

IN THE SUPREME COURT OF IOWA

Leonard Gregory et al.,

Plaintiffs-Appellants,

v.

State of Iowa et al.,

Defendants-Appellees.

APPEAL FROM THE POLK COUNTY DISTRICT COURT
HON. JEFFREY FARRELL AND
HON. LAWRENCE MCLELLAN, DISTRICT COURT JUDGES

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

IN SUPPORT OF PLAINTIFFS-APPELLANTS

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- Biennial Report of the Warden of the Penitentiary to the Governor: Sep. 30, 1879 (1880), https://publications.iowa.gov/35452/1/biennial_report_of_the_warden_of_the_penitentiary_J87.I8%201880%20V.4.pdf.....21
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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 of Iowa works to preserve First Amendment and article I, section 7 freedom of speech and expression of everyone, including those rights belonging to Iowa’s prison inmates. The ACLU of Iowa has a longstanding interest in the protection of these rights.

ARGUMENT

This Court should recognize that the Iowa Constitution independently protects against unreasonable restrictions on prisoner speech at least as robustly as under the United States Constitution, if not more so.

One issue in this case is whether a recently enacted 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. Iowa Code § 904.310A (2025). 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), consistent with numerous Iowa Supreme Court and Court of Appeals cases deciding prisoner free speech claims, albeit not made solely under the Iowa Constitution. D0734, Findings of Fact, Conclusions of Law, and Order, at 17-18 (Apr. 25, 2024).

Outside of the prison context, this Court has repeatedly held that the Iowa constitutional guarantee of free speech rights is at least as protective as the First Amendment. Under the First Amendment, the *Turner v. Safley* standard, which courts apply to prisoner challenges to both federal and state

statutes, regulations, and policies, seeks to balance the significant interest prisoners retain in the exercise of their constitutional speech rights and the State’s legitimate penological interests. 482 U.S. at 89.

This approach is consistent with existing precedent and further supported by the text of the Iowa Constitution, an Iowa constitutional tradition of affording heightened scrutiny to fundamental rights, and historical evidence regarding early protection and even some encouragement of prisoner speech and expression in the state and country at the time that Iowa’s constitutional speech protections were adopted.

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 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. *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)); *City of West Des Moines v. Engler*, 641 N.W.2d 803, 805 (Iowa 2002); *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).

Indeed, there are good textual reasons to find that article I, section 7 of the Iowa Constitution is more protective than the First Amendment. “Unlike the [F]irst [A]mendment, the Iowa Constitution provides protection beyond the proscription of legislation abridging or restraining freedom of speech or of the press.... specifically secur[ing] the affirmative right to speak, write, and publish. This distinction is more than semantic.” See Michael A. Giudicessi, *Independent State Grounds for Freedom of Speech and of the Press: Article I, Section 7 of the Iowa Constitution*, 38 DRAKE L. REV. 9, 16 (1988-1989). Analyzing the Iowa constitutional protection for prisoner speech from this textualist perspective supports a more expansive interpretation than under the United States Constitution. See, e.g., Antonin Scalia, *The Tanner Lectures on Human Values: Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, (Mar. 8-9, 1995), at 111. (“In textual interpretation, context is everything, and the

context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not, of course, an interpretation that the language will not bear.”¹ To the extent that article I, section 7 is construed independently, it should be interpreted to provide heightened scrutiny to prisoner free speech restrictions, with less deference to prison officials than under the *Turner v. Safley* test.

An upward departure would also align with this Court’s long-standing precedent applying strict scrutiny to laws, regulations, and policies restricting fundamental rights, like free speech. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009); *Sanchez v. State*, 692 N.W.2d 812, 817 (Iowa 2005); *In re Det. of Williams*, 628 N.W.2d 447, 452 (Iowa 2001); *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). *See also* Peter P. Miller, *Freedom of Expression under State Constitutions*, 20 STAN L. REV. 318 (Jan. 1968) (exploring cases where either matching with federal jurisprudence was inapt, or where state constitutions provided greater latitude, and finding that exercise of independent review benefitted both state and federal jurisprudence).

¹ available at <https://tannerlectures.org/lectures/common-law-courts-in-civil-law-system-the-role-of-united-states-federal-courts-in-interpreting-the-constitution-and-laws/>.

