concludes defendants have failed to show there are circumstances where some inmates may exercise their right to receive sexually explicit material under the status quo.

Defendants, in their summary judgment briefing, do not offer any examples of how inmates may alternatively exercise their right to receive sexually explicit content under the current DOC policy. Instead, they claim there is no such right as the right to receive sexually explicit content. The case law is against defendants on this point. See Ashcroft, 535 U.S. at 240; Reno, 521 U.S. at 875; Stanley, 394 U.S. at 568; Arpaio, 188 F.3d at 1061. Because the court discerns no method of alternatively exercising the right under the status quo, and defendants have offered no alternative means, the court concludes the second Turner factor favors Mr. Sisney.

iii. "Ripple Effects"

What impact would accommodation of the right have on the safety and liberty of other prisoners and guards? This is the question the third Turner factor requires the court to consider. Defendants do not address the third

Turner factor at all in connection with Mr. Sisney's facial challenge. See Docket No. 68 at pp. 2-10.

The King court upheld the version of the DOC policy at issue in that case, saying of the third factor that allowing a completely free flow of pornography into the prison would "surely drain prison resources" as prison staff attempted to quell fights and keep the materials out of the hands of sex offenders. King, 4:00-cv-04052-LLP Docket No. 34 at p. 9. But what is at issue here is not the all-or-nothing question of allowing all pornography into the prison or banning it all. The King opinion has already settled the question whether allowing *all* pornography would create undue ripple effects. Instead, the question is whether *the expansion* of the DOC policy post-King is necessary to prevent ripple effects. Phrased another way, would rejecting the expansion of the DOC policy which occurred after King create undue ripple effects on the safety and welfare of other inmates and prison staff?

Again, the court is stymied in its attempt to analyze this issue by defendants' refusal to engage in discussion of the issue. Defendants want to pretend the DOC policy examined in King is "essentially the same" as the policy at issue here. It simply is not. And defendants do not explain what about the King policy was unworkable or unsafe such that it fueled the expansion of the policy to its current form. The King policy was obviously workable for a number of years. Its use of the definition of "features" was in place from 2000 until 2009. See Docket No. 95-1 at p. 2 Interrogatory #5 to defendant Kaemingk; and Docket No. 95-3 at p. 5 Kaemingk's answer to Interrogatory #5.

Defendants are silent as to why the definition of features was dropped and the pornography policy extended to apply to publications that do not routinely contain pornography or promote themselves based on such content. Id. Defendants are silent as to why written sexually explicit material is considered dangerous now when it was not banned under the policy in King and why outgoing pornography must be banned as well. The court concludes this third Turner factor favors Mr. Sisney as well.

iv. Obvious, Easy Alternatives to Censorship

Defendants do not address the fourth Turner factor at all in connection with Mr. Sisney's facial challenge. The burden of showing easy and obvious alternatives is on Mr. Sisney. O'Lone, 482 U.S. at 350. He argues the easy and obvious alternative was the status quo that previously existed under King: allow written sexually explicit materials, the occasional nude picture or photo if a publication does not regularly and routinely feature nude content, and allow outgoing sexually explicit material. These matters were all permissible under the King policy and, Mr. Sisney argues, they were completely workable, easy, obvious alternatives to the current overly-restrictive policy. The fact the current DOC policy results in the prohibition of magazines of general readership like *Men's Fitness*, *National Geographic* and pictures of the Sistine Chapel shows, Mr. Sisney argues, that defendants' current policy is an "exaggerated response" to the problems posed by pornography in general in a prison setting. Mr. Sisney readily concedes "traditional" forms of pornography

such as the magazines *Penthouse, Playboy*[15] and *Hustler* should be banned and were banned under the King policy. He posits allowing fashion magazines like *Glamour* or pictures of the Sistine Chapel to reach prisoners will not create chaos in the prison or negatively affect inmates convicted of sex crimes. The court agrees on the record before it.

v. Summation of Turner Factors

The Eighth Circuit held inmates were entitled to prevail on a First Amendment challenge in Murphy v. Missouri Dept. of Corrections, 814 F.2d 1252, 1256-57 (8th Cir. 1987). Inmates challenged a prison censorship policy that completely banned materials from the Aryan Nations, an organization with the philosophical or religious belief that the white race is the chosen people of God and that racial integration is wrong or sinful. Id. at 1254, 1254 n.2. Prison officials justified the ban because they stated white supremacy literature increased racial tensions and racial unrest in the prison, thereby threatening prison security. Id. at 1254. The court rejected this rationale, holding that the ban on Aryan Nations material was more restrictive of inmates' First Amendment rights than was necessary—only literature that advocated violence or was "so racially inflammatory as to be reasonably likely to cause violence" should be banned. Id. at 1257.

The Murphy opinion from 1987 (as opposed to the Murphy opinion from 2004), must be read with some caution. The 1987 court applied the old

[15] The court notes that *Playboy* no longer contains nude photographs as of last year. See http://www.cnn.com/2015/10/13/opinions/robbins-playboy-no-more-nudity/ last checked May 4, 2016.

Martinez standard rather than Turner.[16] Id. at 1255-56. However, the opinion is still entitled to considerable weight because the governmental interest asserted by prison officials therein—prison security—has been held by the Eighth Circuit to be "the most compelling government interest in a prison setting." Murphy, 372 F.3d at 983 (quoting Goff v. Graves, 362 F.3d 543, 549 (8th Cir. 2004)). Despite the "most compelling governmental interest" being at stake, the court still held an all-out ban on the materials at issue violated inmates' First Amendment rights. Murphy, 814 F.2d at 1256-57.

There are numerous decisions upholding regulation of pornography in prisons, but all of the regulations allowed *some* pornography to reach *some* inmates in *some* form or another. Arpaio, 188 F.3d at 1061 (allowing sexually explicit letters between inmates and others, sexually explicit articles, and suggestive but clothed photos); Amatel, 156 F.3d at 201 (allowing all written forms of "smut" not barred by the Thornburgh holding); Dawson, 986 F.2d at 259 n.5, 260-61 (psychologically fit inmates could view sexually explicit materials in special reading room and inmates could have nude materials in their cells); Smith, 2012 WL 1004985 at **2, 10 (materials with limited nude depictions allowed so long as they did not routinely contain nudity; written sexually explicit material allowed as long as it was short and did not preponderate); Wickner v. McComb, 2010 WL 3396918 at *5 (D. Minn. 2010),

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[16] The Eighth Circuit decided Murphy on March 19, 1987; the Supreme Court decided Turner two and one-half months later on June 1, 1987. Therefore, the Murphy court was correct in applying the Martinez standard as that was the applicable law at the time of the decision.

adopted by district court, 2010 WL 3396921 (allowing depictions of buttocks and cleavage as long as anal and genital areas not exposed).

Although "narrow or improbable excesses of a statute are not a ground for invalidation before application shows their reality," Amatel, 156 F.3d at 202, here, the reality of the excesses of the DOC pornography policy have been shown in application. Defendants have used this policy to censor pictures of Michelangelo's paintings, and works by Matisse and Picasso. Therefore, the excesses of the policy are real rather than theoretical.

Because defendants do not specifically address the expansion of their policy after King was decided, they provide no rebuttal to Mr. Sisney's showing. The Eighth Circuit has cautioned the Turner standard is not "toothless"—"[w]e would misconstrue the recent Supreme Court decisions in [Thornburgh], O'Lone, and Turner if we deferred not only to the choices between reasonable policies made by prison officials but to their justifications for the policies as well." Salaam v. Lockhart, 905 F.2d 1168, 1171 (8th Cir. 1990). And the reasonableness test "does not obviate the need for accommodation" of the constitutional right; the "usual prefatory declaration that prisoners retain certain basic constitutional rights has meaning," even post-Turner. Id. at 1171, 1171 n.6.

Rule 56 requires defendants to make a showing by affidavit or other competent evidence that there is no genuine issue of material fact (as to their motion) or that there is a genuine issue of material fact (as to Mr. Sisney's motion), *and* that they are entitled to judgment as a matter of law. See FED. R.

