FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEIL GRENNING, *Plaintiff - Appellant*, v. JAMES R KEY, sued in his official and individual capacities; ANN WISE, sued in her official and individual capacities, *Defendants - Appellees*.	No. 23-3018 D.C. No. 2:22-cv-00136-MKD OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Mary K. Dimke, District Judge, Presiding

Argued and Submitted February 11, 2026
Seattle, Washington

Filed August 26, 2026

Before: M. Margaret McKeown, William A. Fletcher, and Patrick J. Bumatay, Circuit Judges.

Opinion by Judge McKeown;
Dissent by Judge Bumatay

SUMMARY*

First Amendment

The panel reversed the district court's summary judgment for prison officials and remanded in Neil Grenning's 42 U.S.C. § 1983 action alleging that his First Amendment rights were violated when prison officials refused to submit a story he wrote to a university literary journal.

While incarcerated, Grenning participated in a prison writing program and wrote a short story that referred to a moment of sexual intimacy. When he submitted his story to a university journal affiliated with the writing program, defendant Ann Wise, the prison's Community Partnership Program Coordinator, intercepted his outgoing story and returned it to him because she deemed it "inappropriate for publication" because of its "sexual content." Grenning then mailed the story directly to the university and complained to defendant James Key, the prison superintendent. Key subsequently endorsed the decision to block Grenning's submission and warned Grenning he would be removed from the writing program if he again sent correspondence directly to a journal volunteer without prior approval.

Grenning filed suit, alleging that the prison violated his First Amendment rights by censoring his submission and retaliating against him for exercising those rights. The district court granted the prison's summary judgment motion, deciding that Wise and Key had not violated

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Grenning's First Amendment rights, and even if they had violated Grenning's rights, their actions were protected by qualified immunity. The district court also found no retaliation.

Reversing the district court's summary judgment order, including its qualified immunity determination, the panel held that the district court erred by applying the standard in *Turner v. Safley*, 482 U.S. 78 (1987), which governs most regulations of prisoner conduct, instead of the standard from *Procunier v. Martinez*, 416 U.S. 396 (1974), which governs outgoing inmate correspondence. Because Grenning's censorship claim turns on a prison official's content-driven screening of outgoing inmate correspondence, *Martinez* applied.

The panel held that viewed in the light most favorable to Grenning, the record demonstrates genuine disputes of fact, which, if proven at trial, would support the conclusion that Wise's refusal to transmit Grenning's story to the university journal constituted censorship prohibited by the First Amendment. Furthermore, *Martinez* clearly established Grenning's right not to have prison officials refuse to transmit his nonthreatening outgoing correspondence to an outside recipient because they disapproved of its content or feared the public's reaction to it.

The panel noted that they would be compelled to reverse even if *Turner* applied because there was no valid, rational connection between the decision to bar Grenning's story and the asserted penological interests.

The panel further held that the district court erred in granting summary judgment on Grenning's retaliation claim by relying on an Eighth Amendment retaliation case. On remand, the district court should address the claim under

Rhodes v. Robinson, 408 F.3d 559 (9th Cir. 2005), which sets forth the basic elements for a viable claim of First Amendment retaliation in the prison context.

Dissenting, Jude Bumatay would apply *Turner*'s deferential standard and conclude that there was no First Amendment violation. Even if there were a First Amendment violation, he would hold that Wise and Key are entitled to qualified immunity because Grenning's right to publish work—without approval—created while participating in a prison program was not clearly established at the time of Wise and Key's conduct. Judge Bumatay would also affirm the district court's summary judgment for Key on the retaliation claim, because Key's threat was a result of Grenning violating the writing program's policies, not "because of" Grenning's protected conduct.

COUNSEL

Brendan D. Duffy (argued), Chloe M. Meade, Garrett W. Callen, Eric M. Walker, and William D. Coglianese, Jones Day, Washington, D.C., for Plaintiff-Appellant.

Michelle M. Young (argued), Assistant Attorney General, Corrections Division; Nicholas W. Brown, Washington Attorney General; Office of the Washington Attorney General, Olympia, Washington; Kelly A. Fitzgerald, Assistant Attorney General, Office of the Washington Attorney General, Spokane, Washington; for Defendants-Appellees.

OPINION

McKEOWN, Circuit Judge:

Free speech does not vanish at the prison gate. In the course of his incarceration and as part of a prison writing program, Neil Grenning wrote a short story that referred to a moment of sexual intimacy. When he submitted his story to a university journal affiliated with the writing program, a prison employee barred the story as "inappropriate for publication" because of its "sexual content." Grenning then mailed the story directly to the university and complained to the prison superintendent, who subsequently endorsed the decision to block his submission. The superintendent also warned Grenning that if he ever again sent correspondence directly to a journal volunteer without prior approval, he would be removed from the writing program.

In rejecting Grenning's First Amendment censorship claim, the district court sidestepped the standard that governs outgoing inmate correspondence as laid out in *Procunier v. Martinez*, 416 U.S. 396 (1974). The court also misconstrued the standard that applies to Grenning's retaliation claim. We reverse and remand.

Background

Grenning is an inmate at Airway Heights Corrections Center ("the prison") serving a sentence for multiple sex crime convictions. While incarcerated, Grenning enrolled in a writing program. The Writers in the Community course is sponsored by Eastern Washington University ("EWU" or "the university") and encourages participants to develop their writing skills and submit their work for potential publication in *InRoads*, a literary journal.

Writers in the Community courses are held in various settings in and around Spokane, and *InRoads* publishes works by participants of all ages, including elementary school students. The writing program informed enrolled inmates that to be submitted to *InRoads*, their works needed to be "approved" by Ann Wise, the prison's Community Partnership Program Coordinator. Everyone, prisoner or otherwise, who submitted their writing to *InRoads* had to acknowledge that "the audience of *InRoads* includes children and special populations, sensitive to any kind of explicit material." The submission agreement cautioned that *InRoads* may feature "[m]ature themes and adult language," with "inclusion in *InRoads* . . . left to the managing editor's discretion." Prior works published in *InRoads* had included references to rape, teen pregnancy, drug use, suicide, arson, and death. The Writers in the Community syllabus required students to read books that included depictions of a young woman's sexual assault by a group of boys (Sandra Cisneros's *The House on Mango Street*) and a character's fantasy of forcefully carrying a woman upstairs and tying her to a bed (Tim O'Brien's *The Things They Carried*).

As part of the program, Grenning wrote "Dark Room," a short story that explored the protagonist's relationship with his daughter, Kayla, and his attempts to talk to Kayla about his wife, who had died by suicide. "Dark Room" described a moment of sexual intimacy with his late wife:

> Smell of her breath after jogging a mile to Einstein's Bagels and back before dawn. Before she was pregnant. Before five hours of labor ended with you. That fiery sweat of exuberant energy when we screwed barefoot against the unfinish drywall of the washroom.

> I smell fresh caulk and syrup sticky sex the same way. Time before Diagnosed Conditions ending in Ideation. None of which I can explain to Kayla.

Grenning read this story to his class, and one of the instructors told him that it was "well-written" and "close to being finished."

