SUPREME COURT NO. 21-0419
POLK COUNTY CASE NO. CVCV057085

IN THE SUPREME COURT OF IOWA

Leonard Gregory, et al.,

Plaintiffs-Appellees,

v.

State of Iowa, et al.,

Defendants-Appellants.

APPEAL FROM THE POLK COUNTY DISTRICT COURT
HONORABLE LAWRENCE P. MCLELLAN, DISTRICT COURT JUDGE

FINAL BRIEF OF *AMICUS CURIAE** AMERICAN CIVIL LIBERTIES UNION OF IOWA

IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

Neither party nor their counsel participated in the drafting of this brief, in whole or in part. Neither party nor their counsel contributed any money to the undersigned for the preparation or submission of this brief. The drafting of this brief was performed *pro bono publico* by amicus curiae.

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Iowa ("ACLU of Iowa") is a statewide nonprofit and nonpartisan organization with thousands of Iowa members that is dedicated to the principles of liberty and equality embodied in the United States and Iowa Constitutions. Founded in 1935, the ACLU of Iowa is the fifth oldest state ACLU affiliate. The ACLU of Iowa works in the courts, legislature, and through public education and advocacy to safeguard the rights of everyone in our state.

As part of its mission, the ACLU works to preserve the First Amendment and Article I, section 7 freedom of speech and expression of persons, including the freedom of speech and expression of Iowa's prison inmates. The ACLU of Iowa has a longstanding interest in the protection of the First Amendment and Iowa constitutional freedom of speech of persons, including those of Iowa's prison inmates.

ARGUMENT

This Court should reject the State's novel argument to apply a less protective standard to restrictions on speech under the Iowa Constitution than under the United States Constitution.

At issue in this case is whether an Iowa statute—Iowa Code section 904.310A—violates the freedom of speech rights of Iowa prisoners under the Iowa Constitution. Section 904.310A prohibits the Iowa Department of Corrections ("DOC") from using public funds for the distribution of any material that is "sexually explicit or features nudity" to Iowa prisoners. The State argues the trial court erred with respect to the standard it applied in denying the State's motion for summary judgment on the free speech issue in this case. State's Proof Br. 24-29. The trial court applied the heightened rational basis review standard set forth by the United States Supreme Court in *Turner v. Safley*, 482 U.S. 78, 89 (1987), which interpreted the First Amendment and has been applied numerous times by this Court and the Iowa Court of Appeals to prisoner free speech claims. (Mar. 19, 2021, Order re: Motion and Cross Motion for Summary Judgment at 6-9). According to the State, because this case involves a statute, not a prison regulation or policy, a different, lower standard should apply—the rational basis test enumerated

in *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 962 N.W.2d 37, 49 (Iowa 2021). State's Proof Br. 24-25.

The State's argument fails because this Court has repeatedly held that the Iowa constitutional protection for free speech is at least as protective as the First Amendment. Under the First Amendment, the *Turner v. Safley* standard seeks to balance the significant interest prisoners retain in the exercise of their constitutional speech rights and the State's legitimate penological interests.

The Iowa Supreme Court has already applied the *Turner v. Safley* standard to prisoner freedom of speech claims, and the State offers no cogent reason for Iowa courts to depart from that precedent here.

The State's attempt to distinguish this case from that precedent on the basis that this case challenges a statute, rather than policy or practice, is unsupported: The *Turner v. Safley* standard applies *both* to speech claims that challenge federal and state statutes *and* prison regulations and policies. Nor does *Planned Parenthood of the Heartland* provide support for the State's argument. *Planned Parenthood of the Heartland* is inapposite to the question of the appropriate standard that applies to statutes regulating the speech of prisoners under the Iowa Constitution—both because it was decided on other

grounds, with the Court specifically not reaching the plaintiffs' free speech claims, and because it was not a prisoner speech case at all.

Thus, this Court should at a minimum apply the *Turner v. Safley* standard to the prisoners' speech claims.

I. Article I, Section 7 of the Iowa Constitution Is at Least as Protective of Free Speech as the First Amendment.

Article I, section 7 of the Iowa Constitution provides in pertinent part that "[e]very person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech. . . ." Iowa Const. art. I, § 7. The First Amendment similarly provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. Const., amend I.