CIV. P. 56. Affidavits submitted in connection with a summary judgment motion must be based on personal knowledge, set forth facts that are admissible in evidence, and show that the affiant is competent to testify to the matters stated. See FED. R. CIV. P. 56(c)(4). The United States Supreme Court explained Rule 56 succinctly in Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990). "Rule 56(e) provides that judgment shall be entered against the nonmoving party unless affidavits or other evidence set forth specific facts showing that there is a genuine issue for trial. The object of this provision is not to replace conclusory allegations of the . . . answer with conclusory allegations of an affidavit." Id.

"[C]onclusive assertions of ultimate fact are entitled to little weight when determining whether a nonmovant has shown a genuine issue of fact sufficient to overcome a summary judgment motion supported by complying affidavits." Miller, 728 F.2d at 1024 (citing 10A C. Wright, A. Miller & M. Kane, Federal Practice & Procedure, § 2727 at pp. 157-59 (1983)). In Miller, the plaintiff opposed the defendants' summary judgment motion with his own affidavit which contained "sweeping conclusory allegations that both defendants intentionally failed to protect him . . ." Miller, 728 F.2d at 1025. The affidavits he submitted were deficient because (among other reasons) they contained inadmissible hearsay. Id. at 1026. The court explained the plaintiff's conclusory allegations were "unsupportable, frivolous, and cannot withstand summary judgment." Id. See also, Wells Dairy Inc. v. Travelers Indemnity Co., 241 F. Supp. 2d 945, 956 (N.D. Iowa 2003) ("Hearsay statements which cannot

be categorized as a hearsay exception, conclusory allegations, legal arguments, and statements not based on personal knowledge may be stricken.") (citing cases).[17]

Likewise, in Malorana v. MacDonald, 596 F.2d 1072, 1080 (1st Cir. 1979) the plaintiff's affidavits were rejected because the defects were "numerous." Id. The court noted the plaintiff's affidavits were not based on personal knowledge, but instead were based on statements she heard or documents she read, but the properly authenticated transcripts/documents were not attached to the affidavit. Id. Her affidavit contained inadmissible hearsay. Id. And, "[p]articular portions of the counteraffidavits were improper because they purported to examine the defendants' thoughts as well as their actions. Other portions contained impermissible speculation or conclusory language." Id.

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[17] An extreme example of an improper affidavit is found in Alvariza v. Home Depot, 2007 WL 794416 (D. Colo., March 14, 2007). In that case, the plaintiff claimed she was wrongfully fired because of age discrimination. When the defendant moved for summary judgment, the plaintiff submitted an affidavit in opposition which stated in part:

> (1) Mr. Leo was neither human nor a resource—but that was his job; (2) the older women were left feeling adrift, while other, younger, more attractive people were doted upon by managers who should be trained better; (3) this pattern of sexist remarks is not limited to an isolated instance in an accessible computer room. Mr. Hardy set the tone each and every time he came into the store plaintiff was working. He was on a mission –put out to pasture older women, and hire . . . prettier women—and he let plaintiff know this on a regular basis.

Id. at *6. The court held this affidavit "falls far, far short of the requirements of Federal Rule of Civil Procedure 56 . . ." Id.

In Perez v. Volvo Corp., 247 F.3d 303 (1st Cir. 2001), the sufficiency of the following paragraph from Mr. Gonzalez's affidavit was the subject on appeal:

> Volvo knew about the higher AUM invoice cost figures. From my personal discussions with various Volvo representatives, I know that Volvo was fully aware of the relationship between Trebol and AUM, including the nature and amount of the guarantees.

Id. at 315. The court observed "if admissible, these statements are little short of damning." Id. The statements were not admissible, however, because though they purported to be based on Mr. Gonzalez's personal knowledge, they were "totally lacking in specificity . . ." Id.

> Affidavits purporting to describe meetings or conversations need not spell out every detail, but to receive weight at the summary judgment stage they must meet certain rudiments. Statements predicated upon undefined discussions with unnamed persons at unspecified times are simply too amorphous to satisfy the requirements of Rule 56 . . . even when proffered in affidavit form by one who claims to have been a participant.

Id. (citations omitted). See also James Wm. Moore, et. al. Moore's Federal Practice § 56.14(1)(d) (3d ed. 1997) ("The affidavit, in addition to presenting admissible evidence, must be sufficiently specific to support the affiant's position."). In Perez, the court determined the above language, along with other language in the affidavit was insufficient. Perez, 247 F.3d at 316. "Although these statements purport to deal with Volvo's knowledge of ongoing events, they are conclusory rather than factual . . . such gauzy generalities are not eligible for inclusion in the summary judgment calculus." Id. at 316-17.

A district court may strike speculative and conclusory affidavits from the record. Broughton v. School Board of Escambia County, Florida, 540 Fed.

Appx. 907 (11th Cir. 2013). In Broughton the district court struck the non-movant's affidavits submitted in resistance to a summary judgment motion which "contained mostly legal conclusions and factual allegations [that] were not based on personal knowledge." Id. at p. 911. The Eleventh Circuit affirmed, noting "the affidavits . . . simply say [the defendant] lied and mistreated [the plaintiff] without any supporting facts indicating how they arrived at those conclusions. They therefore do not satisfy the standard Rule 56(c) requires." Id.

In Perez, 247 F.3d at 315, the court explained, however, that the "rule requires a scalpel, not a butcher knife. The . . . court ordinarily must apply it to each segment of an affidavit, not to the affidavit as a whole." Id. On a motion for summary judgment, therefore, the district court should disregard only those portions of an affidavit that are inadequate pursuant to FED. R. CIV. P. 56(c), and consider the rest. Id.

Here, the affidavits offered up by defendants on the subject of the penological goals served by the current DOC pornography policy are conclusory in the extreme. They do not recognize and discuss the differences between the policy discussed in King and the current policy. They do not explain if or how the expansion of the pornography policy in its current form is necessary to serve defendants' penological goals. The affidavits simply substitute defendants' conclusory allegations in their answer with conclusory allegations in their affidavits. The court will not strike these portions of the affidavits from

the record, but the court concludes they fail to establish genuine issues of material fact.

The court concludes, after evaluation of all the Turner factors, that defendants are not entitled to summary judgment as to the facial constitutionality of the current DOC policy. The court also concludes that Mr. Sisney, for the same reasons, has shown entitlement to summary judgment on his own cross-motion for summary judgment as to the facial validity of the current policy. Accordingly, the DOC policy may be enforced insofar as it comports with the policy approved of in King, but no further.

c. Application of Martinez to Outgoing Mail

The prohibition on "manufacturing" pornography contained in the DOC policy facially applies not only to materials created by an inmate and kept within the confines of the prison. To such "in-house" pornography, the above-discussed Turner analysis applies. Thornburgh, 490 U.S. at 412-13. But the prohibition on "manufacturing" pornography also applies to written and pictorial pornography created by an inmate and sent to persons outside the prison. See Appendix 2; Docket No. 69-2 at pp. 7-9, ¶¶ 5-B, 8-A-2, and 8-A-12. To this outgoing pornography, the stricter Martinez test applies. Thornburgh, 490 U.S. at 412-13. This is because "outgoing correspondence from prisoners" does not "by its very nature, pose a serious threat to prison order and security." Id. at 411 and 411 n.10. Under Martinez, censorship of outgoing mail complies with First Amendment principles if it is necessary to "further an important or substantial governmental interest unrelated to the

suppression of expression" and the means used to further this interest is "no greater than is necessary or essential to the protection of the particular governmental interest involved." Martinez, 416 U.S. at 413-14.

Here, again, analysis is frustrated by defendants' refusal to acknowledge and address the differences between the King pornography policy and the current DOC policy. Defendants never address the outgoing-component of the current policy. The only governmental interests they articulate are to parrot the interests expressed in King: security, order and rehabilitation. However, because they rely on King and do not tailor their affidavits to the current DOC policy, they never explain what "important or substantial" interest is furthered by censoring *outgoing* pornography. Of course, they also do not explain how the DOC policy is narrowly tailored to serve that governmental interest.