The Washington Department of Corrections policy governing publications states that "[m]ail to *or from* offenders, including publications . . . may be rejected" if the "[p]ublications . . . contain *significant* or *repeated* instances of content defined per WAC 137-48-020(13)(a)-(b) . . . ." The Washington regulation cited in the policy defines "[s]exually explicit materials" to describe, among others, "a sex act which includes, but is not limited to, genital-genital, oral-genital, anal-genital, or oral-anal contact/penetration, genital or anal contact/penetration with an inanimate object, masturbation, and/or bodily excretory behavior." WAC 137-48-020(13)(b). The policy also states that "[p]ublications with content that violates any Department policy or facility specific procedure will be referred to the Publication Review Committee for further review and a final decision" and that "[p]ublications initially rejected as sexually explicit material per WAC 137-48-020 may be approved by the committee for artistic, health/medical, and educational purposes." The policy further prescribes general rules for outgoing mail, including that envelopes "be stamped with the following or similar message: 'This was mailed by an offender confined at the Washington State Department of Corrections facility. Its contents are uncensored.'" In this appeal, the prison officials

acknowledge that Grenning's story "was not graphic enough to violate the prison's restrictions."

Wise had requested that the Writers in the Community staff route all submissions to *InRoads* through her. After Grenning submitted his story to program staff, Wise reviewed it and barred it from publication. In her note to Grenning after intercepting his story, Wise stated: "Due to sexual content this writing submission is inappropriate for publication in the InRoads Book that includes distribution to minors." Wise did not cite any policy that the story allegedly violated. Nor is there indication that Grenning's story was ever reviewed by the Publications Review Committee.

Facing Wise's interception, Grenning mailed his story directly to Eastern Washington University. He also wrote a letter to prison superintendent James Key, objecting to Wise's interception and letting Key know that he had mailed the story to the university. Key responded:

> It is the responsibility of the [Community Partnership Program Coordinator] to ensure nothing leaves the institution through the volunteer program that could cause some negative publicity for the facility and department. I concur with her decision to not allow your story to be published by the volunteer group Writers in the Community.
>
> You stated in your letter that you had to send your story directly to EWU. This causes me concern, as you have bypassed our established processes. Policy does not allow for the volunteers to accept any correspondence without prior approval. If

> you send any correspondence directly to a volunteer again without prior approval, you will not be allowed to participate in this volunteer program.

After receiving the message from Key, Grenning filed a grievance with the prison. In notes taken after a meeting with the grievance coordinator, Grenning wrote that the coordinator "said he did not know any reason why [Grenning] would not be able to send material to a university through the mail."

Unbeknownst to Grenning, Wise also corresponded with the *InRoads* staff. A student director offered to edit "Dark Room" to address the concerns: "I have no objection to to [sic] attempting to edit the story in such a way that the problematic paragraph can be dropped entirely[.]" The student director also acknowledged that "even if Ann [Wise] had approved the piece in question," *InRoads* editorial staff "would most likely not have approved it after that (or only with cuts)." Wise asked the student director to send the story back to Grenning and tell him, "Thank you for your submission but this needs to go through the proper channels at the prison."

After his internal efforts went nowhere, Grenning filed this lawsuit and alleged that Key, Wise, and the prison violated his First Amendment rights by censoring his submission and retaliating against him for exercising those rights. He immediately sought discovery and requested that the prison produce the policy that governs screening of inmate publications as well as Wise's job description that authorized her to bar submissions to *InRoads*. It appears that the prison did not produce the requested documents by the required deadline. When Grenning served requests for

admission to Key and Wise after the discovery deadline, they replied that the requests were untimely. Stymied on discovery requests not fully answered, Grenning filed a motion to stay summary judgment until he had received the discovery. Later, when the prison moved for summary judgment and Grenning attempted to file an opposition through the prison counselor, the scanned document was apparently never forwarded to the legal librarian for electronic filing.

The district court granted the prison's summary judgment motion, deciding that Wise and Key had not violated Grenning's First Amendment rights because the prison had "an important government interest in preventing inmates from using their educational programs to disseminate sexual material to children" and "an interest in ensuring nothing leaves the institution through the [Writers in the Community] that could cause negative publicity for the facility or department," protected by *Turner v. Safley*, 482 U.S. 78 (1987). The court further decided that even if Key and Wise's refusal to transmit "Dark Room" to *InRoads* had violated Grenning's rights, their actions were protected by qualified immunity. The court also found no retaliation and denied Grenning's motion to stay the summary judgment proceedings pending receipt of discovery. Grenning's motion to vacate and set aside the judgment under Rule 59(e) was denied. With the benefit of pro bono counsel, Grenning timely appealed the denial of summary judgment and the motion to vacate and set aside the judgment.[1]

[1] Grenning's pro bono counsel has capably discharged his responsibility, and we thank him for his substantial efforts.

Analysis

Grenning's appeal turns on two constitutional theories and two claims of procedural error. He argues that Wise's refusal to forward his short story to *InRoads* constituted censorship that violated the First Amendment, and that those rights were clearly established at the time of the violation. He also contends that Key's threat to expel him from the writing program was "textbook retaliation" in violation of the First Amendment. Separately, Grenning claims that the district court wrongly denied him additional discovery despite his diligence and the demonstrated effect of that discovery on the summary judgment decision. He finally argues that the district court's refusal to consider his belated opposition brief violated Rule 56. The parties focused most of their time on the censorship claim, which is a logical starting point.

I. Censorship

The parties acknowledge the baseline principle that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555–56 (1974). Grenning does not argue that he has a constitutionally protected right to publication in *InRoads*. *See Pell v. Procunier*, 417 U.S. 817, 821–22 (1974). We address instead whether Grenning had a right to have his story transmitted to the journal for consideration.

Reviewing de novo the district court's summary judgment order, including its qualified immunity determination, we reverse. *See Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 776 (9th Cir. 2022). The district court applied the four-factor test from *Turner*, which governs most regulations of prisoner conduct, instead of the standard from *Martinez*, which continues to apply to

outgoing inmate correspondence. Viewed in the light most favorable to Grenning, *id.*, the record demonstrates genuine disputes of fact, which, if proven at trial, would support the conclusion that Wise's refusal to transmit "Dark Room" to *InRoads* constituted censorship prohibited by the First Amendment. *See Martinez*, 416 U.S. at 413–15. *Martinez* and its progeny clearly established Grenning's right not to have prison officials refuse to transmit his nonthreatening outgoing correspondence to an outside recipient because they disapproved of its content or feared the public's reaction to it, unless the officials could establish a sufficiently close fit between the restrictions and a concrete substantial or important interest in security, order, or rehabilitation. *See id.*; *Barrett v. Belleque*, 544 F.3d 1060, 1062 (9th Cir. 2008) (per curiam).

We conclude that *Martinez* applies because this claim, like the ones asserted in *Martinez*, turns on a prison official's content-driven screening of outgoing inmate correspondence. *Martinez* announced the following standard under which "censorship of prisoner mail is justified":

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. Prison officials may not censor inmate correspondence simply to eliminate unflattering or unwelcome opinions or factually inaccurate statements. Rather, they must show that a regulation authorizing mail censorship furthers one or more of the substantial governmental interests of security, order, and

> rehabilitation. Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved. Thus a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad.

Id. at 413–14. As the Court explained, the "interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment." *Id.* at 418. That liberty interest accordingly demands appropriate "minimum procedural safeguards." *Id.* at 417.

