APPENDIX - A

NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY JAMES MERRICK, in his official capacity only,

Plaintiff - Appellant,

v.

DAVID SHINN, Director of the Arizona Department of Corrections, Rehabilitation and Reentry, in his official and individual capacities; DIANNE MILLER, Administrator of the Office of Publication Review, in her official and individual capacities; D GONZALES, a corrections officer in the Arizona Department of Corrections, Rehabilitation and Reentry, in his/her official and individual capacities; C GONZALEZ, Corrections Officer - Badge #10970; S McQUEEN, Corrections Officer - Badge #12723; RYAN THORNELL, Director of the Arizona Department of Corrections, Rehabilitation,

Defendants - Appellees.

No. 24-4833

D.C. No. 2:23-cv-00296-SPL-MTM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Submitted April 22, 2025**

Before: GRABER, H.A. THOMAS, and JOHNSTONE, Circuit Judges.

Arizona state prisoner Anthony James Merrick appeals pro se from the district court's summary judgment in his 42 U.S.C. § 1983 action alleging federal claims arising from the confiscation of prison mail. We have jurisdiction under 28 U.S.C. § 1291. We review de novo. *Prison Legal News v. Ryan*, 39 F.4th 1121, 1128 (9th Cir. 2022). We affirm.

The district court properly granted summary judgment because Merrick failed to raise a genuine dispute of material fact as to whether Arizona Department of Corrections Order 914, as revised on August 12, 2022, was facially unconstitutional or whether defendants lacked a legitimate penological interest in confiscating content deemed sexually explicit under the order. *See id.* at 1128-36 (setting forth factors for analyzing the facial and as-applied constitutionality of prison regulations under *Turner v. Safley*, 482 U.S. 78 (1987); holding that Order 914's policy prohibiting graphic depictions of nudity or sex acts was facially valid; and explaining that "inconsistency in prison censorship" is insufficient to establish an as-applied First Amendment violation).

The district court did not abuse its discretion in denying Merrick's motions

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

for injunctive relief in the form of additional legal resources, for appointment of counsel, for recusal of the magistrate judge, for reconsideration of its dismissal of defendant McQueen for failure to effect service, and to compel discovery because Merrick failed to establish a basis for such relief. *See Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (setting forth standard of review and "exceptional circumstances" requirement for appointment of counsel); *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (setting forth standard of review and requirements for injunctive relief); *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002) (setting forth standard of review and explaining that a decision to deny a motion to compel discovery will not be disturbed without "actual and substantial prejudice to the complaining litigant" (citation and internal quotation marks omitted)); *United States v. Hernandez*, 109 F.3d 1450, 1453-54 (9th Cir. 1997) (setting forth standard of review and standards for recusal of judges); *Sch. Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262-63 (9th Cir. 1993) (setting forth standard of review and grounds for reconsideration).

The district court did not abuse its discretion in denying Merrick's request to certify an interlocutory appeal. *See Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995) ("Congress . . . chose to confer on district courts first line discretion to allow interlocutory appeals.").

We do not consider arguments and allegations raised for the first time on appeal. *See Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

APPENDIX- B

SM

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Anthony James Merrick,

Plaintiff,

v.

David Shinn, et al.,

Defendants.

No. CV-23-00296-PHX-SPL (MTM)

ORDER

Plaintiff Anthony James Merrick, who is currently confined in Arizona State Prison Complex (ASPC)-Yuma, Cibola Unit in San Luis, Arizona, brought this civil rights case pursuant to 42 U.S.C. § 1983. (Doc. 10.) Defendants move for summary judgment, and Plaintiff opposes.[1] (Docs. 71, 82.) Defendants filed a Reply. (Doc. 84). Also before the Court are Plaintiff's Motion for Order to Show Cause Re: Legal Access (Doc. 29), Motion for Expedited Request for Interlocutory Appeal (Doc. 47), and Rule 59(e) Motion to Amend (Doc. 55).

