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First Amendment Rights behind Bars: To Deny a Prisoner Pornography, The Third Circuit in Ramirez v. Pugh Requires Proof of Detriment to Rehabilitation

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As ordinary citizens, we tend to take our First Amendment rights for granted.\(^1\) We do not think twice about speaking our minds, reading what interests us, or attending the church of our choosing.\(^2\) Nevertheless, incarcerated citizens are more susceptible to having those same rights impinged upon in the name of government interests.\(^3\)

In *Ramirez v. Pugh*,\(^4\) the United States Court of Appeals for the Third Circuit renewed a First Amendment challenge to the Ensign Amendment, a law that bans federal prison inmates from receiving material that is "sexually explicit" or features nudity.\(^5\) The Third Circuit addressed whether prohibiting inmates from receiving sexually explicit material is necessary to promote prisoner rehabilitation, or is instead, a violation of their First Amendment rights.\(^6\) Departing from the United States Court of Appeals for the District of Columbia Circuit,\(^7\) the Third Circuit held that the Ensign Amendment could be found constitutional only if an evidentiary

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1. For a discussion of First Amendment rights, see *infra* notes 23-24 and accompanying text.
2. See *id.* (detailing guarantees of First Amendment).
3. For a discussion of prisoners' rights in light of government regulations, see *infra* notes 114-84 and accompanying text.
4. 379 F.3d 122, 124 (3d Cir. 2004).
6. See *Ramirez*, 379 F.3d at 125 (defining challenge raised by prisoner plaintiff). For the text and discussion of the First Amendment, see *infra* notes 23-32 and accompanying text.
7. See Amatel v. Reno, 156 F.3d 192, 194 (D.C. Cir. 1998) (upholding statutory ban of prison funds distributing "sexually explicit materials to prisoners" as constitutional).
record supported a connection between the denial of the sexually explicit material and the goal of rehabilitation.8

Courts did not begin to recognize prisoners' constitutional rights until the 1960s and 1970s.9 Society now recognizes that inmates do not surrender their constitutional rights upon entering prison.10 Highlighting the need to protect a prisoner's rights, the D.C. Circuit recognized, "Few minorities are so 'discrete and insular,' so little able to defend their interests through participation in the political process, so vulnerable to oppression by an unsympathetic majority [as prisoners]."11 While prisoners' rights are of significant concern, prison administrators need to perform the prison's daily operations, including maintaining order.12 The appellate courts have struggled to reconcile these two competing concerns.13

This Casenote examines the Third Circuit's decision in Ramirez. Section II discusses the relevant law, including the Ensign Amendment, the First Amendment and the Turner test, and the current circuit split.14 Section III sets forth the facts of Ramirez.15 Section IV presents the Third Circuit's opinion.16 Section V evaluates

8. See Ramirez, 379 F.3d at 131 (describing court's holding). For a discussion of the Ensign Amendment, see infra notes 19-22 and accompanying text.


11. Amatel, 156 F.3d at 204 n.2 (Wald, J., dissenting) (quoting Doe v. District of Columbia, 701 F.2d 948, 960 n.14 (D.C. Cir. 1983)).

12. See id. at 204 (Wald, J., dissenting) (emphasizing conflicting interests at stake).

13. Compare Ramirez v. Pugh, 379 F.3d 122, 126 (3d Cir. 2004) (discussing Turner test and emphasizing appropriate balance between prisoners' rights and prisons administrators' institutional needs), with Amatel, 156 F.3d 192, 195-96 (D.C. Cir. 1998) ("In [prison], the government is permitted to balance constitutional rights against institutional efficiency in ways it may not ordinarily do.").

14. For discussions of the Ensign Amendment, First Amendment, Turner test and circuit split, see infra notes 19-67 and accompanying text.

15. For a discussion of the Ramirez facts, see infra notes 68-75 and accompanying text.

16. For a discussion of the Ramirez opinion, see infra notes 76-113 and accompanying text.
the Third Circuit's analysis of Ramirez. Finally, Section VI assesses the likely impact of the Third Circuit's holding.

II. BACKGROUND

a. Ensign Amendment

The Ensign Amendment was enacted as part of the Omnibus Consolidated Appropriations Act of 1997 and has since been codified. By passing the Ensign Amendment, Congress has barred the use of Bureau of Prisons ("BOP") "funds to pay for the distribution of commercial material that 'is sexually explicit or features nudity.'" The BOP has promulgated regulations defining the Amendment's important terms. Those regulations control softcore and hardcore pornography that prisoners receive.

17. For a discussion analyzing the Ramirez court's rationale, see infra notes 114-84 and accompanying text.

18. For a discussion of the possible impact of the holding in Ramirez, see infra notes 185-99 and accompanying text.

19. See 28 U.S.C. § 530C(b)(6) (2005) (authorizing and outlining appropriate use of funds). Section 530(b)(6)(D) provides in relevant part: "[N]o funds may be used to distribute or make available to a prisoner any commercially published information or material that is sexually explicit or features nudity." Id.

20. Amatel v. Reno, 156 F.3d 192, 194 (D.C. Cir. 1998) (citing Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 614, 110 Stat. 3009 (1997)). Prior to the passage of the Ensign Amendment in 1996, "federal regulations authorized prison wardens to reject a publication 'only if it [was] determined detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity.'" Id. (citing 28 C.F.R. § 540.71(b) (2000) (alteration in original)). While there is no restriction on prisoners obtaining the material at their own expense, this Note will treat the spending restriction as a ban on distribution. See id. at n.1 (noting prisoners obtaining material at own expense is not realistic).

21. See 28 C.F.R. § 540.72(b) (2000) (defining "sexually explicit," "commercially published information," "nudity," and "features"). "Sexually explicit" is defined as "a pictorial depiction of actual or simulated sexual acts including sexual intercourse, oral sex, or masturbation." Id. "Features" means that the publication in question "contains depictions of nudity or sexually explicit conduct on a routine or regular basis or promotes itself based upon such depictions in the case of individual one-time issues." Id. There is an exception to "features" for material that contains nudity "illustrative of medical, educational, or anthropological content ... ." Id. "Nudity" means "a pictorial depiction where genitalia or female breasts are exposed." Id. Examples of publications that do not "feature nudity" include National Geographic, Sports Illustrated Swimsuit Issue, and the Victoria's Secret catalog. See Ramirez v. Pugh, 379 F.3d 122, 125 (3d Cir. 2004) (referring to Fed. Bureau of Prisons Program Statement 5266.07 (Nov. 1, 1996), aff'd, Fed. Bureau of Prisons Program Statement 5266.10 (Jan. 10, 2003)). "[T]here is no restriction ... on non-pictorial sexually explicit material." Amatel, 156 F.3d at 194.

22. See Ramirez, 379 F.3d at 125 (identifying target of regulations).
b. First Amendment

The Ensign Amendment's most profound issue is whether it infringes upon a prisoner's First Amendment rights. Whether a person is a prisoner or free citizen, the First Amendment guarantees freedom from government intrusion upon religion, speech, press, public assembly, and grievances. When prison administrators regulate a prisoner's mail, there is a potential violation of the First Amendment's Free Speech Clause. The Supreme Court has emphasized, "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." Nevertheless, in an environment such as prison, where government regulation is required and is by its very nature more intrusive than general standards, the government is at liberty to balance constitutional rights against institutional efficiency in ways that could not be done in another setting. Attempting to strike an appropriate balance between a prisoner’s constitutional rights and the prison administrators’ institutional needs, the United States Supreme Court has held that prison regulations must be "reasonably related to legitimate penological interests."

The Court's balancing approach has highlighted significant policy concerns. If strict scrutiny were applied, the inability "to

23. See id. (noting plaintiff's argument that Ensign Amendment violates his First Amendment rights); Amatel, 156 F.3d at 195 (detailing prisoners' challenge to Ensign Amendment as First Amendment violation).

24. See U.S. CONST. amend. 1 (enumerating First Amendment's guaranteed freedoms). The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Id.

25. See Miness, supra note 9, at 1707-08 (discussing section of First Amendment potentially violated by Ensign Amendment).

26. Turner v. Safley, 482 U.S. 78, 84 (1987); see also Amatel, 156 F.3d at 195 ("Cases analyzing constitutional claims by those within governmental institutions such as prisons, public schools, the military, or the government workplace often open with the axiom that the boundaries of those institutions do not separate inhabitants from their constitutional rights.").