The standard announced in *Martinez* governs this case.[2] Indeed, both Grenning's case and *Martinez* involve a strikingly similar sequence of constitutionally relevant facts. Wise's actions echo those of the officials in *Martinez*, who screened "outgoing personal mail" and, when they disapproved of a prisoner's writing, could "refuse to mail or deliver the letter and return it to the author." *Id.* at 399–400. One of the rules that the Court held unconstitutional permitted prison officials to censor correspondences that they deemed "lewd" or "obscene." *Id.* at 400. Wise, too,

[2] We reject the argument that the First Amendment is not implicated because "Dark Room" eventually made it to *InRoads*. The very "refus[al] to mail or deliver" outgoing inmate correspondence may constitute censorship, even if that correspondence reaches its destination by other means. *Martinez*, 416 U.S. at 400, 417.

intercepted Grenning's outgoing short story and returned it to him because she deemed the story "inappropriate for publication" because of its "sexual content." The rejection came even though other issues of *InRoads* had allowed "[m]ature themes and adult language," and the syllabus had assigned works containing substantially more explicit material and stated only that "[s]ubmissions with graphic content" would be returned. Wise's rejection lacked any explanation based on "the substantial governmental interests of security, order, and rehabilitation" that the Court has recognized as constitutionally valid. *Id.* at 413. Rather, her decision turned on elastic, content-based "discretion[ary]" judgments—precisely what was deemed unconstitutional in *Martinez*. *Id.* at 415. The rationale that Key eventually provided in Grenning's case—that Wise had "to ensure nothing leaves the institution" that might cause "negative publicity" to the prison—mirrors the logic of the rules invalidated in *Martinez* that worked "simply to eliminate unflattering or unwelcome" perspectives, and "invited prison officials . . . to apply their own personal prejudices and opinions." *Id.* at 413, 415. The adequacy of the prison's rationale goes to the legitimacy of the penological interests asserted, whether the restrictions imposed were generally necessary to give effect to those interests, and the procedural rights that Grenning was guaranteed. Indeed, Grenning was guaranteed "minimum procedural safeguards," possibly including review from the Publications Review Committee. *Id.* at 417. There is no indication in the record that the prison made good on that guarantee. If proven at trial, that failure would show that Grenning was deprived of the opportunity to have "Dark Room" considered by *InRoads* without impediment by the prison. These similarities demonstrate that Grenning's case clearly comes within *Martinez*'s ambit.

To be sure, rehabilitation is a "legitimate penological interest[]," *see Turner*, 482 U.S. at 89, and an "important or substantial" one, *Martinez*, 416 U.S. at 413. But the broad claim that censoring Grenning's story satisfies the goal of rehabilitation as one of "enhancing community safety, reducing recidivism, and achieving accountability through effective correctional programs," Brief for Appellees at 7, does not meet *Martinez*'s "less deferential" standard. *Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989). If we accepted that level of generality, rehabilitation would stop being an important or substantial governmental interest and become the exception that swallows the rule. On this view, an official could suppress any content that she deems inconsistent with conclusory assertions of "accountability," "appropriate communication standards," or "appropriate boundaries" by claiming that doing so would be rehabilitative. Brief for Appellees at 37. The *Martinez* standard requires "a closer fit," with regulations on outbound mail tailored to prevent "danger to the community *inside* the prison." *Thornburgh*, 490 U.S. at 411–12. Nor can the specter of "negative publicity" to the prison justify the rejection. Brief for Appellees at 38.[3]

Simply put, the record supports the view that Key and Wise refused to allow Grenning's written expression to leave the prison based on its content. That the intended destination

[3] The Court in *Thornburgh* clarified that *Martinez* did not impose a "least restrictive means requirement," *Thornburgh*, 490 U.S. at 411, and we do not endorse one here. *Contra* Dissent at 38–40. But neither *Turner*, which the dissent favors, *see* Dissent at 34–38, nor *Martinez*, which the dissent would sub silentio overturn, *id.* at 38–39, blessed the use of the *most* restrictive approach to outgoing prisoner correspondence. Invoking the "rehabilitation" moniker does not magically make censorship constitutional.

of Grenning's writing was a literary journal does not alter the analysis.

The argument that "a screening requirement" for outgoing inmate mail does not regulate inmate speech runs smack into the teaching of *Martinez*. The rights protected by the First Amendment may not be "renamed away" or have their "protections nullified by mere labels." *Chiles v. Salazar*, 146 S. Ct. 1010, 1021 (2026) (citation modified). The government cannot refuse to externally transmit a short story to a literary journal because it contains a passing reference to sexual intimacy and call that refusal "screening," "prescreening," or an unspecified "prison approval" rule. Call it what you want, the refusal was content-based, pure and simple. The government cannot foil a First Amendment claim with a thesaurus.

Viewed in the light most favorable to Grenning as the nonmovant, *Dodge*, 56 F.4th at 773, the record bespeaks genuine issues of material fact that relate to the alleged constitutional violation. Those facts relate to the claimed policy governing Grenning's submission, the extent and nature of the procedural safeguards that the policy provided to inmate submissions, whether Grenning's attempt to submit "Dark Room" to *InRoads* violated that policy, the reasons why Wise decided to bar the story and Key supported that decision, and the availability of alternatives such as editing the contested sentence out of the story. Those issues render summary judgment inappropriate. *Id.*

In light of *Martinez*, we conclude that Grenning had a clearly established right not to have Key and Wise refuse to transmit his nonthreatening outgoing written expression because they disapproved of its content or feared the public's reaction to it, unless they could establish a sufficiently

"close[] fit," *Thornburgh*, 490 U.S. at 412, between that restriction and "one or more of the substantial governmental interests of security, order, and rehabilitation," *Martinez*, 416 U.S. at 413, in a way that was "unrelated to the suppression of expression," *id.* at 413, and as long as the restriction's "sweep" was not "unnecessarily broad," *id.* at 414.

As the discussion of the similarities between *Martinez* and Grenning's case demonstrates, *supra* pp. 13–14, *Martinez* and its progeny "placed the . . . constitutional question beyond debate." *White v. Pauly*, 580 U.S. 73, 79 (2017) (citation omitted). Supreme Court precedent made "the contours of the right sufficiently clear" such that "every reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (citation modified). Put differently, because the gravamen of the inquiry is "fair warning" and "fair notice," *Hope v. Pelzer*, 536 U.S. 730, 741–42 (2002), Grenning need not point us to "a case directly on point." *Al-Kidd*, 563 U.S. at 741. But with *Martinez*, he has certainly come as close as possible.

The Department of Corrections policy made the same rule concrete for Key and Wise. The policy allowed inspection and reading of mail to prevent contraband, threats to "facility order or security," and criminal activity and expressly explained that mail rejection would be based on "legitimate penological interests." The policy also contemplated that "the contents" of an inmate's mail that left the prison would be "uncensored," and provided that only publications with "sexually explicit material" such as the act described in "Dark Room" would need to "contain significant or repeated instances" of prurient content to be subject to rejection. While the policy does not itself clearly

establish a constitutional right, it nonetheless remains "relevant . . . to whether reasonable officers would have been on *notice* that" their conduct violated the First Amendment. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003).

The backdrop of the Supreme Court's jurisprudence regarding content-based regulations of speech serves to explain our conclusion. It is well established that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). In view of "the First Amendment's jealous protections for the individual's right to think and speak freely," the Court has "long held that [state action] regulating speech based on its subject matter or 'communicative content' [is] 'presumptively unconstitutional.'" *Chiles*, 146 S. Ct. at 1021 (citation omitted).[4] While the shape of the doctrine has changed considerably since the Founding, "a demand that the government act neutrally with respect to the content of the speech it regulates . . . has been a feature of free-speech law in the United States since the eighteenth century."