This Court has recognized that the right to free speech under article I, section 7 of the Iowa Constitution, while interpreted independently, is at least coextensive with the analogous federal constitutional right. *City of West Des Moines v. Engler*, 641 N.W.2d 803, 805 (Iowa 2002); *Bierman v. Weier,* 826 N.W.2d 436, 451 (Iowa 2013) (holding article I, section 7 "'generally imposes the same restrictions on the regulation of speech as does the federal constitution'") (quoting *State v. Milner*, 571 N.W.2d 7, 12 (Iowa 1997)); *Iowans for Tax Relief v. Campaign Fin. Disclosure Comm'n*, 331 N.W.2d

862, 868 (Iowa 1983) (stating that "the applicable [F]irst [A]mendment standard" was "the same" as that for article I, section 7).

II. Under the First Amendment, the *Turner v. Safley* Standard Carefully Balances Prisoners' Speech Rights with Legitimate Prison Needs.

Because article I, section 7 is at least as protective as the First Amendment[1], the prisoners' speech is, at minimum, entitled to the protection afforded by the United States Supreme Court to prisoner free speech claims under *Turner v. Safley* and its progeny. There, the United States Supreme Court set out a four-factor test, which recognized both that prisoners generally retain freedom of speech during their incarceration, and that prisons may reasonably and necessarily restrict those rights in order to meet the state's legitimate penological interests. *Turner*, 482 U.S. at 84, 89; *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987). Thus, *Turner v. Safley* affords

[1] To the extent that article I, section 7 is construed independently, it should be interpreted to provide heightened scrutiny to prisoner free speech claims, with less deference to prison officials than under the *Turner v. Safley* test, not more. This is because the Iowa Constitution has consistently been interpreted to afford strict scrutiny to laws restricting fundamental rights, like free speech. *See, e.g., In re Det. of Williams*, 628 N.W.2d 447, 452 (Iowa 2001); *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009); *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005); *see also City of Maquoketa v. Russell*, 484 N.W.2d 179, 184 (Iowa 1992) (recognizing speech as a "fundamental" constitutional right, to which strict scrutiny applies).

less protection than the strict scrutiny that is normally applied to restrictions on free speech, but more than the rational basis review that is applied when no fundamental constitutional right is at stake. *O'Lone*, 482 U.S. at 349.

Under *Turner v. Safley*, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. The four-factor standard thus examines: (1) whether there is a valid and rational connection between the regulation and the legitimate government interest put forward to justify it; (2) whether there are alternative means of exercising the right that remain open to inmates; (3) whether there is an impact accommodation of the constitutional right on guards and other inmates or on the allocation of prison resources generally; and (4) whether ready alternatives exist or whether there is an exaggerated response. *Id.* at 89-90.

The United States Supreme Court has continued to apply the *Turner v. Safley* standard in subsequent prisoner First Amendment speech cases. *See Beard v. Banks*, 548 U.S. 521, 528-34 (2006) (involving access to newspapers, magazines, and photographs by inmates in restrictive placement); *Shaw v. Murphy*, 532 U.S. 223, 228-31 (2001) (challenging regulation of inmate-to-inmate correspondence about legal assistance); *Thornburgh v. Abbott*, 490

U.S. 401, 407-19 (1989) (challenging regulation of prisoners' receipt off subscription publications).

III. Consistent with the Coextensive Speech Protections Under the Iowa and U.S. Constitutions, the Iowa Supreme Court Has Applied the *Turner v. Safley* Standard to Prisoners' Speech Claims.

This Court is well familiar with the application of the *Turner v. Safley* standard to prisoner speech cases.

The first Iowa Supreme Court case to apply the *Turner v. Safley* standard was *Bryson v. Iowa District Court*, 515 N.W.2d 10 (Iowa 1994), *overruled on other grounds by James v. State*, 541 N.W.2d 864 (Iowa 1995). In *Bryson*, a prisoner brought a postconviction relief challenge to discipline he received for possession of gang related materials, which included a newspaper clipping discussing a gang shooting, as a violation of his First Amendment freedom of speech. *See Bryson*, 515 N.W.2d at 11-12 (applying the *Turner v. Safley* four-factor standard and concluding the prohibition against possessing gang-related materials was reasonably related to institutional security).