27. See Amatel, 156 F.3d at 196 (listing case law that supports concept that government is entitled to balance rights against efficiency). Yet, the Amatel court further noted that "a regulation that promotes an illegitimate or non-neutral goal" cannot pass the Turner test. See id.

28. Turner, 482 U.S. at 89 (defining applicable standard when prison regulation interferes with inmate's constitutional rights). The Court has recognized the tension between a prisoner's constitutional rights and the reality that the legislative and executive branches, rather than the judiciary, are more suited to run the country's prisons. See Ramirez v. Pugh, 379 F.3d 122, 125-26 (3d Cir. 2004) (noting Supreme Court's difficult task of reconciling two competing principles).

29. See Turner, 482 U.S. at 89 ("[S]uch a standard is necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concern-
adopt innovative solutions" to administrative and security problems would hamper prison officials' daily decisions.30 Further, prison officials' decisions would constantly be subject to the possibility that a court could identify a less restrictive solution to the particular problem.31 The balancing test allows prison administrators to enforce regulations as long as such regulations withstand a reasonable review.32

c. Turner Test

The Supreme Court has developed a four-part test ("Turner test") to assess the overall reasonableness of a regulation that implicates a prisoner's constitutional rights.33 In Turner v. Safley, the Court addressed two regulations the Missouri Division of Corrections promulgated.34 The first regulation provided that correspondence with other inmates, who were not immediate family members, was only permitted if "the classification/treatment team of each inmate deem[ed] it in the best interest of the parties involved."35 The second regulation at issue permitted an inmate to marry only with the permission of the prison's superintendent, and that approval would be given only when there were compelling reasons.36 To determine the constitutionality of the prison regulations, the Supreme Court applied the following multi-factor test, the Turner test.37

The first factor requires a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put

30. See id. (outlining potential negative effects of heightened scrutiny standard).

31. See id. ("Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem . . . .")

32. See id. at 87 (requiring reasonable relation between regulation and legitimate penological objective).

33. See id. at 89-91 (setting out relevant factors to determine regulations' reasonableness).

34. See Turner, 482 U.S. at 81-82 (discussing two regulations at issue). The respondents were inmates at the Renz Correctional Institution located in Cedar City, Missouri. See id. at 81.

35. Id. at 81-82 (describing first regulation being challenged for constitutionality).

36. See id. at 82 (detailing challenged marriage regulation). "[G]enerally only a pregnancy or the birth of an illegitimate child would be considered a compelling reason." Id.

37. See id. at 89 (noting that several factors are relevant in determining regulation's reasonableness).
forward to justify it."38 The regulation will not pass muster if the connection to the governmental objective is so remote as to render it arbitrary or irrational.39 Further, this factor requires that the governmental interest be legitimate and neutral.40

The Turner test’s second factor evaluates “whether there are alternative means of exercising the [prisoner’s] right.”41 The third factor considers the impact accommodating the constitutional right would have on prison guards, other inmates, and “allocation of prison resources . . . .”42 If a substantial “ripple effect” on fellow inmates and prison staff is likely to result from the accommodation of the prisoner’s right, courts should give particular deference to the prison officials’ discretion.43

The final factor addresses the availability of alternatives for the proposed regulation, where the absence of ready alternatives for a prison regulation helps demonstrate the regulation is reasonable.44 The Supreme Court noted the fourth factor is not a “least restrictive alternative” test; prison officials do not have to eliminate every conceivable method of accommodating the prisoner’s constitutional complaint.45 Rather, if inmates can identify an accommodating alternative at de minimis cost to valid penological interests, then the regulation may not be reasonable.46

These factors help form “a single reasonableness standard.”47 The first factor, in particular, tends to be the most important be-

38. Id. at 89 (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)).
40. See id. at 90 (“[The Supreme Court has] found it important to inquire whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of the expression.”).
41. Id. (defining second factor). “Where ‘other avenues’ remain available for the exercise of the asserted right, . . . courts should be particularly conscious of the ‘measure of judicial deference owed to corrections officials . . . .’” Id. (citation omitted) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).
42. Id. The Court noted the “closed environment” of prisons increases the likelihood that institutional changes will affect the liberty of those within the prison system and the overall institutional order. See id.
43. See id. (emphasizing situation when balance should weigh in favor of government).
44. See Turner, 482 U.S. at 90 (describing fourth factor). The existence of easy alternatives suggests the response is exaggerated and not reasonable. See id.
45. See id. at 90-91 (explaining that officials need not “set up and shoot down” every possible alternative).
46. See id. at 91 (noting that court should consider evidence of possible accommodation at de minimis cost).
47. Ramirez v. Pugh, 379 F.3d 122, 126 (3d Cir. 2004) (explaining purpose of Turner test’s four factors); see also Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998) (noting similar purpose of Turner test’s four factors).
cause it encompasses the remaining factors. After applying these factors in *Turner*, the Supreme Court held the regulation barring inmate-to-inmate correspondence "was reasonably related to legitimate security interests." Nevertheless, the marriage restriction failed to satisfy the reasonable relationship standard and was therefore held invalid.

d. Circuit Split

The Third Circuit openly acknowledged in *Ramirez* that its decision contradicted the D.C. Circuit. In *Amatel v. Reno*, the United States Court of Appeals for the District of Columbia Circuit determined the constitutionality of a statutory ban on the use of BOP funds to distribute sexually explicit material to prisoners. The plaintiffs, three inmates who were denied the receipt of *Playboy* and *Penthouse*, "filed suits alleging that the Ensign Amendment violated their First Amendment rights." The U.S. District Court for D.C. applied the *Turner* test, found the Ensign Amendment facially invalid, and consequently enjoined its enforcement.

On appeal, the D.C. Circuit Court also applied the four factors of the *Turner* test to assess the challenged regulation. The *Amatel* court emphasized the first factor, the rationality inquiry, tends to address the remaining factors and is limited to promoting a legitimate, neutral goal. The government’s asserted goal was prison-

48. *See Ramirez*, 379 F.3d at 126 (“[T]he first [factor] looms especially large because it tends to encompass the remaining factors, and some of its criteria are apparently necessary conditions.” (citing *Waterman v. Farmer*, 183 F.3d 208, 213-14 (3d Cir. 1999)) (internal quotation marks omitted)).
49. *Turner*, 482 U.S. at 91 (concluding first Missouri regulation was constitutional because record established reasonable relationship between regulation and legitimate security interest).
50. *See id.* (noting marriage regulation was not valid because it constituted "an exaggerated response to petitioners’ rehabilitation and security concerns").
51. *See Ramirez*, 379 F.3d at 131 (“Contrary to the decision in *Amatel*, we believe this to be a case in which factual development is necessary for evaluating the Ensign Amendment and its implementing regulation under *Turner*.”).
52. *See Amatel*, 156 F.3d at 194 (identifying issue of case).
53. *Id.* at 195 (outlining facts of case). Each prisoner filed a separate suit, but "their suits were consolidated, along with similar suits filed by the publishers of [the] magazines and a publishing trade organization." *Id.* For a discussion of the Ensign Amendment, see *supra* notes 19-22 and accompanying text. For a discussion of the First Amendment, see *supra* notes 23-32 and accompanying text.
54. *See Amatel*, 156 F.3d at 195 (noting decision of lower court).
55. *See id.* at 196 (discussing court’s analysis of *Turner* test’s four factors). For a discussion of the *Turner* test used to determine the overall reasonableness of prison regulations, see *supra* notes 33-50 and accompanying text.
56. *See Amatel*, 156 F.3d at 196 (highlighting importance of first factor and noting that regulation promoting illegitimate or non-neutral goals is prohibited).
ers' rehabilitation. The D.C. Circuit found the Ensign Amendment satisfied the neutrality requirement based on the notion that “neutral” means merely that “the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression.” The court found the government's rehabilitative interest met this “thin” neutrality requirement.

The Amatel court decided the government can attach sanctions or exclude speech that threatens its goals because a government has the power to pursue its legitimate goals within reasonable limits in its own institutions. The Amatel court found that the generality of the Turner reasonableness test, plus common sense, suggested that “flexibility open to the political branches” must be at its highest in “institutions for the care and custody of those who have already transgressed society's norms.”

Consequently, the Amatel court found that the government could have rationally linked rehabilitative values and banning pornography. Asserting that common sense is the standard element of reasonableness and rationality, the court relied on common


58. Amatel, 156 F.3d at 197 (quoting Thornburgh v. Abbott, 490 U.S. 401, 415 (1989)). The district court looked at the statute, rather than the goal, and found the statute non-neutral. See id. (assessing district court's conclusion). While the Ensign Amendment is a content-based statute, the D.C. Circuit held that the Amendment does not violate Turner's neutrality requirement. See id. “Neutrality” in the Turner sense is quite different from the familiar First Amendment notion of "content-neutrality." See id.