I. Background

On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated a First Amendment claim in Count One against former Arizona Department of Corrections (ADC) Director David Shinn, Administrator of the Office of Publication Review (OPR) Dianne Miller, and Corrections Officers (COs) C. Gonzalez, S. McQueen, and D. Gonzales

[1] The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc), regarding the requirements of a response. (Doc. 77.)

in their individual capacities. (Doc. 9 at 5.) The Court also determined that Plaintiff stated a claim for injunctive relief in Count One against current ADC Director Ryan Thornell in his official capacity. (*Id.*) The Court directed these Defendants to answer and dismissed the remaining claims and Defendants. (*Id.* at 6–7.)

II. Plaintiff's Motions

A. Motion for Order to Show Cause re: Legal Access

Plaintiff asserts that he has been denied "access to legal authorities which will prejudice him and his claims and tips the scale heavily in the defendants [sic] favor." (Doc. 29 at 3.) Plaintiff claims that Defendants "do not provide resources such as electronic tablet software" such as Microsoft Word and that they do not provide hardware "such as a keyboard" for Plaintiff to prepare motions and pleadings in this case. (*Id.*) Plaintiff moves the Court to order Defendants to provide him "with legal resources on his tablet, to include, 'Word" (or an equivalent), a keyboard . . . and full access to Lexus Nexus and e[-]filing with the [C]ourt." (*Id.* at 5.)

The Court construes Plaintiff's Motion as a motion for injunctive relief. A plaintiff seeking a preliminary injunction must show that (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm without an injunction, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 20 (2008).

Ordinarily, the Court lacks jurisdiction over claims for injunctive relief that are not related to the claims pleaded in the operative complaint. *See Pac. Radiation Oncology, LLC v. Queen's Med. Center*, 810 F.3d 631, 636 (9th Cir. 2015) ("[w]hen a plaintiff seeks injunctive relief based on claims not pled in the complaint, the court does not have the authority to issue an injunction"). However, the Court may consider claims for injunctive relief not pleaded in the operative complaint if they concern a prisoner's access to the court. *See Prince v. Schriro, et al.*, CV 08-1299-PHX-SRB, 2009 WL 1456648, at *4 (D. Ariz. May 22, 2009) (unless a claim concerns access to the courts, the Plaintiff must show a nexus between the relief sought and the claims in the lawsuit).

Here, even if the Court construes Plaintiff's allegations in the motion for injunctive relief as an access-to-courts claim, Plaintiff's request for injunctive relief still fails. To maintain an access-to-courts claim, a prisoner must submit evidence showing an "actual injury" resulting from the defendant's actions. *Lewis v. Casey*, 518 U.S. 343, 349 (1996). With respect to an existing case, the actual injury must be "actual prejudice . . . such as the inability to meet a filing deadline or to present a claim." *Id.* at 348-49. Plaintiff has failed to show a likelihood of success on the merits or irreparable injury as it pertains to an access-to-courts claim. There is no evidence that Plaintiff has faced an unreasonable delay or the inability to file anything in this action or in any other action. In fact, Plaintiff has succeeded in litigating this case through screening, discovery, and now summary judgment. A review of the docket in this matter reflects that Plaintiff has filed an original, first amended, and second amended complaint as well as several motions, notices, responses, and replies. Plaintiff has not shown that his ability to litigate this or any other case has been impeded. Plaintiff has not been prevented from bringing a claim as a result of Defendants' alleged conduct. Thus, Plaintiff has not established actual injury. Plaintiff has also failed to satisfy the remaining requirements that must be shown to warrant injunctive relief. *See Winter*, 555 U.S. at 20. For the foregoing reasons, the Court will deny Plaintiff's motion for injunctive relief.

B. Motion for Expedited Request for Interlocutory Appeal

In his next Motion, Plaintiff requests that the Court "make an expedited determination of [his] interlocutory appeal." (Doc. 47 at 1.) Plaintiff appears to request that the Court vacate its January 10, 2024 Order denying Plaintiff's motion for relief from scheduling order and request for extension of the pre-trial deadlines. (*See id.*)

The Court has discretion to reconsider and vacate a prior order. *Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994); *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 396 (9th Cir. 1992). "The Court will ordinarily deny a motion for reconsideration of an Order absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to its attention earlier with reasonable diligence." LRCiv 7.2(g)(1).