After *Bryson*, the Iowa Supreme Court has continued to apply the *Turner v. Safley* standard to prisoners' speech claims. *See Risdal v. State*, 573 N.W.2d 261, 263-64 (Iowa 1998) (finding a prison violated the First Amendment freedom of speech for disciplining a prisoner, who made

offensive statements to a prison official that few people would believe); *Mark v. State*, 556 N.W.2d 152, 153 (Iowa 1996) (upholding discipline imposed after an inmate made false statements in violation of prison policies); *Carter v. State*, 537 N.W.2d 715, 717-18 (Iowa 1995) (upholding discipline imposed after a prisoner violated a prison rule against "verbal abuse" and "disruptive conduct").[2]

Thus, Iowa precedent holds both that the Iowa constitutional protection for free speech is coextensive with the First Amendment and that *Turner v. Safley* applies to prisoner speech claims.[3]

IV. The State's Attempt to Distinguish this Precedent Fails.

The State attempts to distinguish this case from the precedents discussed above by pointing out that this case challenges a statute, rather than policy or practice, and by citing to *Planned Parenthood of the Heartland*—a case in which the Court recently applied rational basis review to a due process

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[2] The Iowa Court of Appeals has similarly relied on *Turner v. Safley* in evaluating prisoner free speech claims. *See Johnson v. State*, 542 N.W.2d 1, 3 (Iowa Ct. App. 1995) and *Gross v. State*, 460 N.W.2d 882, 884 (Iowa Ct. App. 1990).

[3] A few states have recognized that the *Turner v. Safely* standard applies to prisoners' free speech challenges under their state constitutions as well as under the First Amendment. *See Antenor v. Dep't of Corr.*, 462 P.3d 1, 17 (Alaska 2020); *Hass v. Mass. Dep't of Corr.*, 1994 WL 879619, at *1 (Mass. Sup. Ct. Apr. 27, 1994).

challenge to the constitutionality of a statute after finding no fundamental right was at issue. State's Proof Br. 24-26.

Their argument is unsupported on both grounds. First, the State offers no cogent basis to treat prisoner speech claims challenging statutes differently from those challenging regulations and policies. On the contrary, as discussed below, the *Turner v. Safley* standard applies *both* to speech claims that challenge federal and state statutes *and* prison regulations and policies. Second, *Planned Parenthood of the Heartland* does not provide support for the State's argument—both because it was decided on other grounds, whereby the Court did not specifically reach the plaintiffs' free speech claims, and because it was not a prisoner speech case.

A. *Turner v. Safley* Applies Both to Federal and State Statutes And Prison Regulations and Policies.

The State's attempt to draw a distinction between a challenge to a statute versus a regulation or policy under *Turner v. Safley* is unsupported by the caselaw. State's Proof Br. 25. *Turner v. Safley* applies equally to statutes that restrict prisoners' First Amendment freedom of speech and to rules and regulations that do the same in prison disciplinary cases.

Federal courts have applied the *Turner v. Safley* standard to federal statutes that regulate prisoners' speech, including specifically the Ensign Amendment, upon which Iowa Code section 904.310A is based. Congress

enacted the Ensign Amendment in 1996, which bars the Bureau of Prisons ("BOP") from using funds to pay for the distribution of commercial material that is "sexually explicit or features nudity." 28 U.S.C. § 530C(b)(6). Subsequently, the BOP adopted a regulation implementing the Ensign Amendment and further defining the terms of the statute. 28 C.F.R. § 540.72. Federal appellate courts addressing prisoners' challenges to the Ensign Amendment and its implementing regulation as a violation of their First Amendment freedom of speech rights have consistently applied the *Turner v. Safley* standard. *See Brooks v. Bledsoe*, 682 Fed. Appx. 164, 168-69 (3rd Cir. 2017); *Baker v. Mukasey*, 287 Fed. Appx. 422, 425 (6th Cir. 2008); *Ramirez v. Pugh*, 379 F.3d 122, 131 (3rd Cir. 2004); *Amatel v. Reno*, 156 F.3d 192, 195-203 (D.C. Cir. 1998).[4] A federal district court rejected a similar argument the State makes in this case—that the *Turner v. Safley* standard does not apply to statutes and only applies to prison regulations. *Jordan v. Sosa*, 577 F. Supp. 2d 1162, 1170 n. 1 (D. Colo. July 11, 2008).