59. See id. (concluding rehabilitative interest satisfies first factor of Turner test).

60. See id. at 198 (describing actions that government can take without violating free speech). Thus, according to the court, the government cannot pursue any value it wishes, but an "inculcation of values cannot be characterized as a suppression of expression in every context." Id.

61. Id. (giving deference to power of political branches in restricting prisoners' freedom of speech in effort to promote respect for authority and traditional values).

62. See id. at 199 (finding that government satisfied rationality requirement of first Turner factor). The Amatel court recognized that Congress could have perceived pornography as tending to impede the character growth of those who view it. See id. The court further found that while the government may have been optimistic in thinking that the exclusion of pornography in prisons would have a positive impact, that goal was not irrational. See id.
sense rather than record evidence. The court stated, "Common sense tells us that prisoners are more likely to develop the now-missing self-control and respect for others if prevented from poring over pictures that are themselves degrading and disrespectful."

The Amatel court then considered the three remaining Turner factors and found that each was satisfied. The court concluded that it is unnecessary to make individual prisoner determinations as to whether pornography would harm that prisoner's rehabilitation. Therefore, the Amatel court upheld the Ensign Amendment because it was based on the legitimate goal of prisoner rehabilitation, and there was a rational connection between the goal of rehabilitation and a wholesale exclusion of pornography.

III. FACTS

The United States Court of Appeals for the Third Circuit addressed the constitutionality of the “Congressional ban on the use of federal funds to distribute certain sexually explicit material to prisoners” in Ramirez v. Pugh. The plaintiff, Marc Ramirez, filed suit in the United States District Court for the Middle District of

63. See Amatel, 156 F.3d at 199 (finding despite no record evidence of social science data proving pornography hinders rehabilitation, Turner test requires nothing more than common sense).

64. Id. The court noted, “Of course, it seems quite likely that a culture and its manifestations have a mutually reinforcing relationship, so that a prohibition of pornography is a reasonable element of a struggle against machismo and its ill effects.” Id. at 200.

65. See id. at 201 (finding Ensign Amendment satisfies three remaining factors). For the second factor, the D.C. Circuit found that prisoners do have alternative means of exercising the right at stake because a broad range of publications can still be "sent, received, and read." Id. (relying on similar conclusion in Thornburgh v. Abbott, 490 U.S. 401, 418 (1989)). The court found the third factor was satisfied by deferring to Congress: “if Congress may reasonably conclude that pornography increases the risk of prison rape, then the adverse impact is substantial.” Id. Addressing the fourth factor, the court determined that the prisoners’ rights could not be accommodated at de minimis cost. See id. Specifically, the court found that sifting through the mail of each prisoner would incur significant administrative burdens, and the sexually explicit material approved for only one prisoner could still be passed to other inmates. See id.

66. See id. (noting costs of prisoner-by-prisoner determinations are “far from de minimis”). The court concluded prisoner-by-prisoner determinations evaluating the effect of the received pornography would impose an administrative burden. See id. Moreover, given that prisoners are likely to pass pornographic materials around, making the prisoner-by-prisoner determination would be futile. See id.

67. See id. at 202 (concluding statute satisfied Turner reasonableness test and satisfied all four factors). The D.C. Circuit remanded the case to the district court to address vagueness issues, but the D.C. Circuit lifted the permanent injunction previously imposed on the regulation. See id. at 203 (reversing and remanding to district court).

Pennsylvania in 1997, and named the United States Attorney General, the director of the BOP, and the warden of the Allenwood institution where he was imprisoned (collectively, the "government") as defendants. Ramirez claimed magazines addressed to him were withheld by prison officials because the material was prohibited under the Ensign Amendment for being "sexually explicit" or "featuring nudity." Ramirez argued the Ensign Amendment violated his First Amendment rights.

After applying the *Turner* test, the district court held that the Ensign Amendment and its regulations passed constitutional muster. Ramirez appealed the district court's decision, arguing the court incorrectly found a rational connection between the ban on pornography and rehabilitation. Specifically, Ramirez contended the district court failed to engage in a "'contextual, record-sensitive analysis' before determining the ban's overall reasonableness under *Turner*." The Third Circuit reversed and remanded the case to the district court for an evidentiary hearing.

IV. NARRATIVE ANALYSIS

a. Application of the *Turner* Test

The United States Court of Appeals for the Third Circuit analyzed the Ensign Amendment's constitutionality by first applying the *Turner* test. The court realized the tension between a prisoner's constitutional rights and the fact that the judicial branch was not created to run the country's prisons. Acknowledging this ten-

69. See *id.* at 125 (identifying parties in lawsuit).
70. *Id.* (defining plaintiff's contention).
71. See *id.* (contending First Amendment violation).
72. See *id.* (describing district court's holding). The district court based its decision on the following findings:
   [The Amendment and its regulations]... were rationally connected to the government's asserted interest in prisoner rehabilitation, prisoners still had access to a broad range of materials (including materials with sexually explicit text), accommodating the asserted right to view explicit materials would threaten the safety of correctional staff and other inmates, and no ready alternative existed that would accommodate Ramirez's asserted right at a *de minimus* cost to valid penological interests.
73. See *Ramirez*, 379 F.3d at 125 (establishing basis of plaintiff's appeal).
74. *Id.* (highlighting crucial argument of plaintiff's appeal).
75. See *id.* at 131 (giving holding of case).
76. See *id.* at 125-26 (introducing principles leading to need for test to determine reasonableness of regulation).
77. See *id.* at 126 (recognizing conflicting principles). The legislative and executive branches are responsible for running the country's prisons. See *id.* (refterring to *Turner v. Safley*, 482 U.S. 78, 84-85 (1987)).
sion, the court applied the four factors articulated in *Turner* to determine whether a prison regulation that implicates an inmate's constitutional rights is "reasonably related to legitimate penological interests." 78

The court's threshold inquiry was whether a "valid, rational connection" between the prison regulation and the legitimate governmental interest" existed. 79 The second factor the court applied was "whether there are alternative means of exercising the right that remain open" [sic] to prisoners." 80 The third factor the court applied was "[what] impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." 81 The fourth and final factor the *Ramirez* court applied was whether there existed "ready alternatives" that would fully accommodate the constitutional right 'at de minimus cost to valid penological interests.' 82

**b. Critique of Amatel's Application of the *Turner* Test**

Before deciding the Ensign Amendment's constitutionality, the *Ramirez* court evaluated the decision of the D.C. Circuit in *Amatel*, which previously heard a First Amendment challenge to the Ensign Amendment. 83 The *Amatel* court rejected the First Amendment challenge, finding that the restriction on the distribution of sexually explicit material was reasonably related to the legitimate penological interest of prisoner rehabilitation. 84 The *Ramirez* court noted that in *Amatel*, the D.C. Circuit broadly defined the interest of rehabilitation as the "promotion of 'respect for authority and traditional values' [which is] a legitimate rehabilitative purpose in and of itself." 85

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78. *Ramirez*, 379 F.3d at 126 (repeating *Turner*’s four factors). For a discussion of the *Turner* test, see *supra* notes 33-50 and accompanying text.
79. *Id.* (quoting *Turner*, 482 U.S. at 89).
80. *Id.* (quoting second *Turner* factor from *Turner*, 482 U.S. at 90).
81. *Id.* (alterations in original) (quoting third *Turner* factor from *Turner*, 482 U.S. at 90).
82. *Id.* (quoting fourth *Turner* factor from *Turner*, 482 U.S. at 90-91).
83. *See Ramirez*, 379 F.3d at 126 ("To date, the United States Court of Appeals for the D.C. Circuit is the only federal appellate court to have considered the merits of a First Amendment challenge to the Ensign Amendment and its implementing regulation.").
84. *See id.* (stating holding of *Amatel* court); *Amatel v. Reno*, 156 F.3d 192, 201-02 (D.C. Cir. 1998) (declaring holding of case).
85. *Ramirez*, 379 F.3d at 126 (quoting *Amatel*, 156 F.3d at 202-03). The *Amatel* court believed Congress could have perceived pornography as impeding character growth and that without pornography prisoners could develop self-control and respect. *See id.* (referring to *Amatel*, 156 F.3d at 199).
In addition, the Third Circuit noted that the Amatel court considered an evidentiary record unnecessary. Rather, the Amatel court concluded that a court's own common sense was sufficient to verify the rational connection between the Ensign Amendment's prohibitions and the rehabilitative goal. According to the Ramirez court, the Amatel court determined that the remaining three Turner factors did not undermine the overall reasonableness of the Ensign Amendment.

c. A Common Sense, Rational Connection

The United States Court of Appeals for the Third Circuit, in Wolf v. Ashcroft, previously addressed whether the rational connection between a prison regulation and a legitimate penological interest can be based on common sense alone. In Wolf, the Third Circuit struck down a prohibition against showing R-rated and NC-17-rated movies in federal prisons. In reversing the district court's decision, the Third Circuit found that the lower court failed to state the relevant penological interest. The Third Circuit explained:

86. See id. (noting that Amatel court did not rely on evidentiary record); see also Amatel, 156 F.3d at 199.

87. See Ramirez, 379 F.3d at 126 (explaining Amatel's decision and rationale). The Amatel court did, however, cite scholarly research to support the reasonableness of the proposition that pornography leads to male objectification of women and other negative effects. See Amatel, 156 F.3d at 199-200 (discussing and citing scholarly analysis of pornography and sexual aggression) (citations omitted).