Any motion for reconsideration must specifically identify the matters that were overlooked or misapprehended by the Court. *Id.* If any new matters are being brought to the Court's attention for the first time, the movant must identify the reasons they were not presented earlier, and any specific modifications being sought in the Court's Order. *Id.* No motion for reconsideration of an Order may repeat any oral or written argument made in support of or in opposition to the motion that resulted in the Order. *Id.*

Here, Plaintiff has not pointed to an actual error or to any new facts or legal authority. Instead, Plaintiff argues that the Court's January 10 Order "is manifestly wrong as it placed the Judiciary on the side of the defendant and violates the Federal Rules of court[.]" (Doc. 47 at 2.) Plaintiff then lists several rules that the Court has purportedly violated without specifically explaining how the Court has done so. Absent a showing of an actual error, Plaintiff's argument amounts to a mere disagreement with the Court's conclusion, which is insufficient to support a motion to reconsider or vacate an Order. Accordingly, this Motion will also be dismissed.

C. Rule 59(e) Motion to Amend

Finally, Plaintiff moves the Court to amend or alter its January 23, 2024 Order (Doc. 49) denying Plaintiff's January 10, 2024 Motion for Reconsideration (Doc. 44). (Doc. 55.) As explained above, absent a showing of manifest error, new facts, or changes in the controlling law, reconsidering or amending an Order is not warranted. In this Motion, Plaintiff argues that the Court erred when it denied Plaintiff's motion to reconsider (Doc. 44) the Court's Order (Doc. 42) adopting the Magistrate Judge's Report & Recommendation (R&R) (Doc. 36) dismissing Defendant McQueen from the action. (*Id.*) In the current Motion, Plaintiff rehashes his argument that he never received a copy of the R&R. (Doc. 55 at 2.) But the Court already considered this argument when it denied Plaintiff's Motion for Reconsideration. (*See* Doc. 49 at 2 ("To the extent Plaintiff contends he never received a copy of the R&R issued by [Magistrate] Judge Morrissey, the docket reflects that it was sent to him on December 4, 2024, and he has continued to receive mail following the R&R.[] Upon review, the Court finds Plaintiff has not presented any basis

warranting reconsideration of its prior ruling."). Plaintiff has not identified a change in the law that was decided after the Court's decision or shown that the Court failed to consider facts that were presented before the decision. Rather, Plaintiff effectively asks the Court to rethink what it has already thought through, which is not a proper basis for reconsideration, amending, or altering a prior Order. This Motion will be denied as well.

III. Summary Judgment Standard

A court must grant summary judgment "if the movant 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); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); however, it must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted); *see* Fed. R. Civ. P. 56(c)(1).

At summary judgment, the judge's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant's evidence and draw

all inferences in the nonmovant's favor. *Id.* at 255. The court need consider only the cited materials, but it may consider any other materials in the record. Fed. R. Civ. P. 56(c)(3).

IV. Relevant Facts

A. Prisoner Mail Policy

On March 2, 2022, the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) implemented "Department Order Manual 914 – Inmate Mail" (DO 914). (Doc. 72, Defs.' Statement of Facts (DSOF) ¶ 1.) The purpose of DO 914 is to establish "regulations, processes and procedures for inmates to send and receive mail, music, and individually reviewed publications." (*Id.* ¶ 2.) DO 914 § 7 deems certain publication content contrary to ADCRR's penological interest because it is "detrimental to the safe, secure, and orderly operation of the facility." (*Id.* ¶ 4.) DO 914 § 7 was implemented in order to "reduce sexual harassment and prevent a hostile environment for inmates, staff and volunteers" and "to assist with rehabilitation and treatment objectives, and promote the safe, secure, and orderly operation of the facility[.]" (Doc. 72-1 at 16 (DO 914 § 7.1).)