[4] Prison writings have an equally storied past. *See, e.g.*, Boethius, *The Consolation of Philosophy* (Victor Watts trans., Penguin Classics rev. ed. 1999) (philosophical work written while Boethius was imprisoned and awaiting execution for treason in the sixth century); *The Forlorn Hope*, Mar. 24, 1800 (newspaper written and published by inmates in a New York debtors' prison); Oscar Wilde, *De Profundis and Other Prison Writings* (Colm Tóibín ed., Penguin Classics 2000) (1905) (letter written during Wilde's imprisonment for gross indecency at Reading Gaol); Martin Luther King, Jr., *Letter from Birmingham Jail* (Apr. 16, 1963), University of Alabama Libraries Special Collections, https://perma.cc/5N7J-FCXN (letter written during King's Birmingham confinement in response to criticism of the civil rights movement).

Genevieve Lakier, *A Counter-History of First Amendment Neutrality*, 131 Yale L.J. Forum 873, 875 (2022). That presumption generally means that "content-based restrictions trigger strict scrutiny." *Chiles*, 146 S. Ct. at 1021 (citation modified).

The Court's decision in *Martinez* brought inmate mail into the First Amendment's analysis of content-based speech restrictions. To be sure, the protections of the First Amendment must be "applied in light of the special characteristics" of the environment. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In the prison context, the Court has applied those protections with an effort to give "due regard [to] the 'inordinately difficult undertaking' that is modern prison administration." *Thornburgh*, 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 85).

For a large part of their history, however, the federal courts "adopted a broad hands-off attitude toward problems of prison administration," including regulations on prisoner speech. *Martinez*, 416 U.S. at 403. That attitude reflected a notion that the prisoner was "the slave of the State." *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). As that understanding began to evolve in the lower courts, *see, e.g.*, *Weller v. Dickson*, 314 F.2d 598, 599–601 (9th Cir. 1963) (a prisoner could bring an "action[] for damages under the Civil Rights Act, 42 U.S.C. §§ 1981–1988, against various officials of the State of California"), the Supreme Court recognized a state prisoner's right to sue prison officials under Section 1983 for First Amendment violations in *Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam). The Court's decision in *Martinez* came a decade later and recognized that "a policy of judicial restraint" with respect to prison administration "cannot encompass any failure to

take cognizance of valid constitutional claims." *Martinez*, 416 U.S. at 405.

Following *Martinez*, the Court in *Turner* articulated a more deferential reasonableness test for ordinary prison regulations. *See* 482 U.S. at 90. The Court subsequently, in *Thornburgh*, applied the *Turner* standard to *incoming* publications while preserving the *Martinez* heightened standard for *outgoing* correspondence. 490 U.S. at 412–13. The Court recognized both that outgoing correspondence was *Martinez*'s "central focus" and that "the implications of outgoing correspondence for prison security are of a categorically lesser magnitude than the implications of incoming materials." *Thornburgh*, 490 U.S. at 412–13. More recently, the Court applied *Turner* to inmate-to-inmate legal correspondence and declined to recognize heightened protection "above and beyond the protection normally accorded prisoners' speech" in that context, *Shaw v. Murphy*, 532 U.S. 223, 231 (2001), but "did not address the right of prisoners to send mail outside the prison—the regulation of which is governed by the *Martinez* standard." *Koutnik v. Brown*, 456 F.3d 777, 784 n.4 (7th Cir. 2006). Each time the Court has considered the scope of *Martinez*, it has preserved the application of that standard to outgoing inmate correspondence, while also reaffirming the principle that incarceration does not send the inmate into a void beyond the Constitution's reach.

We too have reaffirmed that regulation of outgoing inmate correspondence sits squarely in *Martinez*'s domain. *See Barrett*, 544 F.3d at 1062 ("*Procunier* [*v. Martinez*] is controlling law in the Ninth Circuit and elsewhere as applied to claims involving outgoing prisoner mail."); *Lane v. Salazar*, 911 F.3d 942, 945, 948–50 (9th Cir. 2018) (applying *Martinez* to discipline for statements in outgoing

letters and holding that threats of bodily harm "address[] legitimate penological concerns in a manner that is sufficiently narrow to satisfy constitutional concerns"); *Lane v. Swain*, 910 F.3d 1293, 1294, 1297 (9th Cir. 2018) (holding that Federal Bureau of Prisons Prohibited Acts Code 203, which bars "[t]hreatening another with bodily harm or any other offense" constitutes "a sufficiently 'close fit' with [the asserted] legitimate interests to pass the *Procunier* [*v. Martinez*] test"); *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995) (per curiam) ("When a prison regulation affects outgoing mail as opposed to incoming mail, there must be a 'closer fit between the regulation and the purpose it serves.'" (quoting *Thornburgh*, 490 U.S. at 412)). We have, by contrast, applied *Turner* to assess "the constitutionality of prison rules that restrict the *ingress and possession* of sexually explicit materials." *Prison Legal News v. Ryan*, 39 F.4th 1121, 1129 (9th Cir. 2022) (emphasis added).

Other circuits similarly continue to distinguish between outgoing and incoming prisoner correspondence. *See Nasir v. Morgan*, 350 F.3d 366, 371 (3d Cir. 2003) ("Because *Thornburgh* holds that *Turner* does not squarely overrule *Martinez* as applied to outgoing mail, we will apply *Turner* to incoming mail and *Martinez* to outgoing correspondence."); *see also Brooks v. Andolina*, 826 F.2d 1266, 1268–69 (3d Cir. 1987) ("The *Turner* opinion . . . provides no support" where the prisoner was "not disciplined for communicating with other inmates, but for the contents of his letter to a person outside the prison system," because if officials "cannot censor unflattering statements made in letters to outsiders, they also may not punish an inmate for the contents of such letters."); *Loggins v. Delo*, 999 F.2d 364, 366–68 (8th Cir. 1993) (inmate's letter containing

"derogatory comments" about mailroom clerk did not "implicate [prison] security concerns" and thus the disciplining of the inmate was unconstitutional under *Martinez*); *McNamara v. Moody*, 606 F.2d 621, 624 (5th Cir. 1979) ("No [governmental] interest is implicated by the mailing of non-erotic vulgarities from a prisoner to a person on the outside," and if a "warden's purpose [was] to prevent strongly worded and exaggerated criticism of prison officials from reaching the public," that was "precisely the sort of purpose ruled impermissible by *Martinez*"). Unlike the dissent, we are persuaded by the weight of this authority that *Martinez* established an enduring "governing standard" that applies in this instance. Dissent at 33. While the domain of the *Martinez* rule has narrowed, its core—regulations that govern inmates' outgoing correspondence—remains intact.

We finally note that we would be compelled to reverse even if we agreed with the view that *Turner* applies in this circumstance. We have articulated the *Turner* factors as follows:

> (1) [W]hether there is a valid, rational connection between the policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) whether the impact of accommodating the asserted constitutional right will have a significant negative impact on prison guards, other inmates and the allocation of prison resources generally; and (4) whether the policy is an

> "exaggerated response" to the [prison]'s concerns.

Mauro v. Arpaio, 188 F.3d 1054, 1058–59 (9th Cir. 1999) (en banc) (quoting *Turner*, 482 U.S. at 89–90).