88. See Ramirez, 379 F.3d at 127 (detailing Amatel analysis). Prior to proceeding with its analysis, the Third Circuit addressed a prior case, Waterman v. Farmer, 183 F.3d 208 (3d Cir. 1999), in which the court considered the constitutionality of a restriction similar to the Ensign Amendment. See Ramirez, 379 F.3d at 127 (addressing Waterman, 183 F.3d at 209). In Waterman, the Third Circuit "upheld a New Jersey statute that restricted prisoners' access to pornographic materials at a facility for sex offenders who exhibited 'repetitive and compulsive' behavior." Id. (quoting Waterman, 183 F.3d at 210). The court identified the interest as rehabilitating the state's "most dangerous and compulsive sex offenders." Ramirez, 379 F.3d at 127 (quoting Waterman, 183 F.3d at 215). In evaluating the connection between the statute and the asserted goal of rehabilitating sex offenders, the Third Circuit relied on an evidentiary record consisting of expert testimony stating that sex offenders' exposure to pornography would impede rehabilitative strategies, and further hinder treatment administered by prison staff. See Ramirez, 379 F.3d at 127 (referring to Waterman, 183 F.3d at 215-16).

89. See Ramirez, 379 F.3d at 127 (explaining that question was addressed in Wolf v. Ashcroft, 297 F.3d 305 (3d Cir. 2002)).

90. See id. (referring to Wolf holding).

91. See id. (stating district court opinion was deficient because it never identified penological interest). "The government offered several theories in general terms at different times, but the District Court opinion did not mention or discuss any such theories or interests." Wolf, 297 F.3d at 308. The three possible interests were prison security, crime deterrence, and rehabilitation. See id.
While the connection may be a matter of common sense in certain instances . . . there may be situations in which the connection is not so apparent and does require some factual development. Whether the requisite connection may be found solely on the basis of 'common sense' will depend on the nature of the right, the nature of the interest asserted, the nature of the prohibition, and the obviousness of its connection to the proffered interest. 92

Thus, the Third Circuit made clear in Wolf that a "brief, conclusory statement" does not suffice when analyzing the Turner test's first prong. 93

d. Rehabilitative Interest and Rational Review

The Third Circuit found the district court erred in evaluating the Ensign Amendment under the Turner test's first prong because it failed to inquire into the interests involved and the connection between those interests and the restriction. 94 The court found further error in the district court's decision because although the connection between the Ensign Amendment and rehabilitation of federal sex offenders may be obvious under Waterman, where the prison housed only sex offenders, that connection becomes attenuated when considered in the context of the entire population of BOP inmates. 95 When an inmate's incarceration is not due to a sexual offense, the rehabilitative purpose supporting the denial of pornography becomes less apparent. 96 Consequently, in light of a diverse inmate population, a factual record becomes necessary to

92. Ramirez, 397 F.3d at 127 (quoting Wolf, 297 F.3d at 308-09). The court rejected the government's assertion that a connection between a prison regulation and the proffered interest could always be found without an evidentiary hearing. Id.

93. Id. (referring to Wolf, 297 F.3d at 308).

94. See Ramirez, 397 F.3d at 128 (finding fault in district court holding). The district court made a decision "without adequately describing the specific rehabilitative goal or goals furthered by the restriction on sexually explicit materials." Id.

95. See id. (noting that prison at issue in Ramirez is different than Waterman prison). In Waterman, the prison was only for sex offenders, hence the connection between prohibition of sexually explicit material and rehabilitation was obviously rational. See Waterman v. Farmer, 183 F.3d 208, 209 (3d Cir. 1999). For a discussion of the facts and holding of Waterman, see supra note 88. The prison at issue in Ramirez is a low-security correctional institution not limited to sex offenders. See Ramirez, 379 F.3d at 124, 129.

96. See Ramirez, 379 F.3d at 129 (noting Ensign Amendment's constitutionality is not obvious when prisoner incarcerated for reasons other than sex-related crimes).
determine the rationality of the Ensign Amendment’s overall connection to rehabilitative interests.97

The Ramirez court acknowledged that while the obvious goal of rehabilitation is to prevent recidivism, the Supreme Court has never defined the scope of this interest.98 The Ramirez court found the following were within the legitimate bounds of the rehabilitation interest: (1) prison policies targeting the behavioral patterns that led to a prisoner’s incarceration, or (2) behavioral patterns developed in prison that pose a threat of other lawbreaking activity.99 Despite this recognition, the Third Circuit drew a line: “To say . . . that rehabilitation legitimately includes the promotion of ‘values,’ broadly defined, with no particularized identification of an existing harm towards which the rehabilitative efforts are addressed, would essentially be to acknowledge that prisoners’ First Amendment rights are subject to the pleasure of their custodians.”100 The Ramirez court’s conclusion on this point caused the present split between the Third Circuit and the D.C. Circuit.101

Although the Ensign Amendment narrows a prisoner’s rights, the Third Circuit opined that courts must uphold their responsibility to scrutinize the government’s reasons for infringing upon those rights.102 The Third Circuit hypothesized that if the Ensign Amendment’s scope was limited to federal prisoners who have committed sex crimes or violence against women, then the means-end connection would be sufficiently obvious to satisfy the first prong of the Turner test based on common sense.103 Because the entire fed-

97. See id. at 128 (stating need for factual record). The Third Circuit instructed the district court on remand to identify with particularity the specific rehabilitative goals advanced by the government, and then allow the parties to provide evidence that would sufficiently enable a court to find a rational connection between the goals and the restriction. See id. (confirming instructions to district court on remand).

98. See id. (recognizing ambiguousness of rehabilitative interest).

99. See id. (exemplifying legitimate bounds of rehabilitative interest).

100. Id. (quoting and disagreeing with D.C. Circuit in AmateO).

101. See Ramirez, 379 F.3d at 128 (“To the extent that the Amatel majority defines rehabilitation in this way, we disagree with its reasoning.”).

102. See id. at 128-29 (noting that courts have duty of inquiry under Turner test). The Supreme Court previously noted, “[Turner’s] reasonableness standard is not toothless.” Thornburgh v. Abbott, 490 U.S. 401, 414 (1989). The Third Circuit instructed that a district court must describe with particularity the specific rehabilitative goal justifying the challenged regulation. See Ramirez, 379 F.3d at 129.

103. See Ramirez, 379 F.3d at 129 (describing situation where common sense can determine reasonableness). Compare id. (rejecting obvious connection), with Waterman v. Farmer, 183 F.3d 208, 220 (3d Cir. 1999) (finding prohibition against sexually explicit material clearly connected to rehabilitation of recidivist sex offenders).
eral inmate population included prisoners not incarcerated for sex-related crimes, the \textit{Ramirez} court did not find the connection between the Ensign Amendment and the government's rehabilitative interest sufficiently obvious.\textsuperscript{104}

e. Evidentiary Requirement

The Third Circuit explicitly demanded that a reviewing court develop a factual record.\textsuperscript{105} The \textit{Ramirez} court was concerned that in the absence of a factual record, the regulation could rationally apply to a small percentage of the BOP inmate population, but its connection to the rehabilitative interest of other prisoners could be "so remote as to render [it] arbitrary or irrational."\textsuperscript{106} Therefore, the court strongly advocated that to establish a rational link between sexual material and an injury to rehabilitation, the proponent must provide more than a conclusory statement asserting that the sexually explicit material undermined the viewer’s ability to respect others.\textsuperscript{107}

Likewise, the \textit{Ramirez} court confirmed that the evidentiary basis extended to the remaining three factors of the \textit{Turner} test: "[W]e have historically viewed these inquiries as being fact-intensive . . . [requiring] 'a contextual, record-sensitive analysis.'"\textsuperscript{108} The court admitted that one exception where evidence may not have been necessary to evaluate the other prongs was where the link between the regulation and the government interest was "sufficiently obvious."\textsuperscript{109} Nevertheless, the court specifically noted that factual de-

\textsuperscript{104} See \textit{Ramirez}, 379 F.3d at 129 (stating that given diverse prison population, rehabilitation is not obviously connected to enforcement of Ensign Amendment).