Here, the 1987 Murphy opinion from the Eighth Circuit is directly on point and controls. Reiterating, the court held inmates were entitled to prevail on a First Amendment challenge in which the Martinez standard applied. Murphy, 814 F.2d at 1256-57. Inmates challenged a prison censorship policy that completely banned materials from the white supremacist organization, Aryan Nations. Id. at 1254, 1254 n.2. Prison officials justified the ban on the basis of the threat to prison security. Id. at 1254. The court rejected this rationale, holding the ban on Aryan Nations material was more restrictive of inmates' First Amendment rights than was necessary—that only literature that advocated violence or was "so racially inflammatory as to be reasonably likely to cause violence" should be banned. Id. at 1257. Prison security is described

by the Eighth Circuit to be "the most compelling government interest in a prison setting." Murphy, 372 F.3d at 983 (quoting Goff v. Graves, 362 F.3d 543, 549 (8th Cir. 2004)). Despite the most compelling governmental interest being at stake, the court was still willing to limit prison officials' all-out ban of Aryan Nations' literature. Murphy, 814 F.2d at 1256-57. See also Grenning v. Klemme, 34 F. Supp. 3d 1144, 1154, 1159 (E.D. Wash. 2014) (denying summary judgment to defendants on issue of constitutionality of censorship pursuant to a prison policy banning outgoing mail that was sexually explicit).

In Loggins v. Delo, 999 F.2d 364, 365-68 (8th Cir. 1993), the Eighth Circuit applied Martinez to uphold a grant of summary judgment to an inmate whose outgoing letter to his brother included a discussion of a female corrections officer who "enjoyed reading people's mail" and hoped "to read a letter someone wrote to their wife talking dirty . . . so she could go into the bathroom and masturbate." The court held Loggins was entitled to judgment as a matter of law because the letter did not implicate security concerns within the prison.[18] Id. at 367.

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[18] The Loggins court applied Martinez because the censorship at issue was of outgoing mail. Loggins, 999 F.2d at 365-68. Loggins was decided July 21, 1993. Id. at 364. Approximately six weeks earlier, a three-judge panel of the Eighth Circuit issued Smith v. Delo, 995 F.2d 827 (8th Cir. June 9, 1993). The Smith court held the Turner factors applied to determine the permissibility of censorship of outgoing mail, over the express objection of Judge Morris Sheppard Arnold. Smith, 995 F.2d at 830, 832. This is contrary to Loggins, McNamara and Brooks discussed in the body of this opinion. Neither Loggins nor Smith has been explicitly overruled. Other Eighth Circuit decisions after Loggins continue to recite the proposition that the Martinez analysis applies to outgoing mail censorship. See e.g. Leonard v. Nix, 55 F.3d 370, 374 (8th Cir. 1995). The court applies Martinez because that approach is consistent with

The Loggins court relied on a Fifth Circuit opinion in which an outgoing letter an inmate wrote to his girlfriend was censored. See McNamara v. Moody, 606 F.2d 621 (5th Cir. 1979). The letter stated that a corrections officer who worked in the mail room masturbated while reading mail and "had sex" with a cat. Id. at 623. Though the letter was "coarse and offensive," the court held censorship of the letter violated Martinez because there was no evidence it had a deleterious effect on prison discipline or security. Id. Although defendants stated the censorship furthered legitimate concerns about prison security and discipline, they produced no evidence of a causal relationship between letters like the one censored and those legitimate concerns. Id. The court acknowledged that censorship of outgoing mail may legitimately be had for "escape plans, plans for disruption of the prison system or work routine, or plans for the importation of contraband." Id. (quoting Martinez, 416 U.S. at 413). However, the letter in that case did not fall into these categories. Id.

In Brooks v. Andolina, 826 F.2d 1266, 1267-69 (3d Cir. 1987), the Third Circuit applied Martinez to prison officials' censorship and discipline of an inmate for his outgoing letter to a NAACP coordinator.[19] The letter complained that a female prison guard searched the inmate's visitor in "a very seductive manner." Id. at 1267. The court rejected defendants' asserted "security concerns" as justification for their actions, characterizing that rationale as "merely a belated attempt to justify their actions." Id. at 1268.

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the great majority of Eighth Circuit cases and because it is consistent with the Supreme Court's opinion in Thornburgh.

[19] NAACP is the acronym for the National Association for the Advancement of Colored People.

Applying the above law, the defendants are *not* entitled to summary judgment on the facial challenge to the outgoing-mail portion of the DOC pornography policy and Mr. Sisney *is* entitled to summary judgment on that portion of the policy. Loggins, 999 F.2d at 365-68; McNamara, 606 F.2d 623; Brooks, 826 F.2d at 1267-69; Murphy, 814 F.2d at 1256-57; Grenning, 34 F. Supp. 3d at 1154, 1159. Defendants have not shown any evidence that outgoing pornography, whether sexually explicit or nude materials, pose any threat to prison security. Defendants have similarly not shown outgoing pornography poses a threat to the rehabilitation of sex offender inmates or any other inmates. They have failed to show that outgoing pornographic materials increase the harassment or safety of prison corrections officers. Finally, defendants have failed to show the policy as to outgoing mail is narrowly tailored to serve their penological interests. Defendants' complete reliance on King is especially problematic for them here as the King policy did not apply at all to outgoing mail. See Appendix 1.

When a properly supported summary judgment motion is made, it is incumbent upon the nonmoving party to respond to facts asserted by the moving party with affidavits or other evidence disputing the facts in support of the motion. See FED. R. CIV. P. 56(c) and (e). Defendants failed to rebut Mr. Sisney's assertion of facts concerning outgoing mail.

4. As-Applied Challenge

The issue presented at the summary judgment stage is whether a jury could reasonably conclude that defendants herein had legitimate reasons to

apply the DOC pornography policy to the particular materials in Mr. Sisney's case. Hargis v. Beauchamp, 312 F.3d 404, 410-11 (9th Cir. 2002). "A regulation valid and neutral in other respects may be invalid if it is applied to the particular items in such a way that negates the legitimate concerns." Murphy v. Missouri Dept. of Corrections, 372 F.3d 979, 986 (8th Cir. 2004). There are six discrete items or categories of items at issue: (1) the four Pretty Face comic books; (2) Thrones of Desire; (3) Pride and Prejudice: Wild and Wanton Version; (4) Matisse, Picasso and Modern Art in Paris; (5) the Michaelangelo pictures from the Sistine Chapel; and (6) the Coppertone® suntan lotion advertisement.

Mr. Sisney has placed evidence before the court that other inmates were denied receipt of certain materials because of the DOC policy. See Docket Nos. 1-3, 95-14, 95-15, 95-16, 97, and 98. In an as-applied challenge, Mr. Sisney can assert only his own constitutional rights, not those of other inmates. McGowan v. Maryland, 366 U.S. 420, 429 (1961); Minnesota Majority v. Mansky, 708 F.3d 1051, 1059 (8th Cir. 2013); Hodak v. City of St. Peters, 535 F.3d 899, 906 (8th Cir. 2008). Therefore, for purposes of the as-applied challenge, the court does not consider the declarations from other inmates. Also, because Mr. Sisney has not demonstrated that defendants censored any *outgoing* pornography which he attempted to send out of the SDSP, the as-applied challenge relates only to that portion of the DOC policy applicable to *incoming* mail. Therefore, the Turner analysis, not the Martinez analysis,

applies. Murphy, 372 F.3d at 986; Bahrampour, 356 F.3d at 975; Flagner v. Wilkinson, 241 F.3d 475, 484 n.5 (6th Cir. 2001).

When evaluating an as-applied challenge to a regulation censoring incoming mail, prison officials are required to "review the content of each particular item received." Id. The court is required to "conduct an 'independent review of the evidence' to determine if there has been 'an exaggerated response to prison concerns' in relation to [each] particular item." Murphy, 372 F.3d at 986 (quoting Williams v. Brimeyer, 116 F.3d 351, 354 (8th Cir. 1997)). Accordingly, the court now turns to the items in question.

a. Pretty Face Comic Books

Mr. Sisney argues these four books are rated to be age-appropriate for fourteen-year-olds and, thus, do not fall within the DOC pornography policy. He also argues the brief scenes of nudity are simple line drawings and not realistic depictions of nudity. Defendants point to various sections of the books they consider to be covered by the DOC policy. See Docket No. 69-5 through 69-12. Mr. Sisney provided (through his mother, Esther Sisney), the entirety of the four books. See Docket No. 88.