[4] Unsurprisingly, federal district courts also agree that *Turner v. Safley* applies to both prisoner speech challenges to the Ensign Amendment, a statute, and the BOP's implementing regulation. *See, i.e.*, *Schorr v. Walton*, 2016 WL 1117126, *3-4 (S.D. Ill. Mar. 22, 2016); *Lester v. Walton*, 2016 WL 617463, *3-4 (S.D. Ill. Feb. 16, 2016); *Williams v. Garcia*, 2015 WL 1740555, *2-4 (D. Colo. Apr. 14, 2015); *Ickes v. Walton*, 2015 WL 9258611, *3-4 (S.D. Ill. Dec. 18, 2015); *Reynolds v. Rios*, 2012 WL 273606, *3-4 (E.D. Cal. Jan. 30, 2012); *Baker v. Holder*, 2010 WL 1334924, *6 (E.D. Ky. Mar. 30, 2010).

Federal courts have also applied *Turner v. Safley* to prisoner First Amendment speech challenges to state statutes—including specifically statutes that limit access to publications that are sexually explicit or pornographic. *See Waterman v. Farmer*, 183 F.3d 208, 212 (3rd Cir. 1999) (stating that "[c]onstitutional challenges[, such as the First Amendment,] to laws, regulations, and policies governing prison management must be examined under the framework of *Turner v. Safley*" and upholding a New Jersey statute restricting prisoner access to pornographic materials at a facility for sex offenders who exhibited repetitive and compulsive behavior); *Ivey v. Mooney*, 2008 WL 4527792, *4-6 (D. Minn. Sept. 30, 2008) (applying *Turner v. Safley* to a First Amendment challenge to a Minnesota statute and prison regulation restricting sex offenders from having obscene material and material that depicts sexual conduct or pornographic work); *Loehr v. Nevada*, 2006 WL 8442005, *1-2 (D. Nev. Mar. 24, 2006) (applying *Turner v. Safley* to First Amendment challenge to a Nevada statute restricting prisoner access to publications that are sexually explicit, graphically violent, or encourage crime, gang activities, and other acts of violence).

As this caselaw shows, there is no distinction between statutes and prison regulations in determining whether the *Turner v. Safley* standard applies. The *Turner v. Safley* standard applies to both. Therefore, the *Turner*

v. Safley standard should be used to review the constitutionality of Iowa Code section 904.310A under the First Amendment as well as to free speech claims brought under the Iowa Constitution because article I, section 7 is at least as protective as the First Amendment.

B. The *Planned Parenthood of the Heartland* Case the State Cites is Inapposite.

Finally, the argument the State makes for applying only rational basis review based on *Planned Parenthood of the Heartland* to prisoners' speech claims under the Iowa Constitution is also easily dispensed with. *See* State's Proof Br. 24-26. The case is completely inapposite.

In that case, the Court considered a challenge to an Iowa statute that prohibited recipients of government grants, intended to provide sex-education and pregnancy prevention programming, from performing or "promoting" abortions, referring for abortion care, or affiliating with an entity that does so. *Planned Parenthood of the Heartland, Inc.*, 962 N.W. 2d at 45. It had nothing to do with either prisoners or speech claims.

In considering the petitioner's unconstitutional conditions challenge to the statute, the Court determined that petitioners had no constitutional right to provide abortions (as opposed to the right of a woman to obtain an abortion). *Id.* at 55-56. Because the Court found that the statute did not impose an unconstitutional condition in violation of due process, it held that the

petitioner could be excluded from grant eligibility. *Id.* at 57. The Court did not, therefore, reach the question of whether the statute imposed an unconstitutional condition in violation of free speech. *Id.* The case simply does not address the standard applied to state constitutional challenges to statutes restricting speech—generally or in the prison context.

Planned Parenthood of the Heartland thus provides no basis to depart from this Court's precedent applying *Turner v. Safley* to prisoner speech claims.

CONCLUSION

Because, under this Court's precedent, the Iowa Constitution is at least as protective of speech as the First Amendment, the prisoners' claims here are entitled to, at minimum, the protection afforded under the *Turner v. Safley* standard. That standard already balances prisoners' retained constitutional free speech rights, to which heightened scrutiny would apply outside of the prison setting, and a prison's legitimate penological needs. And this Court has already applied *Turner v. Safley* to prisoner speech claims in other cases. The State's attempts to distinguish this precedent are unsupported, and the Court should reject its unprecedented argument to afford *no* heightened constitutional protection to prisoner speech rights.

Respectfully submitted,

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COST CERTIFICATE

I hereby certify that the cost of printing this application was $0.00 and that that amount has been paid in full by the ACLU of Iowa.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:
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