\textsuperscript{105} See id. at 129 (relying on \textit{Wolf v. Ashcroft}, 297 F.3d 305, 309 (3d Cir. 2002)) (noting that Third Circuit precedent required evidentiary showing, corresponding to degree that required means-end connection is demonstrated).

\textsuperscript{106} \textit{Id.} at 130 (alteration in original) (quoting \textit{Turner v. Safley}, 482 U.S. 78, 89-90 (1987)). The court emphasized that sex offenders are not the only legitimate target of the Ensign Amendment. See \textit{id.} at 129-30. Rather, the court recognized that the government has wide latitude in pursuing its legitimate rehabilitative goals, and the court cannot substitute its judgment for that of the legislative and executive branches where the government's position is simply less reasonable. See \textit{id.} at 130.

\textsuperscript{107} See \textit{id.} at 130 (confirming need for evidentiary record). The Third Circuit required some independent analysis of whether the connection is rational. See \textit{id.} at n.3. The court rejected the determination in \textit{Amatel} that scholarly findings were sufficient for establishing a rational connection. See \textit{id.} (emphasizing need for evidentiary hearing).

\textsuperscript{108} \textit{Id.} at 130 (alteration in original) (quoting \textit{Wolf}, 297 F.3d at 310).

\textsuperscript{109} See \textit{Ramirez}, 379 F.3d at 130 (noting scenario where evidentiary basis not needed). Yet, in \textit{Ramirez}, the court concluded that the third and fourth \textit{Turner} factors cannot be assessed without an evidentiary record. See \textit{id.} at 130-31 ("[T]he
velopment was required to determine the adverse impact on guards, other inmates, and resources. Likewise, alternatives that can accommodate the right at a *de minimis* cost to penological interests would require factual considerations.

The Third Circuit was not convinced by the district court’s findings of potential risks that could arise if sexually explicit material was given to a particular prisoner, concluding these risks were “speculative and unsupported.” Therefore, unlike the D.C. Circuit’s decision in *Amatel*, the Third Circuit required factual development to evaluate the constitutionality of the Ensign Amendment under the *Turner* test.

V. CRITICAL ANALYSIS

a. *Turner* Test

The *Turner* test examines the constitutionality of a prison regulation by applying rational basis scrutiny rather than heightened scrutiny. Determining whether the regulation that impinges on a prisoner’s constitutional rights is “reasonably related to legitimate penological interests” is the foundational inquiry of the rational basis review. The rational basis test is appropriate because it balances two competing principles. The first principle is that third and fourth *Turner* factors cannot be adequately assessed in the absence of an evidentiary foundation.

10. See id. (establishing that factual considerations are required for third factor of *Turner* test).

11. See id. at 130-31 (explaining that fourth factor of *Turner* test also requires evidence).

12. Id. at 131 (demonstrating disagreement with district court findings). The *Ramirez* court asserted that the risk of sexual crimes and misconduct that could result from accommodating the prisoner’s right was unproven. See id. The court further noted that the possibility of a “ripple effect” was disputable. See id.

13. See id. (reiterating circuit split). The Third Circuit reversed the judgment, holding that the district court erred in determining that the Ensign Amendment was reasonably related to the legitimate government interest of rehabilitation, absent an adequate factual basis. See id. (reversing and remanding so appropriate proceedings can be conducted before reevaluating amendment under *Turner*).

14. See *Turner v. Safley*, 482 U.S. 78, 87 (1987) (stating that in prisoner rights cases, Supreme Court did not apply heightened scrutiny standard, but inquired whether regulation that burdens “fundamental right is ‘reasonably related’ to legitimate penological objectives”). Contrary to the Eighth Circuit’s application of a strict scrutiny analysis, the Supreme Court in *Turner* held that a lesser standard of scrutiny is appropriate in determining the constitutionality of the prison regulations. See id. at 81.

15. Id. at 89.

16. See id. at 84-85 (discussing principles that frame analysis of prisoners’ constitutional claims).
federal courts have an obligation to recognize the constitutional claims of prisoners.117 The second principle is that the courts are not adequately equipped to deal with urgent problems involving prison administration and reform.118 The rational basis standard of review is responsive to both judicial restraint and the necessary protection of constitutional rights.119

Both the Third Circuit and the D.C. Circuit were highly aware of the tension between prisoner rights and prison administrators' autonomy.120 Furthermore, both courts applied the same four factors of the Turner test.121 Despite relying on the same test, the Ramirez court and the Amatel court came to different conclusions based on their interpretation of the first prong of the reasonableness test.122

b. Rehabilitative Goal

To support the validity of the Ensign Amendment, the government asserted rehabilitation as its interest.123 The Third Circuit and the D.C. Circuit differed in their views on the boundaries of rehabilitation, despite rehabilitation being observed as a valid peno-

117. See id. at 84 (emphasizing that prisoners maintain their constitutional rights even after incarceration).

118. See id. (recognizing court's inabilities); see also Procuiner v. Martinez, 416 U.S. 396, 404-05 (1974) ("[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree."). Running a prison lies within the expertise of the legislative and executive branches. See Turner, 482 U.S. at 84-85 (noting prison administration has been committed to these branches of government). "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." Id. at 89.

119. See Turner, 482 U.S. at 85 (demonstrating that rational basis scrutiny is best standard of review).

120. See Ramirez, 379 F.3d at 126 (recognizing need to balance prisoners' constitutional rights and prison administrators' institutional needs); see also Amatel v. Reno, 156 F.3d 192, 196 (D.C. Cir. 1998) (discussing permissible amount of government intrusion in prison context).

121. Compare Ramirez, 379 F.3d at 126 (discussing Turner's four factors), with Amatel, 156 F.3d at 196 (applying four factors from Turner). For a discussion of the Turner Test, see supra notes 33-50 and accompanying text.

122. Compare Ramirez, 379 F.3d at 131 (analyzing Ensign Amendment under Turner and striking it down), with Amatel, 156 F.3d at 203 (upholding Ensign Amendment after applying Turner test).

123. See Ramirez, 379 F.3d at 128 (identifying rehabilitation as legitimate penological interest). Other possible legitimate penological interests include security and crime deterrence. See Wolf v. Ashcroft, 297 F.3d 305, 308 (3d Cir. 2002) (listing interests).
logical objective. Further, as the Ramirez and Amatel courts highlighted, the Supreme Court has not defined the scope of the rehabilitative interest.

The Ramirez court was skeptical of the Amatel court’s expansive view of rehabilitation. The Amatel court relied on the congressional discussions leading to the Ensign Amendment’s enactment, in which House members emphasized sexually explicit materials “have no place in the rehabilitative environment of prisons . . . .” The congressional record suggested that denying prisoners sexually explicit magazines would be harmless.

Following the congressional history of the Ensign Amendment, the Amatel court noted that the goal of imprisonment was rehabilitation. The Amatel court accepted that inculcating values under the guise of rehabilitation may be necessary for prison institutions to take necessary care of those in its custody. The court asserted that while the infusion of values may conflict with the First Amendment, a state was permitted to “become a player in the marketplace of ideas,” especially in government-sponsored institutions.

124. See generally O’Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987) (indicating that rehabilitation is one of primary goals of penal institutions); see also Pell v. Procunier, 417 U.S. 817, 823 (1974) (“[S]ince most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody.”).

125. See Ramirez, 379 F.3d at 128 (“[T]he scope of the [rehabilitative] interest itself has never been defined by the Supreme Court.”); Amatel, 156 F.3d at 209 (Wald, J., dissenting) (“Unlike its interest in institutional security, the contours of the government’s interest in rehabilitation are quite amorphous and ill-defined.”).