The cover of each book bears a "Parental Advisory" that the books contain "Mature Content." See box accompanying Docket No. 88. The books instruct the reader that they read from right to left instead of from left to right. Id. Some, but not all, of the pages bear page numbers. Id. The books are about a teenaged boy who gets a female face transplant after a motor vehicle accident and is living life as a teenaged girl at a girls' high school. Id. Book 3

contains approximately 200 pages, mostly filled with sophomoric close-shave situations where the boy is nearly found out to be a boy or gets to hug girls. Id. On page 142 a man tries to sell the boy a pair of fake silicone breasts he can affix to his person. Id. The breasts are depicted bare with exposed nipples, but they are a torso only. Id. On page 155, the boy is trying out an all-body female suit covered with a skimpy one-piece bathing suit when a snake attacks him, crawling between the (covered) breasts of the suit. Id. The "snake" is drawn to look suspiciously like a penis. Id. The "girl" is subsequently pictured holding a limp "snake" dripping some liquid. Id. These two examples fit the DOC policy definition of "nudity" and "sexually explicit" (mimicking a sex act). Id.

This book clearly runs afoul of the current DOC policy because it contains some nudity and some sexually explicit depictions. See Appendix 2. Books 4, 5 and 6 are of similar ilk. There are examples in all three books of material that fits the current DOC definition of pornography in an overall book of approximately 200 pages where pornographic images do not preponderate.

The Turner analysis is similar to the above-discussed facial challenge. Defendants have not addressed their penological goals and the reasonable relation of those goals to the expansion of the pornography policy post-King. There are no alternative methods for Mr. Sisney to exercise his right to receive sexually explicit communications. Defendants do not address the ripple effects inherent in going back to the old King policy.

As to whether defendants' response is an exaggerated response, the court notes that the Pretty Face books present a close question. The court has already held the current DOC policy is invalid facially, but that the policy may be enforced as far as the King policy would have allowed. The court concludes that the Pretty Face books would have been censored even under King. Although individual nude images and depictions of sexually explicit conduct do not preponderate through the books, the overall theme of the books is that of a sly, ongoing joke of a sexual nature. The books "feature" pornography under the King policy in that they promote themselves based on the sexual themes of the books. While the King policy did not ban sexually explicit writing alone, the Pretty Face books contain both sexually explicit writing along with sexually explicit images. Accordingly, the court recommends granting defendants' summary judgment motion as to the as-applied challenge to the Pretty Face books and denying Mr. Sisney's motion for summary judgment on this claim.

b. Thrones of Desire

This is a book of fourteen short stories by different authors. The "forward" to the collection explains that the stories have plots and sex, but that the sex in the stories moves the plot along, it is not just a side attraction: "Sex is integral and vital to the story." Parts of all of the short stories clearly fit the current DOC policy definition of "sexually explicit" writing. Therefore, the as-applied challenge succeeds only if the facial challenge succeeds—i.e. if defendants' banning of sexually explicit writing does not violate the First Amendment.

The Turner analysis is similar to the above-discussed facial challenge. Defendants have not addressed their penological goals and the reasonable relation of those goals to the expansion of the DOC pornography policy post-King. There are no alternative methods for Mr. Sisney to exercise his right to receive sexually explicit communications. Defendants do not address the ripple effects inherent in going back to the old King policy. For example, for written pornography, defendants do not even address how many inmates at the SDSP are illiterate and, therefore, unable to partake, barter, or fight over written pornography. Because of the absence of any rationale in the record concerning the expansion of the DOC pornography policy post-King, it is difficult to determine if defendants' response is an exaggerated response to a perceived problem.

The court has already held the current DOC policy is invalid facially, but that the policy may be enforced as far as the King policy would have allowed. Because the King policy did not ban sexually explicit writing, Thrones of Desire would not have been banned under that policy. There is a single image on the cover of the Thrones book—a photograph of a scantily-clad woman. Her genitals, buttocks, and nipples are fully covered. Under the King policy, such depictions were allowed (as under the current policy as well). The court recommends that Mr. Sisney's motion for summary judgment on his as-applied challenge be granted and that defendants' motion as to this claim be denied.

c. Pride and Prejudice: The Wild & Wanton Edition

This book combines the complete original Pride and Prejudice novel authored by Jane Austen with sexually explicit additions by Annabella Bloom. Bloom's additions to the original text are printed in bold, helpfully to the reader who wants to just skip ahead to the next sexually explicit insertion. All of the additions by Bloom clearly fit the current DOC policy definition of "sexually explicit" writing. Therefore, the as-applied challenge succeeds only if the facial challenge succeeds—i.e. if defendants' banning of sexually explicit writing violates the First Amendment, then applying the ban to this book is also unconstitutional.

The Turner analysis is similar to the above-discussed facial challenge. Defendants have not addressed their penological goals and the reasonable relation of those goals to the expansion of the pornography policy post-King. There are no alternative methods for Mr. Sisney to exercise his right to receive sexually explicit communications. Defendants do not address the ripple effects inherent in going back to the old King policy. Because defendants do not acknowledge the expansion of the DOC pornography policy post-King, they do not discuss the reasons for that expansion. The court has no record from which to conclude that defendants' response is not an exaggerated response to a perceived problem.

The court has already held the current DOC policy is invalid facially, but that the policy may be enforced as far as the King policy would have allowed. Because the King policy did not ban sexually explicit writing, Pride and

Prejudice: The Wild and Wanton Edition would not have been banned under that policy. Also, the only pictorial image is on the cover of the book. It is a photograph of an old-fashioned lace hand-held fan. There is no nudity. The court recommends that Mr. Sisney's motion for summary judgment on his as-applied challenge be granted and that defendants' motion as to this claim be denied.

d. Matisse, Picasso, and Modern Art in Paris

There is nothing tricky or subversive about this book. It is a straight-up art book. The book is designed as a companion to the T. Catesby Jones Collections of art which are held at the Virginia Museum of Fine Arts and the University of Virginia Art Museum. The book contains pages and pages of text, explaining the art and the artists in the collection. The text is interspersed with generous depictions of the various artworks contained in the Jones Collections. Of these artworks, a very tiny handful have the odd bare breast or exposed buttock.

In the entire universe of art, some is controversial and provocative. The photographs of Robert Mapplethorpe come to mind. Many Mapplethorpe photos contain full frontal nudity including fully erect male penises and often feature S & M themes. They touched off such a controversy in 1989 that it has taken nearly 30 years for a museum to feature a Mapplethorpe retrospective.[20] See http://www.npr.org/2016/03/17/470791941/robert-mapplethorpes-provocative-art-finds-a-new-home-in-la. Last checked May 4, 2016.

[20] Mapplethorpe died at the height of the culture wars he helped ignite on March 9, 1989.

Mapplethorpe could not be further from the tenor or type of art contained in the Matisse book. The nudes, few in number, are like still life paintings. They are restful and peaceful and none contain any sexually explicit component. No subject of any painting is depicted lewdly or is engaged in any actual or simulated sex act. They are simply nudes, usually depicted in highly stylized or abstract form. See Exhibit 88, Matisse, Picasso and Modern Art in Paris, pages 43, 69, 86-87, 91, 94, 101, and 107.

The description on the rejection form is a one-size-fits-all generic description, not individualized to any particular item. See Docket No. 69-13. The first sentence of the form description states:

> The item depicts pornographic materials or encourages sexual behavior, pornography, nudity or sexually explicit conduct which is criminal in nature and/or may be detrimental to your rehabilitation.

Id. Nothing in the nudes in this book encourages criminal sexual behavior, criminal pornography, criminal nudity, or criminal sexually explicit conduct. If this sentence applies, then, it must be only because the nudes are considered "pornographic."

When defendants initially responded to Mr. Sisney's grievance of the rejection of the Matisse book, they stated only that the book violated policy and was not allowed. See Docket No. 69-15. Defendant Young, on appeal, rejected the grievance with the following statement: "All three (3) books you ordered were rejected for sexually explicit content. Two (2) of the books also have nudity in them." See Docket No. 69-17.

Contrary to what defendant Young wrote, there simply is no sexually explicit content in the Matisse book. Sexually explicit is defined under the DOC policy as "depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation." See Appendix 2. None of the nudes are depicted engaging in actual or simulated sexual acts. See Exhibit 88, Matisse, Picasso and Modern Art in Paris, pages 43, 69, 86-87, 91, 94, 101, and 107. They are, however, "nude" as "nudity" is defined in the DOC policy. This book, along with the Michelangelo pictures, convinces the court that defendants' response to the problem of pornography in prisons is an "exaggerated response."

