No. 18-355

In The Supreme Court of the United States

PRISON LEGAL NEWS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF 18 ORGANIZATIONS THAT FAVOR FREEDOM OF THE PRESS AND OPPOSE CENSORSHIP AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Many of the *amici* filing this brief filed an *amicus* brief in support of *Prison Legal News* in the District Court. They also sought leave to file an *amicus* brief in the United States Court of Appeals for the Eleventh Circuit to reiterate their concerns regarding the vagueness of the rule at issue and, specifically, how that vagueness can be used to conceal that official decisions to impound *Prison Legal News* are based on disagreement with editorial content, rather than violations of the rule.[2] The Secretary of the Florida Department of Corrections objected to the filing of that *amicus* brief and the Eleventh Circuit refused to allow it. *Prison Legal News v. Secretary*, No. 15-14220 (11th Cir. May 10, 2016) (Order Denying Motion for Leave to File *Amicus* Brief). This brief reiterates the concerns of the institutional media that the rule violates the First Amendment for the reasons stated in the petition and suggests that an additional question should be accepted for review, namely:

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[1] Pursuant to Rules 37.2 and 37.6 of the Rules of the Supreme Court, all parties have consented to the filing of this *amici curiae* brief. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation of this brief. The parties have received notice of this filing.

[2] A recent front-page article illustrates why prison officials might be tempted to use the vagueness of the challenged rule to impound the publication for an improper purpose. David M. Reutter, *Prison Food and Commissary Services: A Recipe for Disaster*, 29 PRISON LEGAL NEWS 1 (Aug. 2018) https://www.prisonlegalnews.org/news/2018/aug/4/prison-food-and-commissary-services-recipe-disaster/ (last visited Oct. 3, 2018).

Does a state prison rule which relies on vague standards to screen incoming mail facially violate the First and Fourteenth Amendments?

This brief also shows that, because the rule at issue squarely targets the content of advertising, the standard of review set forth in *Turner v. Safley*, 482 U.S. 78 (1987), has no application here. The *Turner* standard applies solely to rules which are themselves content-neutral. Where rules target content, a heightened standard of review is required by *Procunier v. Martinez*, 416 U.S. 396 (1974). The Eleventh Circuit ignored this fundamental principle and reviewed the substance of the rule at issue under the *Turner* standard.

Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association are trade associations for newspapers. Washington newspapers are particularly interested in this matter because Paul Wright, the editor and co-founder of *Prison Legal News*, was imprisoned in Washington for 17 years prior to his release in 2003. Mr. Wright founded *Prison Legal News* in 1990 while imprisoned.

The American Society of News Editors was founded in 1922 to "defend the profession from unjust assault" and is primarily an organization of news leaders in the United States.

Association of Alternative Newsmedia is a 501(c)(6) organization that represents 112 alternative newsmedia organizations throughout North America. AAN

member publications reach more than 38 million active, educated, and influential adults.

The Authors Guild, Inc., was founded in 1912 and is a national non-profit association of more than 9,000 professional, published writers of all genres.

The *Citrus County Chronicle* was founded in the 1890s and is the oldest business in Citrus County, Florida.

Criminal Justice Journalists is the first national organization of journalists who cover crime, court, and prison beats. It was founded by Ted Gest, then of *U.S. News and World Report*, and David Krajicek, who has covered crime for the *New York Daily News* and other newspapers.

First Amendment Foundation, Inc., believes that government openness and transparency are critical to citizen trust and involvement in our democratic society—without Government in the Sunshine, civic engagement cannot bloom. Through ongoing monitoring of Florida's public records and open meetings laws and the education of government officials and the citizens they serve about those laws, the Foundation promotes the public's constitutional right to oversee and to participate in the governance process.

Florida Press Association, Inc., was founded in 1879 as a nonprofit corporation to protect the freedoms and advance the professional standards of the press of Florida.