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, the prisoners' speech is, at minimum, entitled to the protection afforded 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 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.² *O'Lone*, 482 U.S. at 349.

² *Turner v. Safley* followed a body of case law recognizing that First Amendment freedoms enjoy a "preferred position" and, therefore, that the government historically has had a higher burden to meet in order to regulate them than other rights. *See, e.g., The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671, 673-77 (Dec. 1967) (outlining historical jurisprudence to argue that First Amendment freedoms are entitled to a higher level of protection, "meet[ing] not only the reasonableness test of due process, but also the more stringent requirements designed to protect the preferred status of those freedoms" as the "effect of free communications on the goals of rehabilitation do not seem to justify the restrictions imposed [within a carceral setting].")

Importantly, under *Turner*, “[a] ‘reasonableness’ standard is not toothless.” *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (internal citations omitted). *See also Aref v. Lynch*, 833 F.3d 242, 259 (D.C. Cir. 2016) (affirming that “prison authorities [must] show more than a formalistic logical connection between a regulation and a penological objective”). This is consistent with Iowa’s own constitutional regime. *Varnum*, 763 N.W.2d at 879 (quoting *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 675 N.W.2d 1, at 9 (Iowa 2004)). *See also Johnson v. California*, 543 U.S. 499, 507 (2005) (applying a heightened version of the *Turner v. Safley* standard if the question before the court implicates a protected class); *Pesci v. Budz*, 730 F.3d 1291, 1297-99 (11th Cir. 2013) (applying a different standard for civil detentions while reaffirming that *Turner* is not a toothless standard).

Under *Turner v. Safley*, “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to

Indeed, the court’s deference to the government in applying *Turner v. Safley* has been criticized as insufficiently protective of speech rights given their importance in our constitutional system. *See, e.g.,* Clay Calvert & Kara Carnley Murrhee, *Big Censorship in the Big House – A Quarter-Century after Turner v. Safley: Muting Movies, Music & Books behind Bars*, 7 NW. J. L. & SOC. POL’Y 257, 270-72 (Spring 2012) (criticizing the Tenth Circuit’s deferential attitude toward the government in applying *Turner v. Safley* in *Sperry v. Werholtz*, 413 Fed. Appx. 31 (10th Cir. Feb. 14, 2011) by finding that the court’s inadequate “justifications [for abridging prisoners’ rights] boils down to security, treatment, and fear of litigation.”).

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 the regulation of inmate-to-inmate correspondence about legal assistance); *Thornburgh v. Abbott*, 490 U.S. 401, 404 (1989) (challenging the regulation of prisoners’ subscription publications).

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

This Court is 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, 153-54 (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").

Thus, Iowa Supreme Court precedent holds separately that the Iowa constitutional protection for free speech is at least coextensive with the First Amendment for prisoners, and that *Turner v. Safley* applies to prisoner speech claims.³ It follows that in construing article I, section 7, this Court should find that prisoners are afforded at least—and likely more—protection for speech rights than offered under *Turner v. Safley*.

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). It has held that “[p]risoners are not divested of constitutional rights upon confinement in a correctional institution.” *Guy v. State*, 396 N.W.2d 197, 200 (Iowa Ct. App. 1986) (quoting *Hudson v. Palmer*, 468 U.S. 517, 523 (1984)). Similarly, it has affirmed that “[p]rison inmates ‘retain those First Amendment rights of speech ‘not inconsistent with [their] status as . . . prisoner[s] or with the legitimate penological objectives of the corrections system.’”” *Guy*, 396 N.W.2d at 200 (quoting *Pell v. Procunier*, 417 U.S. 817,

³ At least two state courts, the Alaska Supreme Court and a Massachusetts trial court, have applied the *Turner v. Safley* standard 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); *Haas v. Massachusetts Dep’t of Correction*, No. 911371, 1994 WL 879619, at *1 (Mass. Super. Apr. 27, 1994).

822 (1974)). And the Iowa Court of Appeals has applied *Turner* and *Procunier v. Martinez* to find that inspection of prison mail does not violate the First Amendment. *Gross v. State*, 460 N.W.2d 882, 884 (Iowa Ct. App. 1990) (citing *Procunier v. Martinez*, 416 U.S. 396, 413 (1974) and *Turner*, 482 U.S. at 93).

