No. 23-1042

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DANYALE SHARRON TUBBS,

Plaintiff-Appellant,

v.

SHERRY A. PAYTON, named as, General Office Assistant for Michigan Department of Corrections,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Michigan, No. 1:22-cv-649
The Honorable Philip J. Green, United States Magistrate Judge

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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STATEMENT CONCERNING ORAL ARGUMENT

Appellant Danyale Sharron Tubbs, through *pro bono* counsel, respectfully submits that the district court's judgment may be reversed by this Court without oral argument. Mr. Tubbs's complaint was dismissed at the screening stage under 28 U.S.C. § 1915A, but he plainly made sufficient factual allegations to warrant further proceedings at this early stage of litigation.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Sixth Circuit Rule 26.1, Appellant Danyale Sharron Tubbs makes the following disclosure:

Is said party a subsidiary of affiliate of a publicly owned corporation? **No.**

Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No.**

Dated: May 26, 2023

/s/Brendan Bernicker
Brendan Bernicker

JURISDICTIONAL STATEMENT

Mr. Tubbs filed this action pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Michigan. R.1, PageID.1. The district court had jurisdiction over his claims under 28 U.S.C. §§ 1331 and 1343 because they alleged violations of the First and Fourteenth Amendments. The district court dismissed his action on December 12, 2022. R.8, PageID.47. On January 10, 2023, Mr. Tubbs filed a timely notice of appeal. R.10, PageID.49; *see* Fed. R. App. P. 4(a)(1)(A).[1] This Court has jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

ISSUES PRESENTED

This appeal presents two issues for this Court's decision:

1. Whether the district court erred in dismissing Mr. Tubbs's pro se complaint at the screening stage where the complaint plausibly states an as-applied First Amendment claim by alleging that Defendant Payton withheld a self-help memoir that Mr. Tubbs could receive without undermining any legitimate state interest.

[1] The Notice of Appeal was deposited in the facility mail system on January 10, 2023, and docketed on January 12, 2023. R.10, PageID.49. Under the "prison mailbox rule . . . a *pro se* prisoner's notice of appeal is deemed 'filed at the time [*pro se* prisoner] delivered it to the prison authorities for forwarding to the court clerk.'" *United States v. Smotherman*, 838 F.3d 736, 737 (6th Cir. 2016) (quoting *Houston v. Lack*, 487 U.S. 266, 276 (1988)).

2. Whether the district court erred in dismissing Mr. Tubbs's pro se complaint at the screening stage where it plausibly states a claim that the prison's categorical ban on books describing any sexual act involving a child violates the First Amendment because it sweeps so broadly to exclude substantial content that poses no threat to prison interests, and the prison could implement obvious, easy alternatives to this policy.

INTRODUCTION

Danyale Tubbs filed a pro se complaint alleging that Defendant Sherry Payton violated his First Amendment rights by preventing him from receiving a self-help book written by his sister, a survivor of child sexual abuse. As part of a broader narrative about healing from trauma, that book incidentally, briefly, and non-explicitly describes the sexual abuse Mr. Tubbs's sister experienced. A magistrate judge screened Mr. Tubbs's pro se complaint before service on the defendant and dismissed it, with prejudice, for failure to state a claim.

This was error. At this stage of litigation, the dispositive question is whether the complaint states a claim to relief that is plausible on its face. It comfortably passes this threshold. Mr. Tubbs explained that the book has positive content and social value and does not endanger prison interests in any way. The magistrate judge held that Mr. Tubbs's complaint did not state a claim because, contrary to Mr. Tubbs's plausible allegations, permitting him to receive this book *would* undermine security and rehabilitation. That conclusion was based on deference to Defendant Payton's initial reliance on a regulation that permits officials to withhold material that encourages or provides instruction in crime, but the magistrate judge did not acknowledge that Defendant Payton had abandoned this rationale after it had been overruled by a hearing officer who, unlike the magistrate judge, actually

reviewed the book. The magistrate judge should have credited Mr. Tubbs's plausible allegations, especially in light of the corroboration in the hearing officer's report.

In addition to his as-applied claim, Mr. Tubbs also alleged a plausible facial challenge to the Michigan Department of Corrections (MDOC) mail policy, which bans any publication that contains any description of sexual activity involving a child, regardless of context and without exception. This ban applies to a substantial amount of content that the MDOC has no legitimate interest in censoring, including self-help books like the one at issue here, classic works of literature, and even judicial opinions. Furthermore, the ban is unreasonable in light of easy, obvious, narrower alternatives, like the mail policies of many other jurisdictions, including within this Circuit. The magistrate judge did not consider Mr. Tubbs's facial challenge at all.

This Court should therefore reverse the decision below. Once Defendant Payton has been served, she will have an opportunity to explain her actions and the MDOC's broad ban. Her explanations will be entitled to substantial deference, and Mr. Tubbs will bear the burden of proving his allegations. But at this early stage, Mr. Tubbs's has stated two plausible claims for relief and those claims ought to have been allowed to proceed.

STATEMENT OF THE CASE

A. Factual Background[2]

While incarcerated at the Earnest C. Brooks Correctional Facility in Michigan, Petitioner-Appellant Danyale Tubbs attempted to order "Future Fox Teac-Her," an inspirational book written by his sister. R.1, PageID.1, 3. The book is a memoir, written from a "self-help perspective," focusing on her journey healing from childhood trauma. R.1, PageID.3–5. In one passage, the author recounts that she was raped as a child. R.1-1, PageID.10. She discloses her traumatic experience in Future Fox Teac-Her in order "to heal and to promote others to come forth and let their voices be heard." R.1-1, PageID.11.[3] The book contains "healing techniques for abuse survivors," as well as "advice and educational perspective." R.1, PageID.2, 5. It is "a healing balm on a hurt and damaged sexual assault survivor." R.1, PageID.5. When Mr. Tubbs attempted to get a copy of the book from an approved vendor, Defendant-Appellee Sherry Payton, a mail room clerk at his facility, refused to allow it. R.1-1, PageID.10.

[2] These facts are drawn from Mr. Tubbs's verified complaint and the two attached documents: a "Notice of Package/Mail Rejection" and an "Administrative Hearing Report."

[3] The capitalization of quotes from the complaint exhibits is corrected throughout this brief. Minor spelling errors are also corrected throughout.