The Marshall Project is a nonprofit, nonpartisan online journalism organization focusing on issues related to criminal justice in the United States, led by former hedge fund manager Neil Barsky and former *New York Times* executive editor Bill Keller.

National Association for Rational Sexual Offense Laws distributes *The Digest* bimonthly to 1,000 inmates. It is the nation's oldest regularly published journal exclusively dedicated to issues concerning sex offenders and sex offender registries.

National Coalition Against Censorship was formed in 1973 to promote freedom of thought, inquiry, and expression and oppose censorship in all its forms.

The National Press Photographers Association is the leading voice advocating for the work of visual journalists today.

New England First Amendment Coalition is a broad-based organization of people who believe in the power of transparency in a democratic society. Its members include lawyers, journalists, historians, librarians, and academicians, as well as private citizens throughout New England.

Pacific Northwest Newspaper Association is an association of daily newspapers in Alaska, Idaho, Montana, Oregon, Utah, Washington, Alberta, and British Columbia advancing the newspaper industry through information, education, and service.

The Press Freedom Defense Fund supports journalists, news organizations, and whistleblowers who

are targeted by powerful figures because they have tried to bring to light information that is in the public interest and necessary for a functioning democracy.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association. The Reporters Committee was founded by leading journalists and media lawyers in 1970, when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

The Joseph L. Brechner Center for Freedom of Information at the University of Florida exists to advance understanding, appreciation, and support for freedom of information in the state of Florida, the nation, and the world.

Although this case involves a prison rule that has had a particularly harsh impact on *Prison Legal News* because it specializes in serving the prison community, the case is of importance to the *Amici* because the rule threatens every publication that is distributed in Florida prisons, such as the *Tallahassee Democrat*, the *Gainesville Sun*, and the *Miami Herald*. All of these publications carry extensive advertising for goods and services that prisoners might wish to use now or in the future but which they are prohibited from obtaining while in prison. The vagueness of the challenged rule permits prison officials to impound any of these

publications for putative noncompliance with the rule even if the actual basis for impoundment is officials' disagreement with editorial content.

In addition, regulations that target advertising based on content are as offensive to First Amendment principles as regulations that target editorial material based on content. Advertising informs readers about products and services that may be of vital importance to them. In this case, the advertising in *Prison Legal News* advises prisoners about products and services that are commonly available to prisoners outside of Florida. Awareness of these products and services may assist prisoners who wish to challenge the validity of restrictions on those goods or services or to advocate for the lifting of those restrictions. Advertising also helps keeps costs to readers low. This Court invalidated restrictions on speech vital to advertising in *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011). The Court commented that a "'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue'" and pointed out that the marketing data at issue in that case could "save lives." *Id.* at 566 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

This case also is of importance to the *Amici* because the history of the litigation shows that First Amendment principles are seriously endangered when federal courts decline to adjudicate issues during the temporary cessation of unconstitutional restrictions on speech. *Prison Legal News* filed an action similar to this one in 2004. It sought a declaration that the

Florida Department of Corrections ("the Department" or "FDOC") had violated the First Amendment by (1) refusing to allow delivery of *Prison Legal News* to prisoners because it contained ads for three-way calling services and pen-pal services and accepted postage stamps as payment for subscriptions, and (2) prohibiting prisoners from accepting compensation for articles they wrote for newspapers and magazines. *See Prison Legal News v. Crosby*, No. 3:04-cv-14-J-16TEM (M.D. Fla. July 28, 2005) (DE-87 (Order, Findings of Fact and Conclusions of Law) at 2–3).