126. See Ramirez, 379 F.3d at 128 (disagreeing with Amatel’s holding “that rehabilitation legitimately includes the promotion of ‘values,’ broadly defined, with no particularized identification of an existing harm towards which the rehabilitative efforts are addressed . . . .”).


129. See Amatel, 156 F.3d at 197 (relying on prison system’s goal to reduce “likelihood that prisoners would again transgress society’s norms”).

130. See id. at 198 (explaining that inculcation of values cannot be considered as suppressing expression in every context).

131. See id. at 197-98 (indicating government cannot “pursue any value . . . . But inculcation of values cannot be characterized as a suppression of expression in every context”); see also Miness, supra note 9, at 1720 (characterizing D.C. Circuit’s statement as “bold”).
Justice Wald’s dissent in Amatel is in accordance with the Ramirez approach to rehabilitation.132 Despite acknowledging that rehabilitation was a legitimate government interest, Justice Wald noted that the Federal Sentencing Guidelines have abandoned rehabilitation as an attainable goal.133 Scientific evidence has failed to show a causal relationship between the exposure to non-violent and non-degrading sexual depictions and acts of sexual violence.134 Justice Wald was concerned that using “rehabilitation” to infringe upon a prisoner’s First Amendment rights carries the potential for abuse.135 In short, determining whether a particular publication may frustrate a prisoner’s rehabilitation is extremely difficult.136

Further, there is a slippery slope argument: if pornography can be taken away from prisoners in order to pursue rehabilitative goals, then anything could be taken away.137 In essence, First Amendment rights of prisoners could be eviscerated in the name of rehabilitation.138 Likewise, the Supreme Court has recognized that a regulation can constitute “an exaggerated response” to a prisoner’s rehabilitation.139 Thus, to prevent such happenings, Justice Wald’s dissent in Amatel and the Ramirez court majority required

132. See Amatel, 156 F.3d at 214 (Wald, J., dissenting) (arguing that majority’s decision “goes well beyond prior precedent and the case law in other circuits”).
133. See id. at 206 (Wald, J., dissenting) (questioning importance placed on rehabilitation); Kerr v. Puckett, 138 F.3d 321, 324 (7th Cir. 1998) (“Congress abandoned ‘rehabilitation’ as a justification of imprisonment when it enacted the Sentencing Reform Act of 1984.”).
134. See Amatel, 156 F.3d at 209 (Wald, J., dissenting) (citing Edward Donnerstein et al., The Question of Pornography 177 (1987)) (stating conclusion of Attorney General’s Commission on Pornography).
135. See id. at 209-10 (Wald, J., dissenting) (recognizing possibility of abuse in name of rehabilitation). “[U]ndertaking the Herculean task of ‘character-molding’ is inherently problematic in its First Amendment implications, for it presumably involves casting emerging prisoners in society’s own image.” Id. at 210.
136. See id. at 210 (highlighting complexities of determining effects on rehabilitative effort). Justice Wald argued that Congress cannot claim that it knows how to rehabilitate an individual prisoner, let alone an entire prison population. See id. at 209. Rehabilitation tends to involve, for example, a combination of “therapy, drug and alcohol counseling, basic education, or job training . . . .” Id.
137. See id. (highlighting effects if rehabilitation is taken too far). For instance, “lawmakers who believe that books on Russian history may lead to disrespect for the United States may ban those books for prisoners.” Id. For other hypothetical scenarios describing slippery slope, see id.
138. See id. (concluding First Amendment rights could disappear under expansive view of rehabilitation).
139. See Turner v. Safley, 482 U.S. 78, 90 (1987) (deciding marriage restriction did not satisfy reasonable relationship standard but rather was “exaggerated response” to petitioner’s rehabilitation and security concerns).
evidence establishing the connection between the sexually explicit materials and the harmful effects on rehabilitation.\textsuperscript{140}

c. Rationality Requirement

The rationality requirement, encompassed by the first prong of the \textit{Turner} test, upholds as valid a regulation that intrudes on a prisoner's constitutional rights if it reasonably relates to "legitimate penological interests."\textsuperscript{141} The Third Circuit in \textit{Ramirez} found that the connection between the Ensign Amendment and the government's rehabilitative interest was not always obvious.\textsuperscript{142} On the contrary, the D.C. Circuit found a rational connection between the Ensign Amendment and the rehabilitative interest even without a factual record.\textsuperscript{143} Among other things, the two courts differed in their interpretation of what constitutes a rational connection.\textsuperscript{144} The \textit{Amatel} court acknowledged, "[p]rison jurisprudence is not well enough developed to indicate precisely how demanding the requirement of a rational means-end connection is."\textsuperscript{145} The D.C. Circuit took a deferential approach when assessing whether a rational connection existed between the regulation and the rehabilitative interest.\textsuperscript{146} The \textit{Amatel} court adamantly held that its only obligation was to establish whether the judgment was rational, and not to determine whether it agreed with the legislative judgment that pornography adversely affected rehabilitation.\textsuperscript{147}

\textsuperscript{140} See \textit{Amatel}, 156 F.3d at 211 (Wald, J., dissenting) (encouraging need for evidence instead of mere assertion of rehabilitation); \textit{Ramirez v. Pugh}, 379 F.3d 122, 130 (3d Cir. 2004) (requiring evidentiary record).

\textsuperscript{141} \textit{Turner}, 482 U.S. at 89 (establishing first applicable factor when testing prison regulation's constitutionality).

\textsuperscript{142} See \textit{Ramirez}, 379 F.3d at 129 (demonstrating connection is not clear without factual record).

\textsuperscript{143} See \textit{Amatel}, 156 F.3d at 199 (finding that "government could rationally have seen a connection between pornography and rehabilitative values" without factual record).

\textsuperscript{144} Compare \textit{Ramirez}, 397 F.3d at 127-28 (emphasizing factual record to demonstrate rational connection), with \textit{Amatel}, 156 F.3d at 199-200 (refusing to require factual record).

\textsuperscript{145} \textit{Amatel}, 156 F.3d at 198 (explaining that degree of rationality required has yet to be clearly established).

\textsuperscript{146} See id. at 199 ("The question for us is not whether the regulation in fact advances the government interest, only whether the legislature might reasonably have thought that it would."). The Supreme Court stressed in \textit{Turner} that a rational basis review is "necessary if 'prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations.'" \textit{Turner}, 482 U.S. at 89 (1987) (alterations in original) (quoting \textit{Jones v. N.C. Prisoners' Union}, 433 U.S. 119, 128 (1977)).

\textsuperscript{147} See \textit{Amatel}, 156 F.3d at 199 (limiting judicial role to determining rationality of legislative judgment); see also \textit{Mauro v. Arpaio}, 188 F.3d 1054, 1060 (9th Cir.

http://digitalcommons.law.villanova.edu/mslj/vol13/iss1/2
Believing that Congress could have perceived pornography as frustrating the character growth of its consumers, the Amatel court concluded that the government could have rationally seen a connection between pornography and rehabilitative values. The court recognized that while the goals to be achieved from excluding pornography may be optimistic, they are not irrational. Further, the Amatel court held that the legislative judgment was within the realm of reason.

To the contrary, the Ramirez court strongly opposed a deferential approach to the rational basis standard of review, and instead deemed the courts responsible for carefully scrutinizing the government’s reasons for infringing upon a prisoner’s First Amendment rights. The Amatel dissent suggested that the rationality inquiry should be “whether a challenged regulation is, in fact, reasonable or whether it is an ‘exaggerated response’ to the ‘legitimate government interest put forward to justify it.’” Even under a reasonableness test, some courts have performed a more in-depth review to avoid blind acceptance of the legislature’s reasoning. The Amatel dissent voiced a significant concern: “but were [the courts] simply to defer to Congress’s assertion that the Ensign Amendment... was reasonably related to the interest asserted, there would be no need for judicial review at all, for no statute infringing on inmates’ con-

148. See Amatel, 156 F.3d at 199 (demonstrating legislative deference). But see id. at 205 (Wald, J., dissenting) ("[T]he majority appears to [permit] unblinking deference to any 'plausible' legislative judgment about the 'rehabilitative' benefits of denying a prisoner's most fundamental constitutional right . . . ").

149. See id. at 199 (confirming rational connection).

150. See id. at 200 (finding pornography ban satisfied Turner's reasonableness standard).

151. See Ramirez v. Pugh, 379 F.3d 122, 128-29 (3d Cir. 2004) (enforcing stricter rational basis review); see also Thornburgh v. Abbott, 490 U.S. 401, 414 (1989) (discouraging assumption that government is correct and encouraging more searching review of government's reasons).