IV. Historical Evidence Favors A Heightened Degree of Scrutiny Under the Iowa Constitution at Least as Protective as Under the *Turner v. Safley* Standard.

Finally, there is some historical indication that in the decades around the time of the adoption of the Iowa Constitution, prisoners' expressive rights were protected, at least to some extent, especially relative to other rights.⁴ While there is little directly on point in the 1842, 1844, and 1857 Iowa Constitutional Debates, historical material from that period demonstrates a

⁴ There are notable exceptions or limitations to this general trend. See Appellant Br. at 30 n.2 (discussing adoption of the "Auburn System" by the Fort Madison prison in 1839, requiring prisoners to remain silent for hours at a time during the day). However, some caveats about the early days at the Fort Madison prison are appropriate: the total "number of prisoners did not rise above 9 until 1854," and "about one-third of the inmates housed at Fort Madison escaped until the mid-1840s." Joyce McKay, *Reforming Prisoners and Prisons: Iowa's State Prisons—The First Hundred Years*, 60 *The Annals of Iowa* 139, 143-44 (2001), <https://core.ac.uk/download/pdf/61066569.pdf>. Even at Fort Madison, however, prisoners were provided access to a prison library and allowed to read books. *Id.* at 144.

recognition that prisoners retained some free speech rights.⁵ Around this period, the U.S.–Dakota War of 1862 occurred, and two hundred and sixty-five men, sixteen women, and two children were held prisoner in Camp Kearney and Camp McClellan in Davenport, Iowa. *See* Clifford Canku & Michael Simon, *The Dakota Prisoner of War Letters*, xi (2013). Despite harsh prison conditions, there was a vigorous commitment around education, speech, and writing. (*Id.* at xxi-xxii, likening the conditions to “one great school.”).⁶

⁵ It is important to contextualize the larger debates within American society regarding penology as it informed Iowa’s constitutional framers. Beginning in 1776 with the adoption of Pennsylvania’s first Constitution, the Constitution itself “directed the legislature to reform the penal law and make punishments... less sanguinary and more proportionate to the crimes.” *See* George G. Killinger & Paul F. Cromwell, Jr., *Penology: The Evolution of Corrections in America* 12 (1973). This was bolstered by penal reformer John Howard’s “State of Prisons” (1777), which “had tremendous influence on the course of penal reform in Europe and America.” *Id.* at 5. This led to the development of the Pennsylvania system (which granted greater rights to prisoners and focused more attention upon rehabilitation) and the Auburn system (which was stricter in its functioning and more punitive in their treatment of prisoners) between roughly 1830-1870. *Id.* at 36-41. However, this debate led to even greater emphasis on prisoner reformation between 1870-1900. *Id.* at 41-47. During this period, it was noted that even within the stricter Auburn prisons, “[m]ost of these prisons had some kind of rudimentary educational program including a prison library [and religious instruction]” despite its limited emphasis within the largely punitive nature of these prisons. *Id.* at 45-46.

⁶ These choices affording prisoners’ rights were intentional, especially in contrast to earlier but temporally proximate conditions of others (*e.g.*, slavery, indentured servitude, and Indian removal). *See generally* Scott Christianson,

As Appellants' brief demonstrates, accounts by Iowa prison wardens early in the state's history also evince a contemporaneous appreciation of the benefits of reading for inmates. Appellant Br. at 45-46 (collecting and discussing, *inter alia*, Warden's Office, Report of the Warden of the Iowa Penitentiary, to the Governor of the State of Iowa at 8 (1862)⁷; Biennial Report of the Warden of the Iowa Penitentiary to the Governor and Eleventh General Assembly at 7 (1866)⁸; Report of the Warden of the Iowa State Penitentiary

With Liberty for Some: 500 Years of Imprisonment in America, Northeastern Univ. Press (1999).