Specifically, DO 914 § 7.2.17 prohibits "[s]exually explicit content in publications, photographs, drawings, or in any type of image or text, that depicts sexual poses or attire or sexual representations of inmates, correctional personnel, law enforcement, military, medical/mental health staff, programming staff, teachers or clergy." (DSOF ¶ 11.) The ADCRR Glossary of Terms defines "Sexually Explicit Material" as: "Any drawing, photograph . . . or other item, the cover or contents of which depicts or verbally describes nudity, sexual activity, sexual conduct, sexual excitement of either gender . . ." (*Id.* ¶ 12,) D.O. 914 § 7.2.1 prohibits publications "that depict nudity of either gender," and § 7.2.20 prohibits any publication not expressly enumerated that "may otherwise be detrimental to the safe, secure, and orderly operation of the institution." (*Id.* ¶ 22.) The Glossary of Terms defines "Nudity" as "the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple . . ."

(Doc. 72-3 at 3.)

"Unauthorized materials include those that by their nature or content threaten or are detrimental to the security, safety and orderly operation, or discipline of the facility, or prisoner rehabilitation, or are found to facilitate, encourage, incite, promote or instruct in criminal activity or unauthorized prison activity." (*Id.* ¶ 5.) As part of DO 914, "publication[s] received by inmates are individually reviewed consistent with the Department's legitimate penological interest in maintaining the safety, security and orderly operations of the institutions." (*Id.* ¶ 3.) Prisoners' mail is opened, inspected for contraband, and is presorted by the complex unit.

B. Plaintiff's Contrabanded Materials

On July 20, 2022, Plaintiff was confined at the ASPC-Yuma, Cibola Unit. (*Id.* ¶ 7.) That day, Plaintiff received approximately 30 thumbnail photos of female Hollywood celebrities from Acme Publications. (*Id.* ¶ 8.) The photos generally depict scantily clad women in various sexually suggestive poses.[2] (*Id.* ¶ 9.) On July 21, 2022, the publication was contrabanded by Defendant C. Gonzalez pursuant to DO 914 § 7.2.17 and assigned contraband control number 07-096-2022. (*Id.* ¶ 10.) That same day, Plaintiff appealed the contraband finding to OPR. (*Id.* ¶ 13.) On September 27, 2022, Defendant Diane Miller upheld the decision to exclude the publication per DO 914 § 7.2.17. (*Id.* ¶ 14.)

On July 27, 2022, Plaintiff received a brochure that generally contained thumbnail photos of scantily clad female Hollywood celebrities in sexually suggestive poses from Acme Publications.[3] (*Id.* ¶ 15.) That same day, the publication was contrabanded by Defendant McQueen pursuant to DO 914 § 7.3.2[4] and given contraband control number 07-141-22. (*Id.* ¶ 16.) On August 2, 2022, Plaintiff appealed the contraband to OPR. (*Id.*

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[2] Copies of the photos at issue in this action were provided in Defendants' sealed exhibits. (*See* Doc. 76.)

[3] *See id.*

[4] It appears that Defendant McQueen erroneously cited D.O. 914 § 7.3.2, which provides that "[a] publication will not be rejected based solely upon inclusion of an advertisement promoting the following: . . . pen pal services." (DSOF ¶ 17.)

¶ 18.) On October 11, 2022, Defendant Diane Miller upheld the decision to exclude the publication per DO 914 § 7.2.17. (*Id.* ¶ 19.)

On September 14, 2022, Plaintiff received a catalog of photos that generally contained thumbnail photos of scantily clad female Hollywood celebrities in sexually suggestive poses from Acme Publications.[5] (*Id.* ¶ 20.) That same day, the publication was contrabanded by Defendant D. Gonzales pursuant to DO 914 §§ 7.2.1 and 7.2.20, and given contraband control number 09-014-22. (*Id.* ¶ 21.) On September 16, 2022, Plaintiff appealed the contraband to OPR. (*Id.* ¶ 23.) On November 28, 2022, Defendant Diane Miller upheld the decision to exclude the publication per DO 914 §§ 7.2.1, 7.2.2.1, and 7.2.17. (*Id.* ¶ 24.)