The suppression of Grenning's story founders on the first *Turner* factor, which is "a *sine qua non*" of the analysis. *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990). In our examination of that factor, we "determine whether the governmental objective underlying the policy is (1) legitimate, (2) neutral, and (3) whether the policy is 'rationally related to that objective.'" *Mauro*, 188 F.3d at 1059 (quoting *Thornburgh*, 490 U.S. at 414).

On this score, although the *Turner* test is deferential, it "does not make the First Amendment 'toothless.'" *Prison Legal News*, 39 F.4th at 1129 (quoting *Thornburgh*, 490 U.S. at 414). We have previously applied *Turner* to deem unconstitutional bans on incoming publications "that may, could reasonably be anticipated to, could reasonably result in, [are,] or appear[] to be intended to cause or encourage sexual excitement or arousal or hostile behaviors, or that depict[] sexually suggestive settings, poses or attire." *Id.* at 1133. In this case, Key's claimed goal of preventing negative publicity obviously would not be "legitimate" under *Turner*. *Id.* Nor would a talismanic invocation of "sexual content," on its own, legitimate the suppression "Dark Room." Look no further than the Department of Corrections' own policy, which bans incoming or outgoing publications that "contain *significant* or *repeated* instances of content defined" as "sex act[] which include[], but [are] not limited to, genital-genital, oral-genital, anal-genital, or oral-anal contact/penetration, genital or anal contact/penetration with an inanimate object, masturbation,

and/or bodily excretory behavior." *See* WAC 137-48-020(13)(b).

As Key and Wise acknowledge, Grenning's story "was not graphic enough to violate [those] restrictions." The policies regarding sexual content that we have previously deemed legitimate under *Turner* have included bans on "materials that show frontal nudity," *Mauro*, 188 F.3d at 1057, or bans on incoming mail "containing portrayals of certain actual or simulated sexual acts" that nonetheless permit material that has "scholarly value, or general social or literary value," *Bahrampour v. Lampert*, 356 F.3d 969, 972 (9th Cir. 2004). The decision to bar publication of "Dark Room" does not resemble those restrictions.

Nor is a generalized interest in rehabilitation sufficient in this circumstance. *See Turner*, 482 U.S. at 89. Typically, we have required a "policy of excluding sexually explicit materials" to be "*expressly* aimed at maintaining jail security, rehabilitating inmates and reducing sexual harassment of . . . detention officers." *Mauro*, 188 F.3d at 1059 (emphasis added) (citing *Thornburgh*, 482 U.S. at 415). To defend a policy, prison officials "must provide *evidence*" in support of their position. *Walker*, 917 F.2d at 385. Nothing in the record even hints that barring Grenning from submitting the story was necessary because publication of the story could "result in prohibited sexual activity or unwanted sexual behavior, including rape" inside the prison. *Bahrampour*, 356 F.3d at 972.[5]

[5] Even *Turner* does not task us with divining the purported reasons for the prison's regulation of inmate speech. We may not speculate, as the dissent does, whether permitting Grenning to submit his story for consideration by *InRoads* would "endanger[] both the prison and the public." Dissent at 37. Prison officials must "put forth" evidence of such

Relatedly, Key and Wise did not "draw distinctions" between permissible and impermissible story submissions "*solely* on the basis of their potential implications for prison security." *Thornburgh*, 490 U.S. at 415 (emphasis added).[6] In that sense, their decision to bar Grenning's story because it contained the words "exuberant energy," "screwed" or "syrup sticky sex," and because it would cause negative publicity for the prison was not "'neutral' in the technical sense in which [the Court] meant and used that term in *Turner*." *Id.* at 415–16.

Saying that the First Amendment's requirements are satisfied because "the presence of sexually *explicit* materials undermines [the Department's] goals" simply "goes too far." *Prison Legal News*, 39 F.4th at 1133. We identify no "valid, rational connection" between the decision to bar Grenning's story and the interests asserted here. *Turner*, 482 U.S. at 89 (citation omitted). Whether under *Martinez* or *Turner*, the government would need to demonstrate much more to prevail at summary judgment. Because the suppression of "Dark Room" "does not satisfy *Turner*'s first factor, . . . we need not consider the remaining factors." *Prison Legal News*, 39 F.4th at 1133.

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a danger before we may "defer[] to [their] judgment." *Walker*, 371 F.2d at 386.

[6] The word "solely" in the Court's decision in *Thornburgh* is no ornament. We reject the dissent's gloss on the neutrality requirement—that "[a] policy is neutral if its goal is not to suppress expression," Dissent at 34—because that approach oversimplifies the careful connection between a prison's regulation of inmate speech and the "potential effect on the prison's legitimate objectives" that the Supreme Court has drawn. *Mauro*, 188 F.3d at 1059.

II. Retaliation

In the prison context, a "viable claim of First Amendment retaliation" must contain the following five "basic elements":

> (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal.

Rhodes v. Robinson, 408 F.3d 559, 567–68 (9th Cir. 2005) (footnote omitted). The district court erred in granting summary judgment on Grenning's retaliation claim.

Under the First Amendment, the "mere *threat* of harm can be an adverse action, regardless of whether it is carried out[,] because the threat itself can have a chilling effect." *Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009). Key's letter warned Grenning that if he "sen[t] any correspondence directly to a volunteer again without prior approval," he would "not be allowed to participate in" the Writers in the Community program. Relying on *Gaut v. Sunn*, 810 F.2d 923 (9th Cir. 1987), an Eighth Amendment case, the district court decided that "[a] threat to remove [Grenning] from the [writing program] is not sufficient to be the basis of a retaliation claim." But Grenning's is a First Amendment case, not an Eighth Amendment case. The district court, on remand, should address the claim under the *Rhodes* standard.

According to Key, the Department's volunteer policy states that volunteers could not "[a]ccept correspondence . . . from individuals unless approved by" prison officials. But the volunteer policy says nothing about an inmate *sending* correspondence to volunteers. Key's letter expresses concern that Grenning has "bypassed [the prison's] established processes," but does not explain what those processes are. The publication agreement that Grenning signed upon submitting "Dark Room" to *InRoads* also invited the signatory to contact the program's student director for "further information." It is therefore unclear whether a policy concerning volunteer contact existed, and whether Grenning violated it by sending "Dark Room" directly to *InRoads*. It is also not clear whether the student director who received the submission, and who "receives a . . . tuition remission and a stipend" as part of their work in the writing program, would qualify as a "volunteer" under any claimed policy. This lack of clarity bespeaks genuine issues of material fact that render summary judgment inappropriate.

III. Claims of Procedural Error

Because summary judgment was improper on the current record, the district court's judgment must be vacated. We need not decide whether the court abused its discretion in denying Grenning's motions for additional discovery and post-judgment relief. *See Arandell Corp. v. Centerpoint Energy Servs., Inc.*, 900 F.3d 623, 635 (9th Cir. 2018) (declining to reach a Rule 56(d) challenge after reversing the grant of summary judgment). Those matters can be addressed anew on remand.

REVERSED and REMANDED.

BUMATAY, Circuit Judge, dissenting:

Neil Grenning—a serial child sex offender—enrolled in a voluntary creative writing class run by his prison's rehabilitation program. Inmates in the class had the opportunity to submit their work product for publication in a college literary magazine, but only with the approval of the prison program's coordinator. As part of this class, Grenning wrote a short story and submitted it for approval. The story referred to a couple "screwing barefoot" and having "syrup sticky sex." When he submitted the story for approval, the program coordinator rejected it as inappropriate for publication. Did that rejection violate the First Amendment?