In issuing the rejection, Defendant Payton cited the MDOC's mail policy, which is set out in Policy Directive 05.03.118 ("the Directive"). *See* R.1-1, PageID.10, 11 (citing the Directive as the relevant authority). The Directive provides the procedure for processing incoming mail at Michigan correctional facilities.[4] Among other things, it sets forth restrictions on the types of mail and publications that prisoners may receive. "Prisoners are prohibited from receiving mail that may pose a threat to the security, good order, or discipline of the facility, facilitate or encourage criminal activity, or interfere with the rehabilitation of the prisoner." Directive ¶ NN. The Directive identifies twenty-three categories of mail that must be rejected: they "pose such risks under all circumstances and therefore shall be rejected." *Id.*

Two of those categories are relevant to this appeal since–at different stages of the administrative process–the prison relied on different justifications for censoring the book. First, category NN11 prohibits "[m]ail containing, or encouraging or providing instruction in, the commission of criminal activity."[5] It is a crime for adults

[4] The full text of the Directive is not in the record. Under Federal Rule of Evidence 201, the Court can take judicial notice of the text of the Directive, which is available online from the DOC at https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-05-Institutional-Placement-and-Programs/PD-0503-Programs-and-Leisure-Time-Activities/05-03-118-Prisoner-Mail-effective-03-01-18.pdf?rev=746c4080d09840488102247112 8d47a2.

[5] It is not clear what the policy means when it refers to "mail containing . . . the commission of criminal activity."

in Michigan to engage in sexual acts involving minors. *See* Mich. Comp. Laws Ann. §§ 750.520c-750.520d. Paragraph NN11 of the Directive therefore prohibits mail "encouraging or providing instruction in" sexual acts involving minors. Second, paragraph NN5 prohibits "[m]ail describing or depicting acts of sadism, masochism, bondage, necrophilia, or bestiality, or describing, depicting, or appearing to promote sexual acts involving children."[6] These are not the only restrictions related to content that may be sexual in nature: other paragraphs prohibit nude photographs, *see* Directive ¶ NN13, and "photographs depicting actual or simulated sexual acts by one or more persons," *see* Directive ¶ NN14.

As provided in the mail policy, Defendant Payton screened Future Fox Teac-Her when it arrived. R.1-1, PageID.10. She decided to withhold the book under paragraph NN11—"mail containing or encouraging or providing instruction in the commission of a criminal activity"—because it "has details about the rape of a child." *Id.* She asserted that this content "interfere[s] with the rehabilitation of the prisoner and [poses a] threat to security." *Id.* Accordingly, she sent Mr. Tubbs a notice that his mail had been rejected. *Id.*

[6] The policy also includes a narrow and irrelevant exception, which reads: "This does not include small advertisements in a publication sent directly from the publisher or an authorized vendor except if the advertisement depicts or appears to promote sexual acts involving children." Directive ¶ NN5.

After receiving the notice, Mr. Tubbs requested an administrative hearing to review the denial of the book. R.1, PageID.3. He submitted a statement contesting Defendant Payton's reason for withholding the book, explaining that the book "is not promoting sex with a child." R.1-1, PageID.11. Rather, "it's my sister writing about an experience that altered her life but didn't break [her]." *Id.*

At the hearing, Prison Counselor Emmitt Short, the hearing officer, reviewed Future Fox Teac-Her, and disagreed with Defendant Payton's determination. R.1-1, PageID.11; *see also* Directive ¶ WW. He "decided that the book didn't pose a threat [or interfere] with plaintiff['s] rehabilitation . . . and should be given to plaintiff immediately." R.1, PageID.3. As the hearing report reflects, he "believed that the book was written in a self-help perspective and [that] Prisoner Tubbs should have received the book," despite the passage describing a childhood sexual assault. R.1, PageID.11.

But Defendant Payton "still refused to give plaintiff his book." R.1, PageID.4. After Prison Counselor Short communicated his decision to Defendant Payton, she again withheld the book. This time, rather than relying on paragraph NN11, she relied on paragraph NN5, which prohibits mail "describing, depicting, or appearing to promote sexual acts involving children." R.1-1, PageID.11.

Officer Short held a second hearing, but now his hands were tied. He noted that the passage in question "describes a sexual act involving a child." *Id.* And

therefore the restriction applied, despite his earlier finding that the book did not undermine security or rehabilitation. He wrote: "[T]here is no language in policy which indicates that such content is permitted if it includes the description in a condemning or technical/non-sexual way if a positive message can be derived from content." *Id.* Instead, the bare fact that the book included a single passage with a description of a sexual act involving a child rendered the book off-limits. *Id*. It is irrelevant whether the description "is included in a self-help book, a scientific journal or in pornography. All would violate this policy language and all would need to be rejected." *Id*.

B. Procedural History

Proceeding pro se, Mr. Tubbs sued Ms. Payton in her individual capacity under 42 U.S.C. § 1983, claiming that she violated his First and Fourteenth Amendment rights by withholding the book from him. R.1, PageID.1.[7] He alleged that the book covers "topics of great public concern and contains core protected speech and social commentary," and that the prison had no valid reason to withhold it. R.1, PageID.2. In support, he explained that the book is a self-help book about healing from trauma, and he emphasized that a prison official had reviewed the book and determined he should have been allowed to receive it. R.1, PageID.2, 4.

[7] Mr. Tubbs is not appealing the dismissal of the due process claim he also raised.

He also advanced a facial challenge to the applicable subparagraph of MDOC's mail policy. R.1, PageID.5. He argued that the grounds on which he was denied the book were "overly broad." R.1, PageID.1. And he maintained that this censorship, "affects more than just [P]laintiff"; it "affects every prisoner in MDOC both women and men's prisons who's experienced sexual abuse and is finding it hard to cope, recover and or heal." R.1, PageID.5. He sought injunctive relief, as well as compensatory and punitive damages. R.1, PageID.1.

Mr. Tubbs consented to have his case decided by a magistrate judge. R.8, PageID.30. The magistrate judge screened his complaint, prior to service on the defendant, as required by 28 U.S.C. § 1915, and sua sponte dismissed the entire complaint. R.8, PageID.29. In its opinion, the court acknowledged that Mr. Tubbs's right to receive mail in prison is protected by the First Amendment, and that, under the Supreme Court's decision in *Turner v. Safley*, a prison may withhold a book from a prisoner only if the censorship is "reasonably related to a legitimate penological interest." R.8, PageID.35–36 (citing *Knop v. Johnson*, 977 F.2d 996, 1012 (6th Cir. 1992) and *Turner v. Safley*, 482 U.S. 78, 89–90 (1987)). Nonetheless, the magistrate judge dismissed Mr. Tubbs's complaint for failure to state a claim for relief. R.8, PageID.41. That decision was premised on the magistrate judge's belief that Defendant Payton withheld the book based on paragraph NN11, even though her

reliance on that rule was overruled by the hearing officer and she ultimately relied on paragraph NN5. R.8, PageID.40; *cf.* R.1-1, PageID.11.