Plaintiff states that, on other occasions, he has been allowed to receive photos of "scantilly [sic] clad women in two-piece swimsuits or underwear, bending forward to emphasize their chests, bending over to emphasize their posteriors, or leaning back with their legs spread." (Doc. 83 at 8–9, Pl.'s Statement of Facts (PSOF) ¶ 53.) Plaintiff asserts that "[b]etween July 20, 2022 and August 30, 2022 Plaintiff received, through mail, photo catalogs from Acme Publications that were not contrabanded by ADCRR mail room employees and defendants." (*Id.* at 8, PSOF ¶¶ 46, 52.) According to Plaintiff, two of these non-contrabanded "catalogs contained approximately fifty thumbnail photos of scantily clad women in two-piece swimsuits or underwear; five women in lingerie and approximately forty-eight fully clothed women. (*Id.* ¶ 47.) Plaintiff states that on or about August 2, 2022, he "received more than twenty" photos of various female celebrities, some of whom wore "bikinis, or one[-]piece swimsuits[.]" (*Id.* ¶¶ 50, 51.) Plaintiff also asserts that ADCRR allows prisoners to buy, rent, and view programs on television or tablets that show scantily clad women engaged in sexually suggestive poses and sometimes "full frontal and rear nudity, heterosexual and homosexual sex acts and mast[u]rbation. (*Id.* at 9, PSOF ¶¶ 55, 56, 57.)

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[5] *See* Doc. 76.

V. First Amendment Analysis

A. Legal Standard

Prisoners enjoy a First Amendment right to send and receive mail. *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995). But prisoners' First Amendment rights are "necessarily limited by the fact of incarceration, and may be curtailed in order to achieve legitimate correctional goals or to maintain prison security." *McElyea v. Babbitt*, 833 F.2d 196, 197 (9th Cir. 1987) (per curiam). A regulation that impinges on a prisoner's First Amendment rights is valid if that regulation "'is reasonably related to legitimate penological interests.'" *Frost v. Symington*, 197 F.3d 348, 354 (9th Cir. 1999) (citing *Turner v. Safley*, 482 U.S. 78 (1987)). Deterring criminal activity and maintaining prisoner security are legitimate penological interests that justify regulations on prisoner mail. *O'Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996).

To determine the validity of a regulation, courts apply the test established under *Turner v. Safely*, which considers four factors: (1) whether there is a valid, rational connection between the regulation and the legitimate governmental interest the regulation is designed to protect; (2) whether the prisoner has alternative means of exercising the right at issue; (3) the impact any accommodation would have on guards, other prisoners, and allocation of prison resources; and (4) whether there are "ready alternatives" for furthering the government interest, which would suggest that the regulation is an exaggerated response to the jail's concern. *Turner*, 482 U.S. at 89-90. In addition, the Supreme Court recognizes that there are greater security concerns for incoming mail than for outgoing mail. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989).

This is a very deferential standard; courts must give "substantial deference to the professional judgment of prison administrators." *Beard v. Bank*, 548 U.S. 521, 528 (2006) (citing *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)). A court does not have to agree with the officials' proffered legitimate penological interest. *Frost*, 197 F.3d at 355. The inquiry under *Turner* is not whether the policy actually serves a penological interest, but

rather whether it was rational for jail officials to believe that it would. *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999).

B. *Turner v. Safely* Factors

1. Rational Connection to Legitimate Governmental Interest

First, the Court must determine whether the governmental objective underlying the ADCRR's policy of excluding material containing sexually explicit content is (1) legitimate, (2) neutral, and (3) whether the policy is rationally related to that objective. *Thornburgh*, 490 U.S. at 414. "In the prison context, regulations that apply to specific types of content due to specific inherent risks or harms are considered to be content neutral. *Bahrampour v. Lampert*, 356 F.3d 969, 975 (9th Cir. 2004). In *Thornburgh*, the Supreme Court explained that:

> "[P]rison officials may well conclude that certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison. Acknowledging the expertise of these officials and that the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management, this Court has afforded considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world."