This book clearly fits the current DOC policy definition of "nudity." Therefore, the as-applied challenge succeeds only if the facial challenge succeeds—i.e. if defendants' banning of all nudity does not violate the First Amendment.

The Turner analysis is similar to the above-discussed facial challenge. Defendants have not addressed their penological goals and the reasonable relation of those goals to the expansion of the pornography policy post-King. There are no alternative methods for Mr. Sisney to exercise his right to receive sexually explicit communications. Defendants do not address the ripple effects inherent in going back to the old King policy. Critically, defendants do not address why they found it necessary to change the King policy banning publications that routinely featured pornography or promoted themselves based on pornographic content to the current policy in which a single, nude

image can and does result in censorship. Just as critically, defendants stonewall any inquiry into the real-world application of their policy exception for educational, medical and anthropological purposes. As to the Matisse book, defendants' response clearly appears—on this record—to be an exaggerated response to a perceived problem.

The court has already held the current DOC policy is invalid facially, but that the policy may be enforced as far as the King policy would have allowed. Because the King policy banned only those publications that regularly and routinely featured pornography or that promoted themselves based on pornographic content, this art book would not have been banned under that policy. The nude images in this book do not preponderate, composing a distinct minority of the art pictured within. And the conservators of the Jones Collection did not promote the book based on its nude content. The court recommends that Mr. Sisney's motion for summary judgment on his as-applied challenge be granted and that defendants' motion as to this claim be denied.

e. Michaelangelo Pictures and Sculptures

The printed photos of works by Michaelangelo are found in the court's docket at Docket No. 40-2 through 40-9. They all depict portions of various scenes painted by Michaelangelo in the Sistine Chapel, drawings for later paintings, or sculptures. Id. One such photo is of the sculpture of David from the Old Testament of the Bible. A reproduction of this same sculpture graces Fawick Park here in Sioux Falls, South Dakota. The statue of David may very well be visible from afar by Mr. Sisney from his perch on top the hill at the

SDSP, though he would only be able to see David's (bare) buttocks from that vantage point. Many of these Michaelangelo works, including the statue of David, feature full frontal (unerect) male nudity. These works clearly fit the current DOC policy definition of "nudity." Bare buttocks and bare genitalia are visible. Therefore, the as-applied challenge succeeds only if the facial challenge succeeds—i.e. if defendants' banning of all nudity does not violate the First Amendment.

The Turner analysis is similar to the above-discussed facial challenge. Defendants have not addressed their penological goals and the reasonable relation of those goals to the expansion of the pornography policy post-King. There are no alternative methods for Mr. Sisney to exercise his right to receive sexually explicit communications. Defendants do not address the ripple effects inherent in going back to the old King policy. Critically, defendants do not address why they found it necessary to change the King policy banning publications that routinely featured pornography or promoted themselves based on pornographic content to the current policy in which a single, nude image can and does result in censorship. Just as critically, defendants stonewall any inquiry into the real-world application of their policy exception for educational, medical and anthropological purposes. As to the Michelangelo pictures, defendants' response clearly appears—on this record—to be an exaggerated response to a perceived problem.

The court has already held the current DOC policy is invalid facially, but that the policy may be enforced as far as the King policy would have allowed.

Because the King policy banned only those publications that regularly and routinely featured pornography or that promoted themselves based on pornographic content, these pictures would not have been banned under that policy. The nude images do not preponderate and the conservators of this art, mostly the Vatican, do not promote the art works based on their nude content. The court recommends that Mr. Sisney's motion for summary judgment on his as-applied challenge be granted and that defendants' motion as to this claim be denied.

f. Coppertone® Advertisement

The final exhibit is found at Docket No. 40-10. It is a Coppertone® advertisement that will be familiar to anyone over the age of 45 or 50. It features a little girl in pigtails, perhaps between the ages of three and six. She is deeply tanned and wears a bikini bottom, but no top of any kind (her chest faces away from the viewer and is not visible). Id. A little black dog has her bikini bottom between his teeth and is pulling on it, revealing the upper globes of her pale buttocks. Id. Two ad slogans are visible, one stating "Tan . . . Don't Burn . . . Use Coppertone." The other slogan says "Don't be a Paleface." Id. Coppertone introduced the ad in 1959. See http://www.tvacres.com/admascots_coppertone.htm. Last checked May 4, 2016. Coopertone changed its ad to be more modest at the turn of the 21st century. Id.

This ad clearly fits the current DOC policy definition of "nudity." The little girls' buttocks in the ad are mostly visible. Therefore, the as-applied

challenge succeeds only if the facial challenge succeeds—i.e. if defendants' banning of all nudity does not violate the First Amendment.

The Turner analysis is similar to the above-discussed facial challenge. Defendants have not addressed their penological goals and the reasonable relation of those goals to the expansion of the pornography policy post-King. There are no alternative methods for Mr. Sisney to exercise his right to receive sexually explicit communications. Defendants do not address the ripple effects inherent in going back to the old King policy.

The court has already held the current DOC policy is invalid facially, but that the policy may be enforced as far as the King policy would have allowed. It is a close question whether this ad would have been banned under King. Clearly, the big attraction of the ad was the exposure of a little girl's buttocks. Thus, one could conclude that Coppertone® promoted itself based on the nude content of the ad. This is precisely the type of image one would hope to keep out of the hands of a child sexual offender, though the image is innocuous to those of us not afflicted with those criminal desires. The court concludes this image would have been banned even under the King policy. For that reason, the court recommends granting defendants' motion for summary judgment on this as-applied claim and denying Mr. Sisney's motion on the claim.

g. The Exception in the Current DOC Policy

There is an exception to the ban on publications containing nudity in the current DOC policy for nude material that is "illustrative of medical, educational or anthropological content." See Appendix 2. The exception is

permissive, not mandatory, because it uses the word "may." Therefore, application of the exception can be denied by prison authorities in specific instances if, in their discretion, a nude that fits within the exception should nevertheless be kept out of the prison—the Mapplethorpe photographs come to mind. Merely because material has some artistic merit does not mean inmates automatically are entitled to possess it. Ashker v. Schwarzenegger, 2009 WL 801557 *11 (N.D. Ca. 2009).

Defendants have taken the position in their summary judgment motion that the exception cannot apply to nudes that constitute "art" unless the inmate requesting the nudes is a "serious student of the arts." They urge the court to hold the exception to be inapplicable to Mr. Sisney because he is not enrolled in any art classes at SDSP.

Under the defendants' interpretation of the exception to nudity for educational, medical or anthropological purposes, in order for the exception to be anything but illusory, there would, as a matter of common sense, have to be "educational," "medical" and "anthropological" classes available for SDSP inmates to enroll in. Without such classes, inmates cannot qualify for the exception—according to defendants' interpretation of the DOC policy.

But defendants have steadfastly refused Mr. Sisney's attempts to pin them down as to what rehabilitation resources are available to SDSP inmates in general, and to him in particular. Defendants have labeled all such attempts or requests by Mr. Sisney as "irrelevant." The court does not share defendants' view. Whether educational, medical or anthropological classes are

available to Mr. Sisney is crucial to evaluating whether the "exception" to the DOC policy is illusory or real. Similarly, whether defendants have *ever* granted an exception for nude material pursuant to the policy is relevant as it would tend to show whether the exception is ever applied. Defendants have stone-walled Mr. Sisney's attempts to obtain such information and, so, have stone-walled the court too.

In an as-applied challenge to prison officials' censorship of a particular magazine, the prison officials stated the particular issue of the magazine was "so racially inflammatory as to be reasonably likely to cause violence." Murphy, 372 F.3d at 986. The court reviewed the issue of the magazine in question and found that "it does not appear to counsel violence." Id. Holding that defendants' rationale for withholding the magazine was "too conclusory to support a judgment in its favor" on the as-applied challenge, the court reversed the district court's grant of summary judgment. Id. The court recognized that the expertise of prison officials required deference on the court's part, but required that those officials present specific evidence as to why the particular magazine issue in question implicated prison security. Id.