The magistrate judge reasoned that paragraph NN11, prohibiting mail "containing or encouraging or providing instruction in the commission of criminal activity," applied to this case because Future Fox Teac-Her discusses a criminal act—an incident of child sexual abuse. R.8, PageID.40. The magistrate judge then concluded that this was a valid basis for rejecting the book. *Id.* In doing so, he relied on a handful of cases finding that mail policies that restrict content that "encourages or provides instruction for the commission of criminal activity" comport with the First Amendment because they further a legitimate state interest in "preserving the safety of the institution and the resources of the prison expended to ensure that safety." *Id.* Since Future Fox Teac-Her, "at a minimum, discussed the commission of criminal activity," the magistrate judge held that the same logic applied. *Id.* He dismissed the entire complaint with prejudice. R.8, PageID.47. However, he did "not conclude that any issue [Mr. Tubbs] might raise on appeal would be frivolous," and thus refused to certify that an appeal would not be taken in good faith. *Id.*

At no point did the magistrate judge consider whether the prison could have withheld the book if, as the hearing officer found and Mr. Tubbs alleged, it did not encourage or promote crime. Nor did he consider the prison's actual reason for rejecting the book—paragraph NN5. And the magistrate judge issued this dismissal

without looking at the book, which is not in the record in this case (because Mr. Tubbs does not have access to it). The magistrate judge appears to have ignored Mr. Tubbs's facial challenge altogether.

SUMMARY OF THE ARGUMENT

I. Mr. Tubbs was denied access to a self-help memoir that is a "healing balm" on survivors of trauma—not a threat to any prison interest. Defendant Payton's withholding of the book violated his First Amendment right to receive mail and access reading material. *See Bethel v. Jenkins*, 988 F.3d 931, 938 (6th Cir. 2021).

At this early stage of litigation, Mr. Tubbs need only plausibly allege that there is no valid, rational connection between banning Future Fox Teac-Her and any legitimate state interest. He has more than done so. His description of Future Fox Teac-Her makes clear that the book as a whole has a positive, rehabilitative message, and the identified passage—far from constituting inappropriate sexual content—describes a traumatic childhood event in a condemning, non-explicit way. Moreover, the MDOC hearing officer's initial conclusion that Mr. Tubbs should have received the book further reinforces the inference that the book posed no threat to prison security or prisoner rehabilitation. Because Mr. Tubbs has plausibly alleged that Ms. Payton's decision to withhold the book was not rationally related to any legitimate state interest, his as-applied challenge states a valid claim for relief.

In dismissing Mr. Tubbs's pro se complaint at the pre-screening stage, the magistrate judge failed to credit Mr. Tubbs's plausible allegations and relied on irrelevant precedents concerning books which, unlike that at issue in this case, encourage or promote crime and undermine security and rehabilitation. And he

dismissed the claim prematurely—without critical facts in the record, the book itself, or the defendant's reasoning for excluding it. This was error.

II. Although the magistrate judge appears to have engaged only with Mr. Tubbs's as-applied challenge, Mr. Tubbs has also adequately alleged that paragraph NN5 of MDOC's mail policy, which censors any content—regardless of context—that includes a description of sexual activity involving children, is facially unconstitutional. There is no question that MDOC can ban mail that visually depicts sexual acts involving children, or that encourages or provides instruction in committing sex crimes. But paragraph NN5 sweeps much more broadly, categorically banning content that merely describes any sexual act involving a child, even if the description is a miniscule fragment of a book with clear redeeming social or literary value. And it does so despite an obvious, easy alternative: a narrower policy that leads to fewer needless exclusions while still protecting prison interests. There are countless examples of appropriately narrower policies—in caselaw, in the mail policy of the Federal Bureau of Prisons, and in the regulations of state prison systems in this Circuit. Given the breadth of paragraph NN5 and the alternatives, Mr. Tubbs has plausibly alleged that the provision is not reasonably related to legitimate interests. On remand the government will have ample opportunity to defend its sweeping policy. For now, though, this Court should reverse the district

court's premature dismissal of Mr. Tubbs's plausible as-applied challenge and unexamined facial challenge, especially in light of the important freedoms at issue.

STANDARD OF REVIEW

Orders dismissing complaints before service for failure to state a claim are reviewed *de novo*. *See Small v. Brock*, 963 F.3d 539, 540 (6th Cir. 2020). The standard governing dismissal for failure to state a claim under 28 U.S.C. § 1915A is the same as under Federal Rule of Civil Procedure 12(b)(6). *See Hill v. Lappin*, 630 F.3d 468, 470–71 (6th Cir. 2010); *see also Small*, 963 F.3d at 540–41. Under that standard, this Court "examine[s] whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Siefert v. Hamilton Cty.*, 951 F.3d 753, 759 (6th Cir. 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In engaging in this inquiry, this Court may also consider the exhibits attached to Mr. Tubbs's complaint, as they are referred to in the complaint and are central to the claims. *See Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680-81 (6th Cir. 2011).

All plausible factual allegations in Mr. Tubbs's complaint must be accepted as true. *See Small*, 963 F.3d at 540-41. And all reasonable inferences from those alleged facts must be drawn in Mr. Tubbs's favor. *See 859 Boutique Fitness, LLC v. CycleBar Franchising, LLC*, 699 F. App'x 457, 459 (6th Cir. 2017). Furthermore, it is well-established that Mr. Tubbs's "*pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," and must be "liberally construed." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *see*

also Hill v. Lappin, 630 F.3d 468, 471 (6th Cir. 2010) ("[C]ourts are instructed to give" pro se filings "indulgent treatment.").

The magistrate judge's decision to dismiss Mr. Tubbs's complaint with prejudice, rather than without prejudice, is reviewed for abuse of discretion. *See Brown v. Matauszak*, 415 F. App'x 608, 616 (6th Cir. 2011).

ARGUMENT

I. Mr. Tubbs stated a claim that Defendant Payton violated the First Amendment by withholding Future Fox Teac-Her from him.

A prison official can withhold a publication only if doing so is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *see also Thornburgh v. Abbott*, 490 U.S. 401, 413–14 (1989). *Turner* set forth a multi-factor test for channeling that reasonableness inquiry. *Abbott*, 490 U.S. at 414. Under that test, the *sine qua non* of constitutional reasonableness is the first *Turner* factor: a rational relationship between withholding the publication and some legitimate state interest. *See id.* at 404. If that rational relationship exists, then the reasonableness of the withholding is judged by balancing the remaining *Turner* factors.[8] *See Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001). "If not, the

[8] The remaining factors are (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact that accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) "whether there are ready alternatives available that fully accommodate the prisoner's rights at *de minimis* cost

[withholding] is unconstitutional, and the other factors do not matter." *Muhammad v. Pitcher*, 35 F.3d 1081, 1084 (6th Cir. 1994) (cleaned up); *see also Shaw*, 532 U.S. at 229.

The Supreme Court "has stressed that *Turner*'s 'reasonableness standard is not toothless.'" *Muhammad*, 35 F.3d at 1084 (quoting *Abbott*, 490 U.S. at 414). "[A]lthough [the *Turner*] standard requires deference to the judgment of correctional officers, '[courts] must not confuse deference with abdication.'" *Williams v. City of Cleveland*, 771 F.3d 945, 950 (6th Cir. 2014) (quoting *Stoudemire v. Mich. Dep't of Corr.*, 705 F.3d 560, 572 (6th Cir. 2013)).