Thornburgh, 490 U.S. at 408 (citing *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled on other grounds by Thornburgh*, 490 U.S. at 412-414).

ADCRR's policy of excluding sexually explicit materials is rationally related to the legitimate penological goals of reducing sexual harassment, preventing a hostile environment for prisoners and staff, facilitating rehabilitation and treatment objectives, and promoting the safe, secure, and orderly operation of the facility. *See Prison Legal News v. Ryan*, 39 F.4th 1121, 1132 (9th Cir. 2022) ("it is rational for prison officials to restrict sexually explicit materials to mitigate prison violence and advance related interests"). Defendants' stated reason for rejecting the publications at issue was that the publications contained sexually explicit material in violation of ADCRR policy. Notwithstanding Defendant McQueen's erroneous citation to DO 914 § 7.3.2 when filing contraband control

number 07-141-22, it is undisputed that when Plaintiff appealed this finding to OPR, Defendant Miller clarified in upholding the contraband finding that the appropriate policy was DO 914 § 7.2.17. Further, even if Plaintiff was allowed to receive some publications or watch programs that seemingly violated § 7.2.17, the fact that some materials were able to slip through the cracks does not mean that § 7.2.17 does not serve a legitimate penological purpose. The effectiveness of the policy is not the issue, rather, the Court's focus is on whether it was rational for prison officials to believe that the policy would serve a penological interest. *Mauro*, 188 F.3d at 1060.

It is well-established that maintaining institutional security and rehabilitation are legitimate penological interests. *Pell v. Procunier*, 417 U.S. 817, 823 (1974); *Turner*, 482 U.S. at 91; *O' Keefe v. Van Boening*, 82 F.3d 322, 326 (9th Cir. 1996). Here, the policy at issue is reasonably related to furthering the stated goals, and the specific application of that policy to the publications at issue furthered the legitimate goals of security and rehabilitation. Further, the policy is neutral on its face—there is nothing to indicate that the aim of the policy is to suppress expression. *Thornburgh*, 490 U.S. at 415-16 ("the regulation or practice in question must further an important or substantial government interest unrelated to the suppression of expression"). Plaintiff argues that DO 914 is "facially unconstitutional" throughout his response (*see* Doc. 82 at 2–6), but in *Prison Legal News v. Ryan*, the Ninth Circuit specifically determined that "[w]ith one exception, we conclude that [DO 914] is facially constitutional." 39 F.4th at 1131. The "one exception" the Ninth Circuit was referring to was DO 914 § 1.2.17, which is not the policy at issue in this action. *See id.* at 1133 (finding overly broad DO 914 § 1.2.17's ban on content "that may, could reasonably be anticipated to, could reasonably result in, is or appears to be intended to cause or encourage sexual excitement or arousal or hostile behaviors, or that depicts sexually suggestive settings, poses or attire"). Defendants have shown that there is a rational connection between the policy prohibiting sexually explicit materials and the prison's legitimate objectives, and Plaintiff has not refuted Defendant's evidence. Therefore, the first factor of the *Turner* analysis has been satisfied.

2. Alternative Means of Exercising Right at Issue

The second *Turner* factor considers "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. "Where other avenues remain available for the exercise of the asserted right, courts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation." *Bahrampour*, 356 F.3d at 975. When analyzing the second *Turner* factor, the Court must view the right in question "sensibly and expansively." *Thornburgh,* 490 U.S. at 417, 109 S.Ct. 1874 (citation omitted).