We have two choices for the governing doctrine here. Under *Procunier v. Martinez*, 416 U.S. 396 (1974), a prison regulation restricting an inmate's speech "must further an important or substantial governmental interest unrelated to the suppression of expression," and the restriction "must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413. But according to *Turner v. Safley*, 482 U.S. 78 (1987), "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. Whether *Turner*'s deferential standard or *Martinez*'s heightened standard applies dictates the outcome here.

The majority applies *Martinez* and concludes that the answer is "yes." But that's wrong. *Martinez* is a narrow carveout from the general rule announced in *Turner* and concerns only prisoners' outgoing correspondence. It has never been applied to a prisoner's speech created as part of a prison rehabilitation program. So, in my view, this case

falls under *Turner*. And recognizing that "prison officials are to remain the primary arbiters of the problems that arise in prison management," *Shaw v. Murphy*, 532 U.S. 223, 230 (2001), I would apply *Turner*'s deferential standard and conclude that there was no First Amendment violation.

The majority also reverses the district court's grant of summary judgment for the prison officials on Grenning's retaliation claim. The majority errs here too. In this case, in violation of prison and program rules, Grenning directly contacted a student volunteer to the prison's rehabilitation program. And a prison official's warning to Grenning that he would be excluded from prison programs if he continued to violate program rules is not First Amendment retaliation.

Because prison officials are entitled to greater deference in administering prison programs, I respectfully dissent.

I.

Background

Neil Grenning is serving a prison sentence for dozens of child sex abuse convictions, including child rape, child molestation, and sexual exploitation of a minor. In 2019, Grenning's prison hosted a creative writing class for inmates. The course was part of the prison's Community Partnership Program, a program that "provid[es] opportunities for positive change" for inmates through "workshops, activities, events, and programs" that "promot[e] personal growth" and "reduce idleness." The prison's Community Partnership Program Coordinator, Ann Wise, is tasked with planning, coordinating, and overseeing those programs, including the creative writing class.

The class was optional and subject to significant disciplinary strictures. Inmates needed to sign up if they

wanted to enroll. And student volunteers at Eastern Washington University led class sessions. As part of the class, participating inmates could submit written work for publication in a literary magazine run by the University called *InRoads*. To submit their work, inmates needed to sign a publication agreement acknowledging that "the audience of *InRoads* includes children and special populations, [who are] sensitive to any kind of explicit material" and that "[s]ubmissions with graphic content will be returned to the author" and denied. And any proposed pieces needed to be "completed and approved by Ms. Wise" before they could be submitted for publication. So, under prison policy, Wise had to review pieces that inmates sought to publish in *InRoads*.

Grenning enrolled in the class and wrote a five-page short story. The story, written from the perspective of a widowed father, explores the difficulty of communicating the main character's grief to his young daughter. Grenning's story includes a passage about a memory that the main character has involving his late wife: "That fiery sweat of exuberant energy when we screwed barefoot against the unfinished drywall of the washroom. I smell fresh caulk and syrup sticky sex the same way."

Around the last scheduled class session, Grenning tried to publish his short story in *InRoads*. He signed the publication agreement and sent a copy of the story to Wise. Wise rejected the draft, explaining that "[d]ue to sexual content this writing submission is inappropriate for publication in the *InRoads* book that includes distribution to minors." After receiving Wise's rejection, Grenning tried to have his work published by sending a copy directly to a student volunteer from the class. He also wrote a letter to James Key, the prison's superintendent, complaining that

Wise acted beyond her authority. Key replied that Wise was responsible for "ensur[ing] that nothing leaves the institution through the volunteer program that could cause some negative publicity for the facility and department." Key agreed with Wise's decision and chastised Grenning for bypassing the class's policy by sending his story directly to a student volunteer. Key noted that prison policy "does not allow for volunteers to accept any correspondence without prior approval." If Grenning violated the policy again, Key warned, he would not be allowed to participate in the program.

Grenning then sued Wise and Key. He alleged that they violated the First Amendment by refusing to approve his short story for publication. He also alleged that Key retaliated against him, in violation of the First Amendment, by threatening to bar him from future participation in prison programs. Wise and Key removed the case to federal court, and the district court granted summary judgment in their favor.

II.

Defendants Didn't Infringe Grenning's Free Speech Right

A.

Incarceration "was virtually nonexistent as a form of punishment" in 18th-century colonial America. *Overton v. Bazzetta*, 539 U.S. 126, 142 (2003) (Thomas, J., concurring in the judgment). At the Founding, the most popular punishments for crimes included fines, whipping, banishment, and death. *See* The Oxford History of the Prison: The Practice of Punishment in Western Society 112 (Norval Morris & David J. Rothman eds., 1995). Jails

usually held those awaiting trial, or those who had been convicted and were awaiting punishment. *Id.*

"Prison as it is known today and its part in the penitentiary system were 'basically a nineteenth-century invention.'" *Overton*, 539 U.S. at 142–43 (Thomas, J., concurring in the judgment) (quoting Lawrence Friedman, Crime and Punishment in American History 48 (1993)). America's first state penitentiary—Pennsylvania's Walnut Street Prison—opened in the late eighteenth century. Matthew W. Meskell, Note, *An American Resolution: The History of Prisons in the United States from 1777 to 1877*, 51 Stan. L. Rev. 839, 847–48 (1999). But the state prison system did not become a staple of American criminal justice until the antebellum period. *See* The Oxford History of the Prison at 119.

As prisons became the standard form of punishment, the Supreme Court wrestled with how the Constitution applies to inmates. Two principles guided this inquiry. On the one hand, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. But on the other, "for much of this country's history, the prevailing view was that a prisoner was a mere slave of the State, who not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him." *Shaw*, 532 U.S. at 228 (simplified); *see also Ruffin v. Commonwealth*, 62 Va. (21 Grat.) 790, 796 (1871). Working through these competing views, the Court has explained that "the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large." *Shaw*, 532 U.S. at 229; *see also Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990) ("The Supreme Court has repeatedly emphasized that, in determining the validity of regulations

impinging on the constitutional rights of inmates, courts are to accord great deference to prison officials' assessments of their interests.").

Turner is the seminal case. There, the Supreme Court "formulate[d] a standard of review for prisoners' constitutional claims that is responsive both to the policy of judicial restraint regarding prisoner complaints and to the need to protect constitutional rights." *Turner*, 482 U.S. at 85 (simplified). As *Turner* recognized, *Martinez* did not articulate such a standard. *Id.* (noting that *Martinez* "did not itself resolve the question" of what standard applied). But the Court nonetheless worried that lower courts might overread *Martinez*. *See id.* at 86–88; *see also Thornburgh v. Abbott*, 490 U.S. 401, 409 (1989) (explaining the *Turner* Court's "concern that language in *Martinez* might be too readily understood as establishing a standard of 'strict' or 'heightened' scrutiny"). So *Turner* clarified that *Martinez* had "expressly reserved the question of the proper standard" for a later day. *Turner*, 482 U.S. at 85–86 (simplified).

Turner then did what *Martinez* didn't: it set a governing standard. "[W]hen a prison regulation impinges on inmates' constitutional rights," *Turner* explained, "the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. This is a "deferential" standard, *Shaw*, 532 U.S. at 229, though not a "toothless" one, *Thornburgh*, 490 U.S. at 414 (simplified). And it "provides the test for evaluating prisoners' First Amendment challenges." *Shaw*, 532 at 230.

B.