Mr. Tubbs plausibly alleged in his complaint that Defendant Payton's rejection of Future Fox Teac-Her had no valid, rational connection to a legitimate government interest. Specifically, he alleged that the book denounces sexual assault and contains inspirational, rehabilitative content. R.1, PageID.1–2, 4–5, R.1-1, PageID.11. He supported that allegation with record evidence showing that a prison official reviewed the book and found it was written from a "self-help perspective" and posed no threat to security or rehabilitation. R.1, PageID.3, R.1-1, PageID.11. His plausible allegation is conclusive at this stage of the litigation. *See Davis v. Prison Health Servs.*, 679 F.3d 433, 439–40 (6th Cir. 2012) (finding dismissal for

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to valid penological interests." *Muhammad v. Pitcher*, 35 F.3d 1081, 1084 (6th Cir. 1994) (quoting *Turner*, 482 U.S. at 89–91).

failure to state a claim improper where plaintiff alleged sufficient facts that, accepted as true, state a plausible claim for relief).

In dismissing Mr. Tubbs's as-applied challenge, however, the magistrate judge failed to accept these allegations as true and disregarded the record evidence bolstering them. Instead, his entire analysis centered on whether the prison could withhold the book because it "encourages or provides instruction" for criminal activity—even though the hearing officer who reviewed the book found that justification inapplicable, the prison didn't rely on it, and there was no basis for the magistrate judge's assumption that the justification applies to this book. This Court should reverse.

A. Mr. Tubbs plausibly alleged that withholding this book was not rationally related to any legitimate state interest.

Mr. Tubbs alleged that Future Fox Teac-Her does not pose a threat to security or a threat to rehabilitation, R.1, PageID.3, 5, and does not "promot[e] sex with children." R.1-1, PageID.11, R.8, PageID.40. Indeed, Mr. Tubbs alleged that "the withholding and rejection of plaintiff's book was not related to *any* valid penological objective." R.1, PageID.4 (emphasis added). These allegations are amply supported by Mr. Tubbs's additional allegations about the content of the book, and by a prison official's finding, after reviewing the book, that it posed no threat to security or rehabilitation.

First, as the complaint explains, Future Fox Teac-Her is a book with positive content and a positive message. It is a self-help book, written by a survivor of childhood sexual abuse to offer "healing techniques." R.1, PageID.2. It offers "a survivor's point of view from a self-help perspective" and is geared toward helping victims of sexual abuse "refine and re-design their view of themselves from helpless victim to strong, triumphant empowered survivor." R.1, PageID.4. It contains "advice" and an "educational perspective," and "is a healing balm on a hurt and damaged sexual assault survivor." R.1, PageID.5.

The prison's own treatment of the book, documented in the records attached to the complaint, reinforces Mr. Tubbs's allegations that Future Fox Teac-Her does not threaten prison security, rehabilitation, or any other legitimate prison interest. After reviewing Future Fox Teac-Her and Defendant Payton's reasoning for rejecting it, MDOC's hearing officer concluded that Mr. Tubbs "should have received the book." R.1-1, PageID.11; *see also* R.1, PageID.3. In doing so, the hearing officer rejected Defendant Payton's claim that the book violated paragraph NN11 of the mail policy, which prohibits mail "encouraging or providing instruction in, the commission of criminal activity." Directive ¶ NN11; *see also* R.1-1, PageID.11. He also rejected the claim that the book violated paragraph NN, which includes a general prohibition on "mail that may pose a threat to the security, good order, or discipline of the facility, facilitate or encourage criminal activity, or

interfere with the rehabilitation of the prisoner." Directive ¶ NN; *see also* R.1-1, PageID.11. In other words, he thought that Mr. Tubbs could safely receive Future Fox Teac-Her, and that it posed no threat to security or rehabilitation. Nothing in the record suggests that the hearing officer ever reversed those findings, or that they were ever overruled by the Warden or any other MDOC official.

Instead, when the hearing officer ultimately allowed Defendant Payton to withhold the book, the explanation he gave was entirely consistent with his previous findings that this particular book did not encourage or provide instruction in crime or otherwise undermine security or rehabilitation. Rather, he explained, his hands were tied because paragraph NN5—which bars publications containing any description of a sexual act involving a child—does not allow for any exceptions or individualized consideration of the risks posed by specific publications. R.1-1, PageID.11. Any work containing any mention of the prohibited subject matter must be excluded, and it is irrelevant whether the description "is included in a self-help book, a scientific journal or in pornography. All would violate this policy language and all would need to be rejected." *Id*.

But applying a mail policy—even one that is generally valid—does not render a censorship decision reasonable. The decision must be reasonable with respect to the particular publication. *See Abbott*, 490 U.S. at 404 (finding the mail regulation at issue was facially valid, but remanding the case to the district court for a

determination of the validity of the regulation as applied to each of 46 publications); *Merriweather v. Zamora*, 569 F.3d 307, 317 (6th Cir. 2009) (prison mail "policies that are themselves constitutional can be unconstitutional if improperly applied."). And here, the hearing officer's assessment of the particular publication was that it posed no threat to security or rehabilitation.

Put simply, it is more than plausible that Mr. Tubbs and the hearing officer were correct that a self-help book which includes a brief, non-explicit and condemning account of the author's experience being sexually assaulted as a child, in the context of a broader narrative about healing and overcoming trauma, does not pose a risk to security or rehabilitation. R.1, PageID.3-4, R.1-1, PageID.11. If that is so, then withholding that book from Mr. Tubbs, even pursuant to policy, violated his First Amendment rights. Mr. Tubbs's allegations were therefore sufficient to state a claim that the policy was unconstitutional as-applied to withhold this book from him, and that claim should have been allowed to proceed.

B. The magistrate judge erred in concluding that Mr. Tubbs failed to state a claim.

Rather than credit these plausible allegations, which state a straightforward First Amendment claim, the magistrate judge chose a different path. The court held, contrary to Mr. Tubbs's allegations and the record evidence appended to his complaint, that Defendant Payton acted constitutionally because the book could

encourage or promote crime, thereby undermining security and rehabilitation. R.8, PageID.39-41. That was error for at least two reasons.