152. Amatel, 156 F.3d at 205 (Wald, J., dissenting) (quoting Turner v. Safley, 482 U.S. 78, 89-90 (1987)). “The Court did not say, for example, that prison regulations are valid if there is any conceivable basis for their existence, as rational basis review is typically formulated.” Id. (relying on Supreme Court case law). See, e.g., United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980) (noting rational basis review is not complete until “plausible reasons for Congress’ action” are identified).

153. See Campbell v. Miller, 787 F.2d 217, 227 n.17 (7th Cir. 1986) ("[D]efinition of the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute."); see also Miness, supra note 9, at 1739 (noting justification for higher standard of review).
stitutional rights would fail to satisfy the test." Thus, the Ramirez court has required the government to describe the exact rehabilitation goal in order to justify the challenged regulation's rationality.

d. Evidentiary Record

The most divisive aspect between the opinions of the Third Circuit and the D.C. Circuit is the requirement of an evidentiary record to determine the rationality of the link between the regulation and the government rehabilitation interest. Without record evidence, sophisticated multiple regression analyses, and social science data, the Amatel court adhered to the view that "conformity to commonsensical intuitive judgments is a standard element of both reasonableness and rationality." The D.C. Circuit believed the Turner holding did not require a more thorough inquiry.

Relying on common sense, the Amatel court concluded that "prisoners are more likely to develop ... self-control and respect for others if prevented from" viewing "degrading and disrespectful pictures." In finding that pornography harmed the rehabilitation efforts, the Amatel court was highly influenced by the following observations: (1) nonviolent pornography can lead to short-term increases in angered men's aggressiveness, (2) pornography can provide ideas for rape, and (3) pornography can lead to more

154. Amatel, 156 F.3d at 205-06 (Wald, J., dissenting) (noting possible result when deference goes too far).

155. See Ramirez, 379 F.3d at 129 (relying on Wolf holding). Conclusory statements make it difficult to determine what connection a court sees between the advanced penological interest and a prison regulation. See Wolf v. Ashcroft, 297 F.3d 305, 308 (3d Cir. 2002).

156. Compare Ramirez, 379 F.3d at 130-31 (requiring evidentiary record), with Amatel, 156 F.3d at 199-203 (determining connection without evidentiary record).

157. Amatel, 156 F.3d at 199 (arguing that courts should rely on common sense rather than hard data).

158. See id. (noting that court is abiding by Turner). The Amatel court believed the Turner Court only searched the record for proof of a rational link between the security interest and the marriage ban because common sense did not suggest a link. See id.

159. Id. (making conclusion based on common sense observation that viewing pornography has unwanted, implicit effects).

160. See id. at 200 (citing DONNERSTEIN, supra note 134, at 40-48) (noting harmful effect attributed to pornography).

161. See id. (citing LARRY BARON & MURRAY A. STRAUSS, FOUR THEORIES OF RAPE IN AMERICAN SOCIETY 185-87 (Yale University Press 1989) (noting correlation between pornography and sex crimes)). Using evidence from Larry Baron and Murray A. Strauss, the Amatel court concluded that "a prohibition of pornography is a reasonable element of a struggle against machismo and its ill effects." Id. (rely-
tolerance of violence against women. The court was careful not to suggest a causal link between pornography and violence against women; however, it maintained that rewriting legislation was not the judiciary's role. The Amatel court held that the legislative judgment was "within the realm of reason under the standards applicable to the political branches' management of prisons." Because the court is only required to find a reasonable connection between the legislative goals and subsequent actions, the D.C. Circuit was satisfied, despite scientific indeterminacy.

The Amatel court opposed using prisoner-by-prisoner determinations to verify whether a particular publication will harm a prisoner's rehabilitation. The court reasoned that such determinations are costly, administratively burdensome, and become futile because prisoners are likely to share the pornographic materials with fellow inmates. The D.C. Circuit further asserted that the Ensign Amendment would probably not exclude harmless materials. In addition, the court emphasized that the ban only
applied to pictures; consequently, the ban could be seen as strengthening the impact of literature because there are no distracting pictures.169 Dismissing the need for an evidentiary record, the Amatel court refused to remand the case to the district court to allow for the introduction of evidence.170 Rather, the court reinforced that the issue was not whether pornography will hinder the prisoner's rehabilitation, but whether Congress could have reasonably believed that pornography would harm rehabilitation.171

In contrast to the D.C. Circuit, the Third Circuit believed that the development of a factual record was necessary.172 The Ramirez court was not convinced that the connection between the Ensign Amendment and the government's rehabilitation interest was obvious when applied to a diverse federal inmate population.173 The Third Circuit previously stated, "[W]hile the connection may be a matter of common sense in certain instances, . . . there may be situations in which the connection is not so apparent and does require factual development."174 In congruence with the Ramirez court, the United States Supreme Court previously indicated that the "individualized nature" of determinations ensures a policy that would not result in "needless exclusions."175 Further, Justice Wald's dissent in Amatel asserted that a regulation's reasonableness must be supported by evidence demonstrating the rational connection between a regulation and a legitimate penological interest.176

169. See id. at 202 (noting prisoners can read what they please) (italics in original).
170. See id. at 202-03 (suggesting that plaintiff's insistence to remand "misconceives the legal issue under [Turner]").
171. See id. at 203 (finding Ensign Amendment reasonable in relation to governmental interest in rehabilitation).
173. See id. (finding rational relationship between regulation and government interest not facially obvious in all cases).
174. Wolf, 297 F.3d at 308 (emphasizing common sense standard does not apply in every situation). Whether the connection is to be determined only by common sense depends on the nature of the right. See id. The Third Circuit has found that in addition to the first prong of the Turner test, the remaining three prongs are fact-specific. See id. at 310 (requiring record-sensitive analysis).
176. See Amatel, 156 F.3d at 207 (Wald, J., dissenting) (detailing Wald's disagreement with majority opinion). Justice Wald acknowledged that there are situations where the connection between the ban and rehabilitation interest is obvious; however, the connection between the ban on nudity and rehabilitation is murky, and because courts are disconnected from a prison's daily operations, they are less able to assert the connection accurately. See id. Justice Wald stated:
The Third Circuit is not alone in its requirement of an evidentiary record; other jurisdictions have also required evidence to determine the rationality between a prison restriction and the government's penological interest. The Court of Appeals for the Seventh Circuit has ordered that in compliance with *Turner*, prison administrators must offer evidence to support the prison's restriction of constitutional rights. In addition, the Tenth Circuit invalidated a restriction where the defendants could not provide any evidence showing the restrictions were reasonably related to prison security. Likewise, the Ninth Circuit has stated that prison authorities cannot rely on general or conclusory assertions, but rather must provide an evidentiary showing.

Research showing that the relationship between pornography and criminal activity was only correlative and not causative enhanced the need for evidence to support the connection between the ban on pornography and rehabilitation. Further, evidence proved that simply viewing depictions of sexual activities had no effect on the viewer. Even studies finding a positive connection

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177. *See id.* at 208 (listing other courts that have found need for evidentiary record).
178. *See Shimer v. Washington*, 100 F.3d 506, 509-10 (7th Cir. 1996) (requiring evidentiary support that restriction is reasonably related to penological interest). For a discussion of other courts requiring an evidentiary record, see *infra* notes 179-80 and accompanying text.
180. *See Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990), *aff'd*, 8 F.3d 33 (9th Cir. 1993) (demanding evidence to support connection between ban and interest). The Ninth Circuit has required that prison authorities "must first identify the specific penological interests involved and then demonstrate that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests," with an evidentiary showing required for each point. *Id.*
181. *See Amatel*, 156 F.3d at 208-09 (Wald, J., dissenting) (referring to questionable association between pornography and crime). The difference in meaning between these two words is imperative. "Correlative" means "related or corresponding." *Black's Law Dictionary* 281 (7th ed. 2000). "Causative" means "effective as a cause or producing a result." *Id.* at 173.
182. *See Amatel*, 156 F.3d at 209 (referring to *Donnerstein*, *supra* note 134, at 177) (asserting that scientific evidence could not show causation between non-violent and non-degrading sexual depictions and acts of sexual violence); *see also id.* (basing conclusions on Ernest D. Giglio, *The Danish Experience with Pornography*: Is
between violent pornography and aggressive behavior could not decipher whether the aggression was due to the material's violent content or sexual content. In light of such findings, the Ramirez court held, in contrast to Amatel, that an evidentiary record was necessary for evaluating the Ensign Amendment under Turner.