In applying *Turner*, we ask: "(1) [w]hether there is a valid, rational connection between the policy and the legitimate government interest put forward to justify it;

(2) whether there are alternative means of exercising the right; (3) whether the impact of accommodating [the right] will have a significant negative impact on prison guards, other inmates and the allocation of prison resources generally; and (4) whether the policy is an exaggerated response to the jail's concerns." *Prison Legal News v. Ryan*, 39 F.4th 1121, 1128–29 (9th Cir. 2022) (simplified).

These factors dictate that Wise and Key didn't violate Grenning's First Amendment rights.

The first *Turner* factor asks whether a valid, rational connection exists between the policy and the prison's interest in rehabilitating inmates. The prison satisfies this factor if the objective underlying the policy is (1) legitimate, (2) neutral, and (3) rationally related to the objective. *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) (en banc). It is "beyond question" that rehabilitation is a legitimate penological interest. *Prison Legal News*, 39 F.4th at 1132 (simplified). A policy is neutral if its goal is not to suppress expression. *See Mauro*, 188 F.3d at 1059 (simplified). And a prison policy is rationally related to a legitimate interest so long as the connection between the two is not "so remote as to render the policy arbitrary or irrational." *Prison Legal News*, 39 F.4th at 1132 (simplified).

Wise reasonably rejected Grenning's sexually explicit story because it violated the creative writing class's rules. The creative writing class was part of the prison's Community Partnership Program, which focuses on inmate rehabilitation. The Program's "Key Goals" are to "Improve Lives" and "Keep People Safe." The Program's classes and workshops—like Grenning's creative writing class—served the mission of "providing opportunities for positive change" by "promoting personal growth" and "reducing idleness."

And any failure to follow Program rules would make it less effective at achieving its rehabilitative purpose.

In this context, Wise's review of Grenning's writing not only makes sense—it's necessary. Her job was to manage, oversee, and direct all aspects of the prison rehabilitation program. Determining whether an inmate's work complies with program rules is a necessary component of overseeing the prison's rehabilitative programs. And Wise rejected Grenning's story because it didn't comply with the writing class's rules. She explained that its "sexual content" made it "inappropriate" for publication in the *InRoads*, which is distributed to minors. Indeed, Grenning acknowledged that *InRoads* was sent to "children and special populations, [who are] sensitive to any kind of explicit material." He thus knew that "[s]ubmissions with graphic content" were inappropriate for the publication. He was also told that all "pieces needed to be completed and approved by [Ann] Wise," and that he had "to adhere to all [prison] behavioral standards in both writing and in class." And considering that Grenning was a serial sex offender, Wise's rejection of sexual content serves the prison's interest in rehabilitating Grenning. Further, teaching inmates like Grenning to follow program rules reinforces its rehabilitative purpose.

Wise's action thus satisfies the first *Turner* factor—the most essential factor. *See Walker*, 917 F.2d at 385 (describing the first factor as the "*sine qua non*" of the *Turner* analysis). Wise's rejection of Grenning's sexually explicit story was a legitimate exercise of her authority in managing the prison's rehabilitative programs. The approval policy is neutral because it ensures compliance with the prison program's rehabilitative goals and so is not aimed at suppressing expression. And finally, ensuring that participating inmates follow the rules and publish only

appropriate material—especially a serial sex offender like Grenning—is not an "arbitrary or irrational" way to facilitate the program's rehabilitative goals. *See id.* (simplified). Because a valid, rational connection exists between Wise's approval authority and the prison's interests in rehabilitation, the first *Turner* factor favors Wise and Key.

The second *Turner* factor also favors Wise and Key. It asks whether "alternative means of exercising the right" remained open to Grenning. *Prison Legal News*, 39 F.4th at 1128–29 (simplified). In this context, "the right in question must be viewed sensibly and expansively" and it is "sufficient if other means of expression" are available. *Thornburgh*, 490 U.S. at 417–18. Grenning chose to enroll in the creative writing class. He agreed to the *InRoads* publication agreement prohibiting graphic content. And by signing up for the class, he agreed to the need for Wise's approval to submit stories for publication.

Grenning had ample "other means of expression." *See id.* at 418. It's uncontested that Grenning could have submitted his short story for publication in non-*InRoads* periodicals without Wise's approval. If he had written a story on his own—outside the auspices of the creative writing class—he would have been free to submit it for publication elsewhere. The approval policy only applied to pieces written as part of the voluntary prison program and submitted to the publication associated with that program. So any review of Grenning's speech was within the narrow context of a prison program—Wise and Key imposed no other limits on his expression.

Third, we look to "whether the impact of accommodating the asserted constitutional rights will have a significant negative impact" on prison personnel, other

inmates, and prison resources. *Prison Legal News*, 39 F.4th at 1129 (simplified). In other words, if accommodation "will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential" to the prison. *Turner*, 482 U.S. at 90. Permitting prisoners to violate prison program rules and submit writings without approval would significantly undermine prison rehabilitation programs. Simply, it would weaken prison officials' ability to enforce rehabilitation program rules and could lead other inmates to similarly disobey those rules. Given the role that these rules play in the prison's rehabilitative program, we "should defer to the informed discretion of corrections officials." *Thornburgh*, 490 U.S. at 418 (simplified). If prisoners can bend rehabilitative program rules in the name of the First Amendment, then those programs will become less effective—endangering both the prison and the public.

Finally, we look to "whether the policy is an exaggerated response to the jail's concerns." *Prison Legal News*, 39 F.4th at 1135 (simplified). Grenning has the burden "to show that there are obvious, easy alternatives to the regulation that would fully accommodate [his] rights at a de minimis cost to valid penological interests." *Id.* This factor "does not impose a least-restrictive-alternative test." *Overton*, 539 U.S. at 136. Instead, it asks whether the "prisoner has pointed to some obvious regulatory alternative[.]" *Id.* Grenning has pointed to such an alternative here: targeted revisions. He argues that Wise and other prison officials "could have requested targeted revisions" to his short story to address their concerns. Wise and Key counter that nothing prevented Grenning from editing his story and resubmitting. But this ignores that the class syllabus had a deadline for submitting work to Wise.

And by the time she rejected his submission, the deadline had passed and so he could not resubmit. Given the availability of targeted revisions, this factor may favor Grenning.

In sum, the first, second, and third factors strongly support Wise and Key. At best, only the fourth factor favors Grenning. Taken together, then, the *Turner* factors dictate that the approval requirement is "reasonably related to legitimate penological interests," and there was no First Amendment violation. *Turner*, 482 U.S. at 89. I would thus affirm the district court on this issue.

C.

The majority disagrees that *Turner* governs this case. Instead, it applies the more exacting standard from *Martinez*, reasoning that *Martinez* applies because Grenning's short story is "outgoing inmate correspondence." Maj. Op. 12. But this view ignores that Grenning's writing was part of a prison rehabilitative program—not the personal mail of a prisoner seeking to share expression outside the prison walls.

Martinez was a pre-*Turner* decision that struck down a prison regulation censoring a prisoner's personal mail. *See Martinez*, 416 U.S. at 415. As the Court held, such a regulation "must further an important or substantial governmental interest unrelated to the suppression of expression" and the "limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413. But in *Turner*, the Court explained that a more deferential standard applies to prisoners' constitutional claims. *Turner*, 482 U.S. at 89. And after *Turner*, the Court clarified that *Turner*—not *Martinez*—is the governing standard and warned against overreading

Martinez. *See Thornburgh*, 490 U.S. at 410. Indeed, the Court explained that it had "declined to apply the *Martinez* standard in prisoners' rights cases" because "*Martinez* could be (and had been) read to require" a more exacting, less deferential standard. *Id.* (simplified). So *Martinez* is "limited to regulations concerning outgoing correspondence." *Thornburgh*, 490 U.S. at 413. In short, *Turner* "provides the test for evaluating prisoners' First Amendment challenges." *Shaw*, 532 U.S. at 230.