1. The court failed to accept Mr. Tubbs's plausible allegations as true.

First, the magistrate judge focused on the wrong question: whether a prison can restrict access to publications that encourage or provide instruction for the commission of criminal activity. This was not, as the complaint exhibits show, the basis on which the book was withheld. R.1-1, PageID.11. It was the reason that Defendant Payton originally cited, but the hearing officer then rejected that reason as inapplicable to this book. *Id.*

Proceeding from this foundational error, the magistrate judge resolved this case by relying on an inapplicable body of precedent. It viewed this as an open-and-shut case because courts have previously approved restrictions on publications that encourage or provide instruction for committing crime. *See* R.8, PageID.39–40.[9] But

[9] The district court cited the following cases: *Peters v. Simpson*, No. 1:15-cv-751, 2015 WL 5608237 (W.D. Mich. Sept. 23, 2015) (upholding ban on book about wiring and welding that could be used to disable electrical systems in the facility to aid in an escape); *Markham v. Mote*, No. 1:12-cv-1063, 2014 WL 4662185 (W.D. Mich. Sept. 18, 2014) (upholding ban on book about criminal investigation and forensic science that "could be used to facilitate and encourage criminal activity"); *Wells v. Vannoy*, 546 F. App'x 340 (5th Cir. 2013) (upholding ban on book called "Pimpology" which "describes techniques of manipulation and control" and is thus a "potential threat to safety"); *Thompson v. Campbell*, 81 F. App'x 563 (6th Cir.

this book does not encourage or provide instruction in committing crime. The caselaw that the magistrate judge found dispositive, therefore, was instead inapposite.[10]

And as a result of this misguided analysis, the court overlooked the significance of Mr. Tubbs's allegations. It failed to take as true his allegation that this book does not encourage or provide instruction in crime which, again, is corroborated by the hearing officer's report. R.1-1, PageID.11. It also failed to take as true his allegation that the description of child sexual assault in the book, due to its brevity, tone, and context as part of a larger book about healing from trauma, does not pose a threat to security or rehabilitation (similarly corroborated by the hearing officer's report). *Id.* It is also significant that the magistrate judge, who did not have access to the book, never acknowledged in his analysis that the hearing officer, who had reviewed the book, determined that Mr. Tubbs could safely receive it without risk to any prison interests. *Id.* That evidence, which is attached to the complaint and

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2003) (upholding ban on material advocating anarchy or containing obscenity because it reasonably implicates security, order, and rehabilitation).

[10] Indeed, despite relying on cases about materials that encourage or instruct in crime, the magistrate judge never concluded that this book includes any such encouragement or instruction – nor could he. He was able to say only that the book "had content that, at a minimum, *discussed* the commission of criminal activity." *See* R.8, PageID.40 (emphasis added). But discussing criminal activity is not the same as encouraging it or providing instruction in it, and there are clearly different security implications between material that foments or facilitates crime and a book with a single passage that briefly recounts but condemns a crime.

incorporated by reference, would be enough on its own to make Mr. Tubbs's allegations plausible. These errors violate the black-letter requirement that a court accept Mr. Tubbs's plausible allegations as true at this stage of litigation and draw all reasonable inferences in his favor. *See Small*, 963 F.3d at 540–41. By viewing Mr. Tubbs's case as merely a variation of previous cases involving books that promote criminal activity, the magistrate judge overlooked Mr. Tubbs's plausible allegations, bolstered by the prison records, about the content of this book and prematurely dismissed a meritorious complaint. This error alone offers a sufficient basis on which this Court should reverse the decision below.

2. Dismissal without any record evidence on Defendant's reasoning was premature.

Moreover, the sparse pre-service record does not support the magistrate judge's implicit conclusion that Defendant Payton was justified in finding this book to be a threat. In a *Turner* case, it is "up to Defendants to advance a legitimate and neutral governmental interest to which [their action] is rationally connected." *Muhammad*, 35 F.3d at 1085. The existence of a rational relationship between withholding a publication and a legitimate state interest is a question of fact, and that relationship must be demonstrated with evidence. *See Flagner v. Wilkinson*, 241 F.3d 475, 484–87 (6th Cir. 2001).

Here, the record reveals only the ground for denial of the book—the description of a sexual act involving a child—but not the reason why officials believe that implicates prison interests, let alone the reason why a self-help memoir with one isolated passage containing such a description implicates those interests. R.1-1, PageID.11. And Mr. Tubbs, bolstered by the record evidence, denies that there is any such reason. R.1, PageID.3–4.

It is difficult, if not impossible, to resolve these disputes at this early stage of litigation, where the book is not in the record and no defendant has appeared to explain why the book was withheld. For similar reasons, other courts have found that similar cases could not be resolved at the pre-service screening or motion to dismiss stages. *See, e.g., Dunn v. Castro*, 621 F.3d 1196, 1205 n.7 (9th Cir. 2010) (holding it would be premature to apply the *Turner* factors at the motion to dismiss stage and collecting similar cases); *Dean v. Bowersox*, 325 F. App'x 470, 472 (8th Cir. 2009) (reversing a dismissal for failure to state a claim where there was no "justification by defendants to support the regulation" in the record, "making a *Turner* analysis difficult"). Indeed, in a case similar to the instant one, the court cautioned that "prison administrators alleged to have violated inmates' rights must meet such challenges with edifying and illuminating rejoinders drawn from their unique expertise, not with the modest responses advanced in this litigation." *Lyon v. Grossheim*, 803 F. Supp. 1538, 1555 (S.D. Iowa 1992) (quoting *Williams v.*

Lane, 851 F.2d 867, 886 (7th Cir.1988)) (finding no factual basis connecting denial of religious comic books to a valid security concern). Here, we have even less than modest responses: defendants have not appeared in the case to offer any evidence or response at all.

Even at later stages of other cases, when defendants have introduced evidence supporting their claims, this Court and others have rejected prison officials' arguments that withholding books or other First Amendment-protected content is justified by security concerns where those concerns are implausible, far-fetched, or exaggerated. *See, e.g., ACLU Fund of Michigan v. Livingston County*, 796 F.3d 636, 647 (6th Cir. 2015) (finding no valid connection between Jail's mail policies and a legitimate interest because "[n]othing in the record suggests that the parade of horribles advanced by the Defendants would occur"). In *King v. Federal Bureau of Prisons*, 415 F.3d 634 (7th Cir. 2005), the Seventh Circuit reversed a screening-stage dismissal of a claim involving a prison's withholding of a book about computer programming. The prison claimed the book jeopardized security, but the court found those concerns "far-fetched" and allowed plaintiff's First Amendment claim to proceed. *Id*. at 639; *see also Flagner v. Wilkinson*, 241 F.3d 475, 484—87 (6th Cir. 2001) (finding defendants' asserted security justifications lacked a factual basis as applied to plaintiff).

Here, the Defendant has not appeared, and has therefore not yet introduced any evidence from which the magistrate judge could conclude that withholding this book was rationally related to any legitimate state interest. But instead of waiting to perform the evidence-based, fact-specific analysis of the book that an as-applied challenge requires, the magistrate judge "jumped the gun" and found Defendant Payton's actions justified. *See Williams*, 771 F.3d at 955. He relied on cases holding that other items of mail (like nude photos and books about wiring and welding or "techniques of manipulation and control") undermine different state interests to conclude that Defendant Payton could withhold this book. R.8, PageID.39-41. Not so—even if allowing some other mail into other prisons could cause a parade of horribles, it does not follow that such a parade would accompany this book into Mr. Tubbs's facility, and the magistrate judge had no basis for concluding that it would.