Viewing Plaintiff's right "sensibly and expansively," the second factor of the *Turner* analysis has been satisfied. Plaintiff was still permitted to receive non-offending publications, including photos of fully dressed women, that did not contain prohibited sexually explicit material. *See Thornbugh*, 490 U.S. at 401 (where regulation bans sexually explicit material that threatens institutional security, alternative avenues are available where "the regulations [at issue] permit a broad range of publications to be sent, received, and read"). The second *Turner* factor is also satisfied.

3. Adverse Impacts of Accommodation

Third, the Court must consider the impact on the prison and other prisoners if prisoners were allowed to receive correspondence that contains prohibited sexually explicit content or nudity. *Turner*, 482 U.S. at 90. "If accommodations for a constitutional right would cause significant changes within the prison environment, the courts should give deference to the prison officials who are responsible for safe, effective, and efficient administration of the prison system." *Bahrampour*, 356 F.3d at 975.

Defendants argue that allowing prisoners to have access to sexually explicit materials could lead to the bartering of these materials, which could result in fights between prisoners. (Doc. 71 at 12, citing *Mauro*, 188 F.3d at 1061–62.) Defendants also argue that allowing prisoners to possess sexually explicit materials "could expose the female detention officers to sexual harassment and a hostile work environment." *Id.* "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates

or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner,* 482 U.S. at 90. Here, the asserted "ripple effect" is sufficient to satisfy the third *Turner* factor.

4. Obvious Alternatives/Exaggerated Response

Finally, the Court examines whether the policy at issue is an exaggerated response to the prison's concerns. *Turner*, 482 U.S. at 90. On this prong, the Plaintiff bears the burden of showing that there are obvious, easy alternatives to the regulation. *Mauro*, 188 F.3d at 1062. If Plaintiff can identify an alternative that fully accommodates the right at a *de minimis* cost to valid penological goals, the policy is an exaggerated response. *Turner*, 482 U.S. at 90-91. "If there are no obvious alternatives, and if the inmate only presents solutions that will negatively impact valid penological interests, then courts will view the absence of ready alternatives as evidence of a reasonable regulation." *Bahrampour*, 356 F.3d at 976. No alternatives to DO 914.7's prohibitions—other than not enforcing them—have been presented. Because Plaintiff has not pointed to a viable alternative, the Court concludes that the DO 914's prohibition on sexually explicit materials is not an exaggerated response to prison concerns.

5. Conclusion

On this record, the facts show that the designation of the publications at issue as contraband property was based on the legitimate penological goals of rehabilitation and maintaining security and that allowing Plaintiff to possess the items would be counterproductive to these goals. Because the record does not support a constitutional violation, Plaintiff's First Amendment claim against Defendants fails, and summary judgment will be granted to Defendants.

VI. Qualified Immunity

While the Court finds there has been no constitutional violation based on the undisputed relevant facts, even if there was, the individual Defendants would be entitled to qualified immunity because it was not clearly established at the time that their actions violated clearly established law. *Harlow v. Fitzgerald* , 457 U.S. 800, 818 (1982)

(government officials enjoy qualified immunity from civil damages unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known"); *see Pearson v. Callahan*, 555 U.S. 223, 230-32, 235-36 (2009) (when deciding if qualified immunity applies, a court must determine: (1) whether the facts alleged show the defendant's conduct violated a constitutional right; and (2) whether that right was clearly established at the time of the violation).

Whether a right was clearly established must be determined "in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The plaintiff has the burden to show that the right was clearly established at the time of the alleged violation. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Thus, "the contours of the right must be sufficiently clear that at the time the allegedly unlawful act is [under]taken, a reasonable official would understand that what he is doing violates that right;" and "in the light of pre-existing law the unlawfulness must be apparent." *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994) (quotations omitted). Therefore, regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not "clearly established" or the officer could have reasonably believed that his particular conduct was lawful. *Romero*, 931 F.2d at 627.