And this is not an "outgoing correspondence" case. *Martinez* involved prison employees screening "personal mail," *Martinez*, 416 U.S. at 400—in other words, "personal correspondence between inmates and noninmates," *Thornburgh*, 490 U.S. at 408. This case, however, involves a sexually explicit story produced as part of a voluntary prison rehabilitation program. Grenning was not mailing a letter to friends or family. He was not even sharing his story with the public at large. Unlike in *Martinez*, prison officials weren't screening Grenning's outgoing personal communications—instead, Grenning was attempting to publish a story written as part of a prison rehabilitation program without approval. So this isn't a case about an inmate's ability to express himself; it's about an inmate's requirement to comply with prison program rules. As stated above, enforcing compliance with program rules serves rehabilitative purposes.

Because Grenning's writing was part of a prison program, this case falls outside *Martinez*'s scope. *Turner* is thus the proper analytical framework. And as explained above, under *Turner*, there was no constitutional violation. Instead, the majority's rule now effectively lets the

"prisoners run the prison"—at least when it comes to prison rehabilitation programs.[1]

Alternatively, the majority argues that it "would be compelled to reverse even if we agreed with the view that *Turner* applies in this circumstance." Maj. Op. 22. According to the majority, there is "no 'valid, rational connection' between the decision to bar Grenning's story and interests asserted here." Maj. Op. 25. But as explained above, the policy at issue—Wise's approval authority—is part of her authority to manage the prison's rehabilitative programs. Exercising her authority to prevent a sex offender participating in a prison program from publishing explicit material is hardly irrational. Rather than second-guess that decision, we "should [have] defer[red] to the informed discretion of corrections officials." *Thornburgh*, 490 U.S. at 418 (simplified).

III.

Grenning's Retaliation Claim Fails

Grenning also argues that Key retaliated against him in violation of the First Amendment when Key warned that Grenning would "not be allowed to participate in" the class if he "sen[t] any correspondence directly to a volunteer again

[1] Although the majority derides the penal interest in rehabilitation as a mere "moniker," I would take the prison's legitimate interest more seriously. *See* Maj. Op. 15 n.3. And contrary to the majority's assertion, I would not sub silentio overturn *Martinez*. My argument is simple: this case falls into the *Turner* bucket, not the *Martinez* bucket. We do not have the authority to overturn Supreme Court precedent—sub silentio or otherwise. But if I thought *Martinez* was wrong, I would say so. I just don't think it governs.

without prior approval[.]" The district court granted summary judgment for Key. I would affirm.

A "viable claim of First Amendment retaliation" requires a prisoner to show "(1) that a state actor took some adverse action against an inmate (2) because of (3) the prisoner's protected conduct, and that such action (4) chilled the inmate's exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal." *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005) (simplified).

Even assuming that Key's so-called "threat" was "adverse action" and that Grenning's short story was "protected conduct," Grenning's retaliation claim fails because Key's threat was not "because of" Grenning's protected conduct. Instead, Key warned that Grenning may be unable to participate in Community Partnership Program activities because he violated the Community Partnership Program's policies. Key explained that Grenning bypassed the prison's established processes when he sent his story directly to the student volunteer. Grenning admitted that he mailed the story directly to the volunteer because Wise rejected his short story for publication in *InRoads*. But the class syllabus expressly states that inmates wishing to submit stories for publication must have the approval of Wise. Wise's approval was a prerequisite to submission—not a mere suggestion. By submitting his short story to the student volunteer after Wise withheld her approval, Grenning violated the class's clear submission procedures. Key's warning was explicitly based on Grenning bypassing established rules, not any protected activity.

Worse still, Grenning contacted a student volunteer without authorization—in direct violation of prison policy.

Indeed, prison-wide policy prohibits prison volunteers from "[a]ccept[ing] correspondence" from inmates unless approved by a prison administrator. Key explained this policy to Grenning. And he explained that this policy violation was a safety concern. So not only did Grenning circumvent the class's requirements by trying to submit his short story without Wise's approval, he also violated prison policy by corresponding directly with a student volunteer. Safety concerns abound with this action. Rather than retaliation, Key warned that Grenning would face repercussions if he continued to violate class rules and prison policy. This isn't First Amendment retaliation.

The majority sees things differently. Reversing the district court's summary judgment order, the majority explains that the district court erred in applying *Gaut v. Sunn*, 810 F.2d 923 (9th Cir. 1987) to conclude that Key's warning was not adverse action. Maj. Op. 26. But as explained above, even if Key's warning was adverse action, that adverse action was not "because of" protected conduct. The majority also argues that there is a genuine issue of material fact regarding what the relevant prison "processes" are. Maj. Op. 27. But the majority does not address the class syllabus's requirement that Wise approve any submissions. If the syllabus explicitly provides for Wise to "approve" any submissions—and Grenning submitted his story without Wise's approval—then he violated the class's review process. The record thus supports the conclusion that Key's warning was "because of" Grenning's decision to blatantly violate prison procedures. *See Pike v. Hester*, 891 F.3d 1131, 1137 (9th Cir. 2018) ("We may affirm a grant of summary judgment on any basis supported by the record.").

We should have affirmed the district court here too.

IV.

Wise and Key Are Entitled to Qualified Immunity

Wise and Key did not violate Grenning's First Amendment rights. But even if they did, they are entitled to qualified immunity. "Government officials enjoy qualified immunity from suit under § 1983 unless their conduct violates clearly established law." *Zorn v. Linton*, 146 S. Ct. 926, 930 (2026). "In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the officer's alleged misconduct." *Jessop v. City of Fresno*, 936 F.3d 937, 940 (9th Cir. 2019) (simplified). "A right is not clearly established if existing precedent does not place the constitutional question beyond debate." *Zorn*, 146 S. Ct. at 930 (simplified). "The relevant precedent must define the right with a high degree of specificity, so that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* (simplified).

Assuming a constitutional violation here, Wise and Key are entitled to qualified immunity on the "clearly established" prong. Simply, Grenning has cited no authority that "define[s]" "with a high degree of specificity" his right to publish—without approval—work product created while participating in a prison program. *See id.* Grenning relies exclusively on *Martinez* and its progeny. But none of the cases he cites are relevantly similar to the circumstances here—seeking to limit a sex offender from publishing sexually explicit material in a general-audience publication as part of a voluntary rehabilitative prison program. Precedent simply "does not place the constitutional question beyond debate." *Id.* And Grenning did not address the

clearly established prong under *Turner*—nor could he. After all, it is not clearly established that enforcing compliance with a rehabilitative prison program is not "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. So regardless of whether *Martinez* or *Turner* applies, Grenning's right was not clearly established at the time of Wise and Key's conduct. Indeed, that there is a debate about whether *Martinez* or *Turner* applies shows that the law is not clearly established.

V.

In short, I would affirm the district court on the grounds that there was no First Amendment violation. But even if there were, Wise and Key are entitled to qualified immunity.

For these reasons, I respectfully dissent.