The MDOC hearing officer did not believe allowing Mr. Tubbs to receive this book would imperil the prison's legitimate interests, the Defendant has not yet explained why the magistrate judge should reach a contrary conclusion, and the record does not support the conclusion the magistrate judge reached. That conclusion, and the dismissal it supported, must therefore be reversed.

II. Mr. Tubbs stated a First Amendment claim that MDOC's categorical ban on mail which describes any sexual activity with a child violates *Turner* on its face.

Mr. Tubbs's pro se complaint adequately alleged that paragraph NN5 of MDOC's mail policy is unconstitutional not only as applied to Future Fox Teac-Her, but also on its face. *See* R.1, PageID.1, 5.[11] The district court did not even consider this argument, and instead exclusively analyzed the as-applied challenge. See R.8, PageID.35–41. This alone is reason to remand. *See Byrd v. Haas*, 17 F.4th 692, 700 (6th Cir. 2021) ("We are 'a court of review, not of first view.'" (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005))); *Maslonka v. Hoffner*, 900 F.3d 269, 283 (6th Cir. 2018) (remanding where district court did not rule on one of the petitioner's claims).

But even if this Court considers the merits of the claim, it should find that Mr. Tubbs has stated a plausible facial challenge. Like the as-applied challenge, this analysis proceeds under the *Turner* framework, and the central question is whether banning all content that contains any description of a sexual act involving a child, regardless of context or purpose, is reasonably related to a legitimate interest. Mr. Tubbs has sufficiently alleged that paragraph NN5 does not satisfy this

[11] Mr. Tubbs can pursue this facial challenge even if his as-applied challenge fails. *See Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994) (holding that, in the First Amendment context, "an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court.").

reasonableness standard for two reasons: First, he has plausibly alleged that this provision of the policy is overbroad, sweeping in ample content that poses no threat to security or rehabilitation, including salutary material written from a "self-help perspective" and classic and critically acclaimed literature with redeeming social or literary value. Second, MDOC could easily implement a more narrowly drawn policy that allows for individualized determinations of whether a particular publication threatens prison interests—indeed, the federal Bureau of Prisons and other states in this Circuit have policies exactly like that. Either of these facts, if proven, could support a finding that paragraph NN5 is unreasonable under *Turner*.[12]

A. Mr. Tubbs sufficiently alleged that the categorial ban does not have a rational connection to legitimate interests because it is excessively broad.

Since the defendant has not yet appeared in the case, we do not know the specific reasoning behind banning any mention of sexual activity involving children, even non-salacious descriptions in books with redeeming social or literary value.

[12] Given the stage of litigation and absence of an evidentiary record, it would be premature to attempt to analyze all of the *Turner* factors. *See* 482 U.S. at 89–90. But it is not necessary to comprehensively analyze the factors in order to assess whether the complaint states a claim. In fact, this Court has previously held that a complaint stated a *Turner* claim based only on a plausible argument under factor four. *See Williams v. City of Cleveland*, 771 F.3d 945, 954–55 (6th Cir. 2014). And of course, the first factor is an essential requirement so, if a plaintiff plausibly alleges that there is no rational connection to a legitimate interest, that necessarily states a claim. *See Shaw*, 532 U.S. at 229–30. Accordingly, this brief will only discuss factors one and four.

Dismissal without any evidentiary record on this point was therefore premature. *See Ortiz v. Downey*, 561 F.3d 664, 669 (7th Cir. 2009) ("At this pre-discovery stage of the proceedings, there is no evidentiary record from which the district court could conclude that Mr. Ortiz's requests posed a security risk to the institution or were incompatible with his detention.").

Even if we analyze this factor under the general justifications for the mail policy, this Court should find that Mr. Tubbs has plausibly alleged that paragraph NN5 is not rationally related to those ends. MDOC's mail policy on the whole restricts material that "may pose a threat to the security, good order, or discipline of the facility, facilitate or encourage criminal activity, or interfere with the rehabilitation of the prisoner." Directive 05-03-118 ¶ NN. These are legitimate interests, but the analysis does not stop there. "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006). There must be a rational relationship between the asserted objectives and the means chosen to achieve those objectives. In other words, the banned material must actually pose some risk to security, order, or rehabilitation.

As *Turner* itself establishes, an overbroad policy may fail this requirement. Where a regulation sweeps so broadly that it censors a broad array of content that no longer bears any connection to the identified risks, that rational relationship

vanishes. *See Turner*, 482 U.S. at 98 (invalidating marriage restriction that "sweeps much more broadly than can be explained by petitioners' penological objectives"). Accordingly, many courts have found prison regulations transgress the First Amendment where they sweep so broadly as to capture much content for which there is no rational connection to a legitimate interest. *See Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1072, 1079–82 (W.D. Wis. 2000) (holding a reasonable jury could find unconstitutional a policy banning content depicting "human sexual behavior" because it was overbroad and contained no exceptions for "objectionable material that has some redeeming social value"); *Couch v. Jabe*, 737 F. Supp. 2d 561, 571, 574 (W.D. Va. 2010) (holding unconstitutional mail policy that "sweeps so broadly" to encompass content that could not credibly affect prison security, discipline, or good order); *Cline v. Fox*, 319 F. Supp. 2d 685, 693 (N.D. W. Va. 2004) ("In view of the library regulation's substantial overbreadth and incongruities, the Court cannot find any logical connection between [the regulation] and its intended goals.").

By contrast, the Supreme Court in *Abbott* found a mail policy *did* have a rational relationship to legitimate interests where it relied on case-by-case determinations of whether each incoming publication posed a security risk. 490 U.S. at 403, 414–17. Rather than completely barring entire categories of content, the policy in that case made clear that "no publication may be excluded unless the warden himself makes the determination that it is detrimental to [prison interests]."

Id. at 416 (internal citation omitted). In upholding the policy, the Supreme Court noted that it was "comforted by the individualized nature of the determinations required by the regulation" and the fact that "the regulations expressly reject certain shortcuts that would lead to needless exclusions." *Id.* at 416–17.

MDOC's paragraph NN5 falls in the first bucket: it is overbroad, censoring far more content than plausibly poses a risk to the prison, and results in "needless exclusions," *see Abbott*, 490 U.S. at 417. Reasonably interpreted, this provision of the policy prohibits all books, magazines, and other content that contain even one mention of a sexual act involving children, without regard to the nature of the content. The provision draws no distinction between descriptions in "a self-help book, a scientific journal, or [in] pornography." R.1-1, PageID.11. Nor is it limited to material with graphic or salacious descriptions of sexual activity—any description at all, no matter how brief, non-explicit, or condemnatory, triggers the restriction. Additionally, the censorship is mandatory: mail falling under paragraph NN5 "*shall* be rejected" (emphasis added), even without an individualized finding that the content at issue poses a security risk. And—aside from a narrow one not relevant here—there are no exceptions. *See supra* n.6. The provision mandates excluding this broad category of content, even if it could be found to have redeeming social or literary value.