VI. IMPACT

a. Consequential Costs

The Third Circuit has taken a substantial step toward protecting prisoners' First Amendment rights by requiring an evidentiary record when determining the Ensign Amendment's constitutionality. Arguably, the costs of conducting prisoner-by-prisoner determinations will be an administrative burden, costly, and quickly made pointless when prisoners distribute the pornographic materials to other prisoners. Yet, in light of these possible consequences, the Third Circuit believed that limited distribution of pornographic materials can be conducted with de minimis costs to valid penological interests. A case-by-case review may not pose an additional administrative burden because under the Ensign Amendment prison officials are already required to examine each

There a Lesson for America?, in 8 COMPARATIVE SOCIAL RESEARCH 281, 285 (Richard F. Tomasson ed., 1985) ("[A] positive causal relationship between pornography and sex crimes has not been documented by criminologists and psychologists.").

183. See id. (Wald, J., dissenting) (noting inconclusive research results). See, e.g., Baron & Strauss, supra note 161, at 8 ("It seems reasonable to conclude . . . that it is the violent content rather than the sexual content that facilitates aggression.").

184. See Ramirez v. Pugh, 379 F.3d 122, 131 (3d Cir. 2004) (holding factual development is necessary). The Ramirez court required factual development not just for the first Turner factor, but also the remaining three factors. See id. at 130 (requiring evidentiary basis for three remaining Turner factors).

185. See id. at 124 (reversing district court which resolved constitutional issue without adequate factual basis).

186. See Amatel, 156 F.3d at 201 (addressing third factor by showing adverse impact on guards, other inmates, and prison resources if prisoner's right is accommodated). "Even if pornography could be directed only to those not likely to be adversely affected, it could find its way to others, interfering with their rehabilitation and increasing threats to safety." Id. (describing "ripple effect").

187. See Ramirez, 379 F.3d at 131 (noting that limited distribution at de minimis costs is not impossible). In Waterman, the Third Circuit found the third and fourth Turner prongs satisfied because the facility in question was insufficiently staffed to conduct case-by-case reviews and prisoners were "more than likely" to pass materials along to each other. See Waterman v. Farmer, 183 F.3d 208, 220 (3d Cir. 1999) (holding that costs of case-by-case determinations would not be de minimis). Yet, if there was sufficient staffing, limited distribution could be achieved at de minimis costs. See Ramirez, 379 F.3d at 131 ("[I]t does not follow from our decision in Waterman that limited distribution can never be conducted at de minimus costs to valid penological interests.").
publication and determine whether it is sexually explicit or features nudity.\textsuperscript{188} Moreover, resources can be further conserved by utilizing the psychological examinations routinely performed on inmates to determine if they are eligible to receive sexually explicit materials.\textsuperscript{189}

b. A New Standard of Review?

Some have suggested that intermediate scrutiny should be used to evaluate the constitutionality of prison regulations, instead of relying on the rational basis review of the \textit{Turner} test.\textsuperscript{190} With certain courts becoming increasingly deferential to prison authorities, this intermediate scrutiny may stop "[the] progression toward complete abrogation of prisoners' First Amendment rights."\textsuperscript{191} While rehabilitation, order, and security are substantial interests, prison administrators would have to show how banning sexually explicit material from inmates would actually promote those interests.\textsuperscript{192} Intermediate scrutiny review of a prison regulation supports the \textit{Ramirez} court's justification for a required evidentiary record.\textsuperscript{193} The Third Circuit in \textit{Ramirez} has addressed the same concerns that an intermediate scrutiny proposal seeks to solve by maintaining the reasonableness standard under \textit{Turner}, and additionally requiring

\textsuperscript{188} See Amatel, 156 F.3d at 213 (Wald, J., dissenting) (suggesting that additional administrative burden may not exist); see also Miness, supra note 9, at 1734 ("Because a complete ban would still require officials to inspect publications, a case-by-case approach would be no more burdensome on prison resources and administrators than an overly broad scheme.").

\textsuperscript{189} See Miness, supra note 9, at 1734 (arguing that preserving prisoner's constitutional rights does not add to administrative costs).

\textsuperscript{190} See id. at 1726 (suggesting intermediate scrutiny test would complicate restriction of pornographic materials in jails). The intermediate scrutiny standard asks whether the classification has a substantial relationship to an important government interest. See id. at 1710 n.64 (citing to John E. Nowak & Ronald D. Rotunda, \textit{Constitutional Law} § 14.3, at 601-02 (5th ed. 1995)) (asserting that courts should "independently determine the degree of relationship which the classification bears to a constitutionally compelling end").

\textsuperscript{191} Miness, supra note 9, at 1727 (explaining purpose of intermediate scrutiny). "Categorical censorship of publications compromises inmates' First Amendment rights to free speech and expression, rights which the Supreme Court usually protects vigorously." \textit{Id.} (footnotes omitted).

\textsuperscript{192} See id. at 1732 (illustrating effect of increased level of scrutiny). Prison officials would have to offer proof that a link between the regulation and the government interest exists. \textit{See id.}

\textsuperscript{193} Compare Ramirez v. Pugh, 379 F.3d 122, 128 (3d Cir. 2004) (requiring factual record to establish connection between Ensign Amendment and rehabilitation), with Miness, supra note 9, at 1727-36 (asserting need for evidence to support government interest promoted by prison regulation).
an evidentiary record to prove the relationship between the penological interest and the prison regulation.194

c. The Rights of Others

Cases challenging the constitutionality of the Ensign Amendment address more than just prisoners’ rights.195 While in Ramirez the prisoner was the sole plaintiff, in Amatel the plaintiffs included the prisoners, the publishers of the sexually explicit magazines, and the publishing trade organization.196 The Turner reasonableness standard governs “regulations that affect rights of prisoners and outsiders.”197 It is a natural consequence that the free citizens’ First Amendment rights are implicated when prisoners’ mail is censored.198 Requiring an evidentiary record to determine the Ensign Amendment’s constitutionality furthers the rights of publishers and those sending mail to prisoners because those publications and letters will not be categorically banned.199

d. Conclusion

The Third Circuit’s holding is a victory for Ramirez and other prisoners who were denied publications because they were “sexually explicit” or “featured nudity,” even though their imprisonment resulted from non-sexual crimes.200 Creating a circuit split, the Third

194. See Miness, supra note 9, at 1729-30 (describing possible harms that can occur with application of loose reasonableness standard). Such concerns include that an inmate’s constitutional rights can be ignored when the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that interest and the regulation. See Thornburgh v. Abbott, 490 U.S. 401, 434 n.18 (1984) (Stevens, J., concurring in part and dissenting in part). Because of deference to prison authority, there is the possibility that inmates would be stripped of all free communication with those outside the prison. See id.

195. See Amatel v. Reno, 156 F.3d 192, 195 (D.C. Cir. 1998) (noting publishers of magazines and publishing trade organizations made suits similar to prisoners’ suits).

196. See Ramirez, 379 F.3d at 125 (stating plaintiff as Marc Ramirez): Amatel, 156 F.3d at 195 (listing plaintiffs as three prisoners, publishers of Playboy and Penthouse, and publishing trade organization).

197. Thornburgh, 490 U.S. at 410 n.9 (emphasis added) (demonstrating that Turner test applies to prisoners as well as publishers). Justice Stevens’s dissent in Thornburgh referred to the rights of non-prisoners “who have a particularized interest in communicating with [prisoners]” as “inextricably meshed” with those of prisoners. Id. at 423 (Stevens, J., concurring in part and dissenting in part).

198. See id. at 423 (Stevens, J., concurring in part and dissenting in part); see also Miness, supra note 9, at 1731 (relying on Justice Stevens’s dissent).

199. See Ramirez, 379 F.3d at 131 (requiring evidentiary record to prove rational link between sexually explicit material and harm to government’s rehabilitative efforts).

200. See Duffy, supra note 5, at 9 (explaining outcome of Ramirez case).
Circuit did not find the connection between the Ensign Amendment and the government's rehabilitative interest obvious upon consideration of the entire federal inmate population. The Ramirez court gave the parties an opportunity to adduce sufficient evidence for a court to determine whether the connection between the goal of rehabilitation and the restriction of sexually explicit materials is rational under Turner.

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201. Compare Ramirez, 379 F.3d at 129 (finding first prong of Turner test could not be satisfied based on common sense alone), with Amatel, 156 F.3d at 199 (applying common sense to find rational connection between prison regulation and government interest).

202. See Ramirez, 379 F.3d at 128, 131 (remanding to district court with this instruction).