⁷available at https://publications.iowa.gov/38047/1/report_of_warden_of_IA_penitentiary_J87.I8%201861-62.pdf. The benefits are no less important today, of course, and extend beyond the inmate to their families and communities. Empirical research shows that in modern times, literacy rates are much lower across prison populations on all major metrics. *See, e.g.*, Elizabeth Greenberg, Eric Dunleavy, & Mark Kutner, *Literacy Behind Bars: Results From the 2003 National Assessment of Adult Literacy Prison Survey* (2007). However, “[f]rom a psychosocial perspective, improved literacy [leads] to improved self-esteem and reduced embarrassment ... and even the simple act of attending school seem[s] to contribute to self-worth.” Ann S. Douds & Eileen M. Ahlin, *Rethinking America's Correctional Policies* 87 (2017) (distilling the results of Randall L. Wright, *What the Students Are Saying*, 52 *J. Corr.* 84-89 (2001)). Reading and sharing books contributes to healthier family dynamics between incarcerated persons and their families. *Id.* at 87 (surveying several peer-reviewed studies conducted between 1994 and 2002 on the subject, and concluding that “[r]eading-oriented prison visits between inmates and their children create positive interactions and conclude with children taking home positive memories associated with their incarcerated parents.”)

⁸ available at https://publications.iowa.gov/36066/1/biennial_report_of_the_warden_of_the_iowa_penitentiary_J87.I8%201866%20V.2.pdf.

at Fort Madison (1875) at 21⁹; Biennial Report of the Warden of the Penitentiary to the Governor: Sep. 30, 1879 at 55 (1880).¹⁰ Importantly, underlying these records are the wardens' assumptions that prisoners would not lose all speech rights by virtue of their incarceration, and in particular, that prisoners would maintain access to reading material.

Likewise, in Enoch Wines and Theodore Dwight's 1865 survey of American prisons, they noted that "communication ... takes place among convicts continually and in most prisons to a very great extent." *See* George G. Killinger & Paul F. Cromwell, Jr., *Penology: The Evolution of Corrections in America* 40 (1973). This builds upon a history of education within carceral settings in the early 1800s in New England prisons. *Id.* at 31 (noting that "[t]hese early prisons were established primarily on a rational rather than a religious philosophy although undoubtedly the value of 'moral instruction' ... was expected to play an important part in the reformation of convicts.")

Moving to the late eighteen-hundreds, there was liberalized access to literacy, reading, writing, and speaking in most prisons. *See* Rebecca M. McLennan, *The Crisis of Imprisonment: Protest, Politics, and the Making of*

⁹ available at https://publications.iowa.gov/35570/1/Report_of_Warden_Iowa_State_Penitentiary_Fort_Madison_.pdf.

¹⁰ available at https://publications.iowa.gov/35452/1/biennial_report_of_the_warden_of_the_penitentiaryJ87.I8%201880%20V.4.pdf.

the American Penal State, 1776-1941, Cambridge Univ. Press 243 (2008) (showing that there was a seventy-percent rise in literacy rates of the incarcerated between the 1840s and 1900s in New York’s penal system, but also that “reading and writing privileges changed the workings of discipline in the prison and helped inaugurate a new relationship between the state and the convict.”). This access to reading, writing, and speech was meaningful and generally vigorous. *Id.* at 248-49 (describing the conditions at prison in Stillwater, Minnesota in the 1880s where each prisoner would “read, write, deliver, and debate papers, essays, and fiction” regularly and that semi-regularly the prisoners “were allowed to convene to present poetry, music, and recitations.”).

Together, these historical resources demonstrate a history and tradition of protecting prisoner access to reading materials and an expectation that speech rights are not eviscerated as an automatic consequence of incarceration. This Court should construe the Iowa constitutional protection for prisoner speech rights consistent with this history.

CONCLUSION

In accord with this Court’s precedent, the text of the Iowa Constitution and its protection of fundamental rights, and relevant history, this Court should find that the Iowa Constitution is at least as protective of prisoner

speech rights as the First Amendment. Therefore, the prisoners' claims here are entitled to, at minimum, the protection afforded under the *Turner v. Safley* standard. That standard 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.

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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The undersigned certifies that on the 2nd day of April, 2025, the foregoing document was electronically served on the following via EDMS:

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The undersigned also certifies that on the 2nd day of April, 2025, the foregoing document was served via U.S. mail postage prepaid on the following:

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