A closer comparison to the policy that the Supreme Court upheld in *Abbott* highlights paragraph NN5's overbreadth. As already discussed, the *Abbott* policy was discretionary and based on case-by-case determinations, not a mandatory blanket ban. Furthermore, it authorized prison officials to reject "*sexually explicit* material . . . involving children," 490 U.S. at 405 n.6 (emphasis added), notably a narrower exclusion than MDOC's ban on any description at all of a sexual act involving a child, even if technical and condemning. And the *Abbott* policy contained an exception for "explicit material" that "has scholarly, or general social or literary, value." *Id.* MDOC's paragraph NN5 shares none of these limiting features that gave the Supreme Court comfort in *Abbott* that the mail policy was rationally related to its purported ends.

The result is a prison regulation that reaches a wide swath of content that has no plausible effect on any prison interests. For example, paragraph NN5 would proscribe an article in a scientific journal that contained any description of child sexual abuse, even if the description was a clinical case study in the context of important scholarship. It also would ban many classic and critically-acclaimed books that contain episodes of sexual assault of children, such as the Pulitzer Prize-winning novel *The Color Purple* by Alice Walker, and many others.[13] These are celebrated

[13] *See, e.g.*, Stephen Chbosky, *The Perks of Being a Wallflower* (1999); Khaled Hosseini, *The Kite Runner* (2003) (two-year New York Times bestseller); Karen

works with clear social and literary value. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) ("[G]ood books, plays, and the arts lift the spirit, improve the mind, enrich the human personality, and develop character."). And yet, because they contain reference to childhood sexual assault—even in a condemning way or as an important component of a narrative about confronting and processing trauma—they are forbidden by paragraph NN5. Even some decisions of this Court would fall within the sweep of paragraph NN5's categorical language: this Court, like others, sometimes must describe sexual acts involving children in a technical, non-sexual way in order to explain why it has reached its decisions.[14] It strains credulity to think any of this material might pose some threat to legitimate prison interests.

In fact, paragraph NN5 would ban books that offer particular *benefit* to prisoner rehabilitation and prison security. For the many sexual abuse survivors in

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Russell, *Swamplandia!* (2011) (Pulitzer Prize finalist); Alice Sebold, *The Lovely Bones* (2002); Douglas Stuart, *Shuggie Bain* (2020) (Booker Prize winner).

[14] *See, e.g., Michael v. Butts*, 59 F.4th 219, 221–23 (6th Cir. 2023); *United States v. Frei*, 995 F.3d 561, 563 (6th Cir. 2021); *United States v. Wandahsega*, 924 F.3d 868, 874 (6th Cir. 2019); *United States v. Deuman*, 568 F. App'x 414, 417 (6th Cir. 2014).

prison,[15] who generally lack access to regular therapy,[16] books may be the best way to learn to cope and process childhood trauma. And research shows that treating trauma has significant benefits in the prison setting and can reduce problematic behaviors like aggression and rule violations.[17] But books that grapple with this topic are likely to contain some description of abuse, rendering them off-limits. In addition to critically-acclaimed fiction and self-help books like Future Fox Teac-Her, paragraph NN5 would also ban biographies and memoirs of the many successful, high-profile individuals that have disclosed that they were sexually assaulted as children, including Maya Angelou, Oprah, Carlos Santana, and Sally Field.[18] By

[15] Bureau of Just. Stat., U.S. Dep't of Just., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, at 8 (May 2013) (80,600 prisoners each year experience sexual violence while in prison or jail); *see also* Elizabeth Swavola, et al., Vera Inst. of Just., *Overlooked: Women and Jails in an Era of Reform* 11 (Aug. 2016) (86% of women in jail report having experienced sexual violence in their lifetime).

[16] Christine Herman, *Most Inmates with Mental Illness Still Wait for Decent Care*, NPR (Feb. 3, 2019); Bureau of Just. Stat., U.S. Dep't of Just., *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011–12*, at 8 (June 2017).

[17] *See, e.g.*, Haley R. Zettler, *Much to Do About Trauma: A Systematic Review of Existing Trauma-Informed Treatment on Youth Violence and Recidivism*, 19 Youth Violence and Juv. Just. 113 (January 2021); Alyssa Benedict, Nat'l Res. Ctr. on Just. Involved Women, *Using Trauma-Informed Practices to Enhance Safety and Security in Women's Correctional Facilities* (2014); Niki A. Miller & Lisa M. Najavits, *Creating Trauma-Informed Correctional Care: A Balance of Goals and Environment*, 3 Eur. J. Psychotraumatology (2012).

[18] *See, e.g.*, Maya Angelou, *Mom & Me & Mom* (2013); Kitty Kelley, *Oprah: A Biography* (2010); Carlos Santana, *The Universal Tone: Bringing My Story to Light* (2014); Sally Field, *In Pieces* (2018).

doing so, far from serving security, the regulation blocks access to a category of content that may be particularly inspirational to incarcerated people with a history of trauma: stories of real people healing from trauma and going on to highly successful careers.

Given its substantial overbreadth, Mr. Tubbs has a strong argument that this provision of the policy does not have a rational connection to a legitimate prison interest. Although banning some content relating to child sexual abuse is surely permissible, as the Supreme Court held in *Abbott*, MDOC's policy reaches much further to encompass content that does not credibly implicate MDOC's interests. To be sure, if Defendant Payton is served and subsequently appears in this litigation, she may offer evidence on this factor, but at this stage, it is plausible that this sub-paragraph of the policy does not bear the requisite rational relationship to a legitimate interest.

B. An obvious, easy alternative exists: a more narrowly drawn paragraph NN5 with reasonable exclusions.

It is sufficient to warrant reversal that Mr. Tubbs has plausibly alleged that paragraph NN5 is not rationally related to a legitimate government interest. But even if the Court disagrees, it should still reverse because obvious, easy alternatives to the policy exist. "[O]bvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Turner*, 482 U.S. at

90 (internal citation omitted); *see also Jones v. Caruso*, 569 F.3d 258, 272–75 (6th Cir. 2009) (finding plaintiff likely to succeed on challenge to prison censorship policy where prison had alternative means of effecting the policy's intended purpose). At this stage of litigation, alleging obvious, easy alternatives to a prison policy that infringes important freedoms may be sufficient to state a constitutional claim, even if the prison has a legitimate justification for its actions. *See Williams v. City of Cleveland*, 771 F.3d 945, 954 (6th Cir. 2014). In *Williams*, this Court found that plaintiffs stated a plausible constitutional claim challenging a jail's mandatory strip search and delousing practice. While the Court agreed that the practice was "obviously" rationally connected to the jail's interests in discovering contraband and preventing lice, it found that the practice could still be unreasonable under *Turner* given the readily available, less intrusive alternatives, and it held that the claim should be allowed to proceed. *Id.*

The same reasoning applies here. An obvious, easy alternative exists: MDOC could modify the policy to allow for an individualized determination of whether the content poses a threat to security or rehabilitation. For example, it could allow an exception for material with redeeming social or literary value that does not pose any threat to security or rehabilitation. Or it could contain discretionary language, permitting officials to restrict content that *does* pose a threat, but not requiring them to mechanically exclude content that actually has a positive message and is not a

threat, such as the book at issue here. These alternatives would not impose additional burdens: prison officials already must examine each incoming publication to determine whether it contains a description of sexual activity involving children. Directive ¶ DD (all incoming mail's written content "shall be skimmed, and if it appears from skimming the content that the mail may violate this policy, the item shall be read to determine if it is allowed").