The Ninth Circuit's decision in *Prison Legal News v. Ryan*, was issued on July 8, 2022—approximately two weeks before the first materials at issue in this action were contrabanded. As discussed above, in that decision, the Ninth Circuit specifically found that, with the exception of one provision that is not at issue in this action, DO 914 was facially constitutional. *Prison Legal News*, 39 F.4th at 1131. Prior to this decision, the Ninth Circuit had consistently upheld the restriction of sexually explicit materials in prisons for over two decades. *See Mauro*, 188 F.3d at 1057 (upholding ban on materials depicting frontal nudity); *Bahrampour*, 356 F.3d at 972 (upholding ban on mail containing sexually explicit material); *Frost*, 197 F.3d at 357-58 (upholding ban on explicit depictions of certain sexual acts).

Plaintiff has not presented, and the Court is not aware of, any case law that suggests a prisoner has a First Amendment right to receive or possess sexually explicit materials. Moreover, at the time Plaintiff's claim arose, there was not a clear distinction between sexually oriented materials that could be constitutionally restricted from a jail or prison and those that could not. *See Bardo v. Clendenin*, 474 F. App'x 673, 674 (9th Cir. 2012) ("The district court properly held that defendant prison officials were entitled to qualified immunity because Bardo did not have a clearly stablished right to retain the ad depicting side-view nudity."); *Griffin v. Gorman*, No. 1:17-cv-03019, 2021 WL 1056498, 2021 U.S. Dist. LEXIS 51993 (D. Colo. Mar. 19, 2021) (concluding that prison officials did not have fair warning that confiscating "non-explicit photos of women in panties and swimsuits" would violate the First Amendment); *Maday v. Dooley*, No. 4:17-cv-04168, 2019 WL 4747058, at *17, 2019 U.S. Dist. LEXIS 167951, at *54 (D.S.D. Sept. 30, 2019) (finding that "the law regarding what may constitute 'nudity' or 'sexually-explicit' material was not so clearly established that it would have put defendants on notice that [denying access to images of exposed breasts or buttocks] was unconstitutional"); *Rapp v. Barboza*, No. 9:13-cv-0599, 2016 WL 4223974, at *9, 2016 U.S. Dist. LEXIS 94557, at *25, 31 (N.D.N.Y. July 19, 2016) (concluding in the alternative that the defendants would be entitled to qualified immunity for denying access to "magazines such as the Sports Illustrated Swimsuit Edition, Playboy, Maxim, American Curves, and XXL").

Based on the foregoing, Plaintiff has not met his burden of showing that, at the time his claim arose, the law regarding prisoner access to sexually explicit materials was so clearly established that a reasonable prison official would have known that denying access to the materials at issue would violate the First Amendment. Accordingly, even if the individual Defendants' conduct violated the First Amendment, they would be entitled to qualified immunity.

IT IS ORDERED:

(1) The reference to the Magistrate Judge is withdrawn as to Defendants' Motion for Summary Judgment (Doc. 71) and Plaintiff's Motion for Order to Show Cause Re:

Legal Access (Doc. 29), Motion for Expedited Request for Interlocutory Appeal (Doc. 47), and Rule 59(e) Motion to Amend (Doc. 55).

(2) Plaintiff's Motion for Order to Show Cause Re: Legal Access (Doc. 29), Motion for Expedited Request for Interlocutory Appeal (Doc. 47), and Rule 59(e) Motion to Amend (Doc. 55) are **denied**.

(3) Defendants' Motion for Summary Judgment (Doc. 71) is **granted**, and the action is terminated with prejudice. The Clerk of Court must enter judgment accordingly.

Dated this 1st day of August, 2024.

Honorable Steven P. Logan
United States District Judge

APPENDIX-C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 2 2025

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ANTHONY JAMES MERRICK, in his official capacity only,

Plaintiff - Appellant,

v.

DAVID SHINN, Director of the Arizona Department of Corrections, Rehabilitation and Reentry, in his official and individual capacities; et al.,

Defendants - Appellees.

No. 24-4833

D.C. No. 2:23-cv-00296-SPL-MTM

District of Arizona, Phoenix

ORDER

Before: GRABER, H.A. THOMAS, and JOHNSTONE, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 40.

The petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 25) are denied.

No further filings will be entertained in this closed case.