In Amatel, the BOP admittedly allowed *Victoria's Secret* catalogs and the *Sports Illustrated Swimsuit Edition* to reach inmates. Amatel, 156 F.3d at 202. The court noted it found "it all but impossible to believe that the Swimsuit Edition and Victoria's Secret pass muster [under the policy] while Michelangelo's David or concentration camp pictures fail; nor has there been any suggestion that any prison official has attempted to implement such a

bizarre interpretation." Id. Defendants herein implemented such a bizarre interpretation.

Mr. Sisney argues the materials defendants banned in his as-applied challenge are no more obscene or detrimental to prison security or rehabilitation than the popular television shows Family Guy and American Dad. That may be true, but it begs the question.

In Murchison v. Rogers, 779 F.3d 882, 889 (8th Cir. 2015), prison officials produced affidavits and testimony specifically linking the exact material that was censored in that case with the prison censorship policy and their penological goals. The censored material was an article in *Newsweek* regarding Mexican drug cartels that included photographs of corpses hanging from a bridge and the body of a murdered journalist lying in a pool of blood. Id. at 888. The prison officials produced sworn testimony that photos of death and murder promote prison violence, disorder, or violations of law. Id. at 889. Further sworn testimony explained that prolonged exposure to violent acts through print media reinforces socially irresponsible prison behavior. Id. Finally, testimony from defendants established that print materials depicting violent acts circulate in the prison and are used to threaten other inmates, as prison currency, and as gang affiliation identification. Id. In approving the prison officials' censorship of the specific *Newsweek* article at issue, the court reiterated that there was no suggestion the prison used a blanket ban on *Newsweek* itself, or on all material containing any type of violent content. Id. at 889, 891 (noting inmate could read about drug cartels and free press issues

in Mexico from other sources and that other materials depicting violent subject matter was available in the prison).

Here, the current DOC policy, unlike the policy in Murchison, allows no other access to sexually explicit pictures or writing. The defendants have refused to address the real differences between the King policy and the current DOC pornography policy. The court has concluded that, because of defendants' refusal, the current policy must be declared facially invalid pursuant to Mr. Sisney's summary judgment motion. Critical to the court's analysis is the lack of any alternative avenue to exercise the right to receive sexually explicit material, the fact that many (not a single) decision-maker carries out the censorship, and the absence of the requirement that a publication routinely contain pornographic content or promote itself based on that content.

The mere fact that defendants have censored such magazines of general circulation such as *Glamour*, *U.S. Weekly*, and *Men's Fitness* is beside the point. As Murchison shows, even a news magazine like *Newsweek* can permissibly be censored by prison officials, so long as the censorship is not a complete ban on all issues of *Newsweek* and so long as the prison does not categorically ban all publications touching on a certain topic—in Murchison, that topic was violence. Here, the topic is sexually explicit materials.

There is no suggestion in the record before the court that defendants ban all issues of *Glamour*, *U.S. Weekly*, or *Men's Fitness*, but there is concrete proof that they *do* ban all publications with any pornographic content, no matter

how sporadic or isolated. That, even for inmates, runs afoul of the First Amendment without specific evidence in the record from defendants in support of their position.

C. Due Process

Mr. Sisney argues the DOC policy deprives him of due process. It seems Mr. Sisney is raising both a procedural due process argument and a void-for-vagueness argument.

1. Procedural Due Process

When prison officials confiscate an inmate's mail, certain minimal procedural safeguards are required by the Due Process clause. Martinez, 416 U.S. at 417-19. Those safeguards are (1) notice to the inmate of the confiscation, (2) an opportunity for the inmate to be heard, and (3) an opportunity for the inmate to appeal to a prison official not involved in the original censorship. Id. at 418-19. Here, the DOC policy meets those requirements. See Appendix 2; Docket No. 69-2 at pp. 7-9. The policy requires DOC staff to notify inmates if correspondence is confiscated. Id. The inmate may then file a request for administrative remedy to protest the confiscation. Id. The administrative process is evaluated by someone other than the DOC staff person who made the decision to confiscate the correspondence. See Docket No. 69-2 at pp. 7-9. The DOC policy accords appropriate procedural due process protections. Martinez, 416 U.S. at 418-19. The Due Process clause does not require that prison officials let inmates see the material they are withholding in order to challenge the censorship.

2. Vagueness

"A statute is unconstitutionally vague if persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.' " United States v. Posters N Things Ltd., 969 F.2d 652, 659 (8th Cir. 1992) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). The burden is on Mr. Sisney to demonstrate that the DOC pornography policy is unconstitutionally vague. Id.

The gist of Mr. Sisney's argument centers around the term "feature" in the current DOC policy. As discussed above, in the policy at issue in King, the word "feature" was defined to mean a publication which routinely and regularly featured pornography or, in the case of one-time issues, promoted itself based on pornographic content. See Appendix 1. That definition has now been removed from the DOC policy (as of June, 2009), but the word "feature" remains part of the policy. Defendants have steadfastly refused to provide a definition of "feature" in the current DOC policy in this litigation. Their application of the policy in practice convinces the court that defendants now define "feature" to mean a one-time appearance of a single nude picture in an issue of a magazine even if that magazine usually does not contain nudity and does not promote itself based on nude content.

This is certainly different from how the King policy defined "feature." See Appendix 1. It is also different from how other prison officials have defined the term in their policies. For example, defendants in Smith v. Roy, 2012 WL 1004985 at *10 (D. Minn. Jan. 25, 2012), defined "feature" based on the ratio

of nude images to the total number of pages in the publication, the manner in which the nude images are displayed (including size); and whether the publication advertised nude images on the front page. The dictionary defines "feature" as "to be a feature or distinctive mark of; to make a feature of; give prominence to; to delineate the main characteristics of." See http://www.dictionary.com/browse/feature?s=t last checked May 17, 2016. Defendants clearly do not define "feature" as the dictionary does.

Although defendants' definition of "feature" as apparent from their interpretation and application of the policy does not coincide with the definition of "feature" found elsewhere, defendants are of course free to interpret and apply their policy as they see fit. The court adopts the apparent definition of "feature" used by defendants in their application of the current DOC pornography policy.

Mr. Sisney meets himself "coming and going" a bit in his arguments in his brief. In arguing the facial invalidity of the policy, he explains the exact meaning of the policy and to what extreme lengths the policy applies. Then, he argues in support of his due process claim that he cannot decipher what the policy means or what "feature" means.

The court agrees with Mr. Sisney's former argument: through its various revisions until it has reached its current form, the DOC pornography policy has gotten more and more detailed and specific. The court agrees with Mr. Sisney's reading of the policy as to his facial challenge based on the First Amendment: the policy is quite clear and quite specific. Every document containing any

bare genitalia, buttock or female breast is "nudity" and is absolutely banned, even if the document is 200 pages long and has one offending page within it. Also, every document describing any sexually explicit conduct or picturing oral sex, anal sex, intercourse, or masturbation is absolutely banned, again, even if the offending part is but a small portion of the overall document. Finally, the court agrees with Mr. Sisney that the policy through its ban on "manufacturing" bans pornography both as to outgoing correspondence and documents created within the prison walls that are never destined for the outside. Because the court is not required to "guess" at the meaning of the DOC pornography policy, the court rejects Mr. Sisney's argument that the policy is unconstitutionally vague.

D. Official Capacity[21]

Official-capacity claims against state officials are treated as suits against the State itself. Kentucky v. Graham, 473 U.S. 159, 165 (1985). The Supreme Court has held that money damages are not available for § 1983 claims against state officials who are sued in their official capacities. Will v. Michigan Dept. of State Police, 491 U.S. 58, 64, 71 (1989). However, prospective injunctive relief *is* available against state *officials* (though not against the state itself), when sued in their official capacities. Will, 491 U.S. at 71 at n.10. This is because

[21] Defendants devote an entire section of their brief arguing why Mr. Sisney's "individual capacity" claims must fail. See Docket No. 68 at pp. 12-15. However, Mr. Sisney clearly states in his complaint and supplemental complaint that he sues the four named defendants in their official capacities only. See Docket No. 1 at pp. 1-3, ¶¶ 4-7; Docket No. 8-1 at pp. 1-3, ¶¶ 4-7. The court does not, therefore, address defendants' individual capacity arguments.