Other prison systems have policies exactly like this narrower alternative. The Federal Bureau of Prisons (BOP), for example, says that the warden "may" exclude "sexually explicit material . . . involving children." 28 C.F.R. § 540.71(b)(7); U.S. Dep't Just., Fed. Bureau Prisons, Program Statement No. P5266.11, at 3–4 (2011), available at https://www.bop.gov/policy/progstat/5266_011.pdf. The policy is discretionary, so it allows for individualized determinations of whether an individual publication containing this material poses a security risk, and it is limited to sexually explicit material, which implicates prison interests to a greater degree than any non-salacious reference to sexual activity. The BOP regulation also has exceptions: It states that "sexually explicit material does not include material of a news or information type," and also that "sexually explicit material may be admitted if it has scholarly value, or general social or literary value." *Id.*

Every other state in this circuit also has a narrower policy: each uses case-by-case determinations to restrict only material deemed to be a threat to prison interests,

and generally limits those restrictions to sexually explicit material. Ohio, for example, considers "excludable" sexually explicit material that "depicts or graphically describes sexual activity involving children." Printed Materials, Ohio Admin. Code § 5120-9-19(C)(6) (2020). It defines "graphically describe" to mean "to describe a subject in a lurid manner focusing attention of such subject as the primary topic of the printed material." *Id.* § 5120-9-19(C)(6)(f). Similarly, Tennessee has a discretionary policy that incoming mail "*may* be determined to be a threat to the security of the institution" (emphasis added) if it contains "sexually explicit material or material which features nudity which by its nature or content poses a threat to the security, good order, or discipline of the institution or facilitates criminal activity."[19] Kentucky rejects publications on a case-by-case basis, and its only categorical prohibition is a narrow prohibition on publications with "nudity or pictorial depictions of actual or simulated sexual acts."[20]

The fact that so many other jurisdictions employ narrower policies on this same subject matter is evidence that such a policy could be readily implemented in Michigan without compromising prison interests. *See Williams*, 771 F.3d at 954–55; *see also Couch*, 737 F. Supp. 2d at 573 (finding that "clearly alternative regulations

[19] Tenn. Dep't Corr., No. 507.02, Inmate Mail (2020), available at https://www.tn.gov/content/dam/tn/correction/documents/507-02.pdf.
[20] Ky. Corr., No. 16.2, Inmate Correspondence (2017), available at https://corrections.ky.gov/About/cpp/Documents/16/CPP%2016.2.pdf.

to address [the prison's] concerns exist, as evidenced by decisions upholding more limited regulations by other courts" and finding that to be "evidence that the regulation does not satisfy the reasonable relationship standard"). And even if there is any doubt about whether these alternative policies are obvious and easy, as this Court noted in *Williams*, those factual questions are "appropriately resolved through discovery, not on the pleadings." *Williams*, 771 F.3d at 954.

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In sum, Mr. Tubbs has plausibly alleged that it is unreasonable for the prison to ban all content with any mention of child sexual activity, especially in light of the alternatives. But further discovery would certainly aid resolution of these difficult legal questions since, at this stage, we do not even know MDOC's precise justification for banning this content in this blunt manner. "To state a claim, plaintiffs [are] required only to plausibly allege—rather than demonstrate—that the jail acted unreasonably." *Williams*, 771 F.3d at 954. Mr. Tubbs has plausibly alleged that paragraph NN5 of the mail policy is unconstitutional both as applied to an innocuous self-help book, and on its face, and he "deserves a shot at additional factual development." *Davis*, 679 F.3d at 433 (quoting *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010)).

C. Even if there were any deficiencies in Mr. Tubbs's allegations, the magistrate judge still would have erred by dismissing Mr. Tubbs's complaint with prejudice.

"Typically, 'a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.'" *McGowan v. Herbert*, No. 22-2033, 2023 WL 2945341, at *4 (6th Cir. Apr. 14, 2023) (quoting *United States ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634, 644 (6th Cir. 2003)); *see also Tolliver v. Noble*, 752 F. App'x 254, 263 (6th Cir. 2018) (a dismissal should be without prejudice "if it is at all possible that [the plaintiff] can correct the defect in the pleading or state a claim for relief" (citing 6 Charles A. Wright, et al., Federal Practice and Procedure § 1483 (3d ed. 2010))). This is especially true for complaints filed by pro se litigants like Mr. Tubbs because, "[p]articularly where deficiencies in a complaint are attributable to oversights likely the result of an untutored *pro se* litigant's ignorance of special pleading requirements, dismissal of the complaint without prejudice is preferable." *Brown v. Matauszak*, 415 F. App'x 608, 614–15 (6th Cir. 2011) (quoting *Reynoldson v. Shillinger*, 907 F.2d 124, 126 (10th Cir. 1990)). To give effect to these principles, "this [C]ourt has more than once remanded a case to allow a *pro se* plaintiff leave to amend" even "where it was not requested in the district court." *Brown*, 415 F. App'x at 615 (collecting cases).

In this case, the magistrate judge short-circuited this ordinary procedure by dismissing Mr. Tubbs's pro se complaint *sua sponte* and with prejudice. R.9,

PageID.48. Here, Mr. Tubbs had no notice that his complaint was deficient or opportunity to cure the deficiencies before the court terminated his claims—claims which implicate important First Amendment freedoms. *See Brown*, 415 F. App'x at 616 (finding a complaint with claims of "a serious nature" requires close scrutiny before it is dismissed in the pleading stage). To the extent his factual allegations fell short in any respect, he should be permitted to amend his complaint on remand.[21]

CONCLUSION

For the foregoing reasons, this Court should reverse the magistrate judge's dismissal of Mr. Tubbs's complaint.

[21] The same is true for the as-applied challenge. The district court faulted Mr. Tubbs for not alleging the full panoply of *Turner* factors, R.8, PageID.41, but those are exactly the sort of allegations that he could add in an amended complaint. It was therefore error to dismiss this claim with prejudice as well.

Dated: May 26, 2023

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because, according to the word count function of Microsoft Word 2019, the Brief contains 9,729 words excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Times New Roman font for the main text and 14-point Times New Roman font for footnotes.

Dated: May 26, 2023

/s/ Brendan Bernicker
Brendan Bernicker

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2023, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

Dated: May 26, 2023

/s/ Brendan Bernicker
Brendan Bernicker

DESIGNATON OF RELEVANT DISTRICT COURT DOCUMENTS

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