"official-capacity actions for prospective relief are not treated as actions against the State." Id. (quoting Graham, 473 U.S. at 167 n.14 (citing Ex Parte Young, 209 U.S. 123, 159-60 (1908))). Therefore, an official-capacity claim for prospective injunctive relief might be asserted, for example, against an *officer* of a state university, but could not be asserted against the university itself, which is the state itself (agencies of the state are also the state for purposes of the Eleventh Amendment). Monroe v. Arkansas State Univ., 495 F.3d 591, 594 (8th Cir. 2007). Eleventh Amendment immunity protects the state itself from being sued. Id. When an official capacity claim is asserted for injunctive relief against a state officer, the defense of qualified immunity does not apply. Pearson v. Callahan, 555 U.S. 223, 242-43 (2009); Grantham v. Trickey, 21 F.3d 289, 295 (8th Cir. 1994).

"Because the real party in interest in an official capacity suit is the governmental entity and not the named official, 'the entity's "policy or custom" must have played a part in the violation of federal law.' " Hafer v. Melo, 502 U.S. 21, 25 (1991). This is because local governmental entities can only be held liable under § 1983 to the extent the constitutional deprivation was made pursuant to official policy or custom of the city, county or other local governmental unit. See Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658, 689-90 (1978). In official capacity suits, the only immunities available to an individually-named defendant are the immunities that the governmental entity possesses—i.e. usually Eleventh Amendment immunity. Hafer, 502 U.S. at 25. "Official-capacity liability under 42 U.S.C. § 1983 occurs only when a

constitutional injury is caused by 'a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " Gladden v. Richbourg, 759 F.3d 960, 968 (8th Cir. 2014) (quoting Grayson v. Ross, 454 F.3d 802, 810 (8th Cir. 2006)). An official policy or custom will not be inferred from the occurrence of a single incident. Remington v. Hoopes, 611 Fed.Appx. 883 at *3 (8th Cir. 2015) (citing Wedemeier v. City of Ballwin, 931 F.2d 24, 26 (8th Cir. 1991)).

Defendants concede that defendant Young, the warden at SDSP, was the final decision maker as to the interpretation and application of the DOC policy at the SDSP. They concede as well that defendant Young was involved in the appeals process of the rejection of the various items involved in Mr. Sisney's as-applied challenge. This makes defendant Young the appropriate defendant on Mr. Sisney's as-applied challenge.

Defendants also concede that defendant Kaemingk, the Secretary of the DOC, is the final decision maker as to the DOC pornography policy itself. Therefore, Kaemingk is the appropriate defendant on Mr. Sisney's facial challenge to the DOC pornography policy.

That leaves defendants Reimann and Mousel. Defendants argue Mr. Sisney must sue only the defendant who possessed final decision making authority over the subject matter, citing Nix v. Norman, 879 F.2d 429, 433 (8th Cir. 1989). See Docket No. 68 at pp. 10-11. However, defendants omit half of the holding stated in Nix. What the Nix court actually stated was, "[t]o establish liability in an official-capacity suit under section 1983, a plaintiff

must show *either* that the official named in the suit took an action pursuant to an unconstitutional governmental policy or custom, *or* that he or she possessed final authority over the subject matter at issue and used that authority in an unconstitutional manner." Nix, 879 F.2d at 433 (citing Monell v. New York City Dept. of Social Servs., 436 U.S. 658 (1978); and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)) (emphasis added). Thus, defendants Young and Kaemingk are appropriately sued under the second alternative set forth in Nix. Mr. Sisney can sue defendants Mousel and Reimann under the first alternative set forth in Nix if he can show that they took action pursuant to an unconstitutional governmental policy or custom. Id.

Here, Mr. Sisney has shown evidence that both Mousel and Reimann were involved in rejection of the materials he attempted to receive. Mousel was the rejecting officer on the Thrones of Desire, Pride and Prejudice: the Wanton Edition, and Matisse, Picasso and Modern Art in Paris books. See Docket No. 69-13. Reimann was the rejecting officer on the November, 2015, attempted delivery of the Michelangelo pictures. See Docket No. 91-3. In addition, Reimann was the rejecting officer on the various attempted deliveries of *Glamour* magazine which the court considered as evidence of how the defendants interpret the DOC policy facially. See Docket Nos. 1-4 at pp. 5-7 and 95-14. Thus, both Reimann and Mousel are appropriate defendants in their official capacities if they acted pursuant to an unconstitutional governmental policy. Nix, 879 F.2d at 433. They did. They are, therefore, appropriately sued herein.

Defendants argue that defendant Reimann should be dismissed altogether as she had absolutely "no involvement whatsoever in the rejection of" the materials in this case. See Docket 71 at p. 2, ¶ 4. Of course, Mr. Sisney has produced competent evidence to the contrary, discussed above. See Docket No. 91-3. Accordingly, the court rejects defendants' argument that any of the four named defendants should be dismissed because they are improper parties for official capacity suits.

CONCLUSION

Based upon the foregoing law, facts, and analysis, this magistrate judge respectfully makes the following recommendations:

1. Defendants' motion for summary judgment [Docket No. 67] be granted in part and denied in part as follows:

   a. defendants' motion for summary judgment on Mr. Sisney's facial challenge be denied;

   b. defendants' motion for summary judgment on Mr. Sisney's as-applied challenge be granted as to the Pretty Face books and the Coppertone® advertisement;

   c. defendants' motion for summary judgment on Mr. Sisney's as-applied challenge be denied as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book, the Michelangelo pictures, and Matisse, Picasso and Modern Art in Paris; and

   d. defendants' motion for summary judgment on Mr. Sisney's due process claims be granted.

2. Plaintiff Charles Sisney's motion for summary judgment [Docket No. 92] be granted in part and denied in part as follows:

   a. Mr. Sisney's motion for summary judgment on his facial challenge be granted;

b. Mr. Sisney's motion for summary judgment on his as-applied challenge be denied as to the Pretty Face books and the Coppertone® advertisement;

c. Mr. Sisney's motion for summary judgment on his as-applied challenge be granted as to the Thrones of Desire book, the Pride and Prejudice: The Wild and Wanton Edition book; the Michelangelo pictures, and Matisse, Picasso and Modern Art in Paris book; and

d. Mr. Sisney's motion for summary judgment on his due process claims be denied.

NOTICE TO PARTIES

The parties have fourteen (14) days after service of this report and recommendation to file written objections pursuant to 28 U.S.C. § 636(b)(1), unless an extension of time for good cause is obtained. Failure to file timely objections will result in the waiver of the right to appeal questions of fact. Objections must be timely and specific in order to require de novo review by the District Court. Thompson v. Nix, 897 F.2d 356 (8th Cir. 1990); Nash v. Black, 781 F.2d 665 (8th Cir. 1986).

DATED May 25, 2016.

BY THE COURT:

Veronica L. Duffy

VERONICA L. DUFFY
United States Magistrate Judge

South Dakota Department of Corrections		Policy Number 3C.5
Affected Units	**Effective Date**	**Pages**
Adult Institutions	April 1, 2000	2
Subject		
Pornography		

Policy

The Department of Corrections prohibits the purchase, possession and attempted possession of pornographic materials by inmates housed in South Dakota Department of Corrections institutions.

This version of policy 3C.5 supercedes the Feb. 29, 2000 version of policy 3C. 5.

Definitions

1. Pornographic Material: Books, pamphlets, magazines, periodicals, or any other publications that graphically feature nudity or sexually-explicit conduct. "Nudity" means a pictorial depiction where genitalia or female breasts are exposed. "Features" 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. Publications containing nudity illustrative of medical, educational or anthropological content may be excluded from this definition. "Sexually explicit" means a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex or masturbation. Pornographic material also includes individual pictures, photographs, or drawings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.

Procedural Guidelines

I. Purchase, Possession and/or Attempted Possession

A. Any pornographic material is considered contraband.

B. The purchase, possession and/or the attempted possession of pornographic material by an inmate is a violation of Prohibited Act 3-18.

1. Any inmate who violates the procedures in this policy is subject to disciplinary action (See DOC Policy 3C.3 Inmate Discipline System).

2. Materials that are believed to be in violation of this policy may be confiscated and used as evidence during the disciplinary process (See DOC Policy 3C.3 Inmate Discipline System).

C. Staff will not knowingly bring pornographic material into a facility.

D. Each adult facility will promulgate procedures to ensure that pornographic material is not allowed into their facility. Such procedures will include, at a minimum:

1. Specific reference to operations memorandums on correspondence and visiting;

2. The appointment of a single staff member to determine if a particular item is included in the definition of pornographic material; and

3. The requirement that decisions made under section D.2. be shared, coordinated and consistent with the decisions made regarding the same or similar material in the other adult facilities of the SD DOC.

	5/11/00
Jeff Bloomberg, Secretary of Corrections	Date

Revision Index

May 2000
Changed definition of pornography
Added D.2, D.3

1.3.C.8 Pornography

EXHIBIT: A

I Policy Index:

Date Signed:	*06/10/2014*
Distribution:	*Public*
Replaces Policy:	*3C.5*
Supersedes Policy Dated:	*08/08/2013*
Affected Units:	*All Institutions*
Effective Date:	*06/10/2014*
Scheduled Revision Date:	*May 2015*
Revision Number:	*12*
Office of Primary Responsibility:	*DOC Administration*

II Policy:

The Department of Corrections (DOC) prohibits the purchase, possession and attempted possession and manufacturing of pornographic materials by offenders housed in its institutions.

III Definitions:

Pornographic Material:
Includes books, articles, pamphlets, magazines, periodicals, or any other publications or materials that feature nudity or "sexually-explicit" conduct. Pornographic material may also include books, pamphlets, magazines, periodicals or other publication or material that features, or includes photographs, drawings, etchings, paintings, or other graphic depictions of nudity or sexually explicit material.

Nudity:
"Nudity" means a pictorial or other graphic depiction where male or female genitalia, pubic area, buttocks or female breasts are exposed. Published material containing nudity illustrative of medical, educational or anthropological content may be excluded from this definition.

Sexually Explicit:
"Sexually Explicit" includes written and/or pictorial, graphic depiction of actual or simulated sexual acts, including but not limited to sexual intercourse, oral sex or masturbation. Sexually explicit material also includes individual pictures, photographs, drawings, etchings, writings or paintings of nudity or sexually explicit conduct that are not part of a book, pamphlet, magazine, periodical or other publication.

Offender:
For purposes of this policy, an offender is an inmate (in the custody of the South Dakota DOC institutional system), a Community Transition Program parolee or detainee (See DOC policy 1.5.G.2 *Community Transition Program*), or a juvenile housed at the State Treatment And Rehabilitation (STAR) Academy.

IV Procedures:

1. Purchase, Possession and/or Attempted Possession of Pornographic Material:

A. Any pornographic material is considered contraband.

B. The purchase, possession, attempted possession or manufacturing of pornographic material by an offender is a violation of certain Offenses in Custody (See DOC *Inmate Living Guide* and STAR OM 5.3.C.1 *Youth Standards of Conduct*).

1. Any offender found in violation of this policy may be subject to disciplinary action (See DOC policy 1.3.C.2 *Inmate Discipline System* or DOC policy 1.3.C.3 *Juvenile Discipline System*).

2. Materials are believed to be in violation of this policy may be confiscated and used as evidence during the disciplinary process.

3. Additionally, the purchase, possession, attempted possession or manufacturing of pornography by a sex offender is a violation of the STOP Program contract (See DOC Policy 1.3.C.9 *Sex Offender Restrictions*).

2. Institutional Guidelines:

A. Each institution's Warden/Superintendent will ensure procedures are in place to prevent pornographic material from being brought into the institution(s) under their authority. Such procedures will encompass at a minimum:

1. Prevention of pornographic material through correspondence and visits (See DOC policies 1.5.D.1 *Inmate Visiting*, 1.5.D.2 *Juvenile Visitation and Telephone Contact* and 1.5.D.3 *Offender Correspondence*).

a. All incoming and outgoing correspondence or publications depicting pornography or containing pornographic material will be rejected (See DOC policy 1.5.D.3 *Offender Correspondence*).

2. Designated staff who have the authority to determine if a particular item is included in the definition of pornographic material.

3. A procedure/system in place to allow each institution/unit to share and coordinate information regarding pornography in the effort to keep standards consistent between institutions.

B. If an offender disagrees with the decision that a particular item meets the definition of pornographic material, he/she may appeal the decision through the administrative remedy process (See DOC policy 1.3.E.2 *Administrative Remedy for Inmates* or 1.3.E.3 *Juvenile Administrative Remedy Procedure*).

C. Staff will not knowingly bring or receive pornographicic material (see definition) inside a DOC facility or on the grounds of a DOC facility (See DOC policy 1.3.A.10 *Restrictions on Electronic Equipment*).

V Related Directives:

DOC policy 1.3.A.10 – *Restrictions on Electronic Equipment*
DOC policy 1.3.C.2 – *Inmate Discipline System*
DOC policy 1.3.C.3 – *Juvenile Discipline System*
DOC policy 1.3.C.9 – *Sex Offender Restrictions*
DOC policy 1.3.E.2 – *Administrative Remedy for Inmates*
DOC policy 1.3.E.3 – *Juvenile Administrative Remedy Procedure*
DOC policy 1.5.D.1 – *Inmate Visiting*
DOC policy 1.5.D.2 – *Juvenile Visitation and Telephone Contact*
DOC policy 1.5.D.3 – *Offender Correspondence*
DOC policy 1.5.G.2 – *Community Transition Program*
STAR OM 5.3.C.1 – *Youth Standards of Conduct*
Inmate Living Guide

VI Revision Log:

October 2002: **Revised** term facility to institution throughout policy.
October 2003: **Moved** some information into a separate section on Institutional Guidelines.
June 2004: **Changed** "inmate" to "offender" **Added** definition of offender **Changed** affected units to All Institutions **Added** a reference to policies 1.3.C.3, 1.3.E.2 and 1.3.E.3 and the *Juvenile Offender Living Guide.*
July 2005: **Added** references to DOC policies 1.5.D.2 and 1.5.D.3.
June 2006: **Revised** the policy name on 1.3.C.3 and 1.5.D.3 **Added** reference to policy 1.5.D.1.
July 2007: **Revised** the policy statement **Revised** the definition of offender **Added** a reference to DOC policy 1.5.G.2.
May 2008: **Revised** formatting of policy in accordance with DOC policy 1.1.A.2 Policy and Operational Memorandum Management policy **Changed** "detainer" to "detainee" in the definition of Offender. **Revised** "Visiting with Inmates" to read "Inmate Visiting" in subsection (A1 of Institutional Guidelines) to be consistent with the policy's title.
June 2009: **Revised** definition of "Pornographic Material", **added** definition of "Nudity", "Sexually Explicit" and **added** reference to South Dakota as it relates to DOC in definition of Offender all within Definitions section. **Replaced** former ss (A3 of Institutional Guidelines) with statement regarding coordinating information to keep standards consistent amongst institutions **Revised** title of DOC policy 1.5.D.1 within Section V. **Added** hyperlinks throughout policy.
June 2010: **Revised** formatting of Section 1.
June 2011: **Added** "articles", "describes, depicts", "etchings, paintings" to definition of Pornographic Material. **Added** "pubic area", "buttocks" to definition of Nudity **Added** "etchings, paintings" to definition of Sexually Explicit.
June 2012: **Added** "The purchase, possession or attempted to possession of pornography by a sex offender is a violation of the Stop Contract" in Section 1 B. 3. **Added** a. "All incoming and outgoing correspondence or publications depicting pornography or containing pornographic material shall be rejected" in Section 2 A. 1.
May 2013: **Added** "and manufacturing" to II Policy. **Deleted** "describes, depicts" in definition of Pornographic Material. **Added** "graphic" and "writings" to definition of Sexually Explicit. **Added** "or manufacturing" and **Deleted** "prohibited acts" and **Replaced** with "offenses in custody" in Section 1 b. **Added** "or manufacturing" in Section 1 B. 3.
May 2014: Reviewed with no changes.

Denny Kaemingk (original signature on file)	*06/10/2014*
Denny Kaemingk, Secretary of Corrections	Date

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-2460

Charles E. Sisney

Appellee

v.

Denny Kaemingk, in his official capacity as the South Dakota Secretary of Corrections, et al.

Appellants

National Coalition Against Censorship

Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of South Dakota - Southern
(4:15-cv-04069-LLP)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 22, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.