In apparent reaction to the suit, the Department amended its rules effective March 16, 2005, to provide that a publication such as *Prison Legal News* would not be rejected based on its inclusion of advertisements for prohibited products or services, as long as those advertisements were "'merely incidental to, rather than being the focus of, the publication.'" (*Id.* at 8–9 ¶¶ 18–19.) After the amendment, the Department allowed distribution of *Prison Legal News* to continue. *Prison Legal News* insisted that the amended rule posed a continuing threat to it, notwithstanding that its distribution was being permitted. U.S. District Judge John H. Moore, II, conducted a three-day bench trial and found that the Department's prior prohibition of distribution served no governmental purpose whatsoever because the Department effectively could stop the inmates from using the advertised services whether they saw advertising for them or not. (*Id.* at 14–15.) But Judge Moore also entered judgment as a matter of law for the Department because it was no

longer prohibiting distribution. (*Id.* at 16–17.) The Eleventh Circuit agreed that the Department had mooted the challenge by adopting an amended regulation and then not invoking the new rule to prohibit further distribution. *Prison Legal News v. McDonough*, 200 F. App'x 873, 877–78 (11th Cir. 2006). The Eleventh Circuit held the Department had shown " 'no intent to ban PLN based solely on the advertising content at issue in this case' in the future." *Id.* at 878. But the Eleventh Circuit added: "We have no expectation that FDOC will resume the practice of impounding publications based on incidental advertisements. As to the current rule, we offer no opinion on its constitutionality." *Id.* at 878. This ruling allowed the Department to escape an adjudication that its amended rule violates the First Amendment.

In light of this history, the Department's invocation of its new rule, as it was amended in 2009, should have been viewed with great skepticism, given that the 2009 amendment greatly exacerbated the problems found in the 2005 rule.[3] The new rule: (1) contained no

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[3] The amended rule provides:

> (3) Inmates shall be permitted to receive and possess publications per terms and conditions established in this rule unless the publication is found to be detrimental to the security, order or disciplinary or rehabilitative interests of any institution of the department, or any privately operated institution housing inmates committed to the custody of the department, or when it is determined that the publication might facilitate criminal activity. Publications shall be rejected when one of the following criteria is met:
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> * * *

procedural safeguards to prevent its use for improper censorship, (2) utilized such vague standards that procedural safeguards could not be effective, and (3) targeted advertising based on content. The district court recognized the first of these problems and imposed a mandatory injunction to cure it, but failed to recognize that procedural safeguards are useless in the absence of specific standards for the safeguards to apply. The district court also ignored this Court's rulings that the *Turner v. Safley* standard is not sufficient for the purpose of reviewing content-based restrictions on prison correspondence. The Eleventh Circuit then affirmed all aspects of the district court's decision. *Prison Legal News v. Secretary, Florida Dep't of Corr.*, 890 F.3d 954 (11th Cir. 2018).

(l) It contains an advertisement promoting any of the following where the advertisement is the focus of, rather than being incidental to, the publication or the advertising is prominent or prevalent throughout the publication.

1. Three-way calling services;
2. Pen pal services;
3. The purchase of products or services with postage stamps; or
4. Conducting a business or profession while incarcerated.

(m) It otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or to the safety of any person.

SUMMARY OF THE ARGUMENT

The Court should grant the writ because:

Point I. The challenged rule violates the First and Fourteenth Amendments due to vagueness. It allows prison officials to impound and reject publications sent to prison subscribers for improper censorial purposes that cannot be detected even when the procedural safeguards mandated by the district court are put in place.

Point II. The challenged rule prohibits publication on the basis of content. The standard applied in *Turner v. Safley* applies solely to content-neutral prison correspondence rules. The stricter standard established in *Procunier v. Martinez* governs content-based prison correspondence rules, but that standard was not applied by the Eleventh Circuit or the district court. The rule challenged in this case targets content and therefore should have been evaluated in accordance with the *Martinez* standard. In any event, the rule is invalid under either the *Martinez* or *Turner* standards.

ARGUMENT

I.

The Court Should Grant the Writ Because the Eleventh Circuit Upheld a Rule that Lacks Specific Criteria To Prevent its Use for Improper Censorship

At the heart of this case is a vague regulation of advertising in a news magazine sent to subscribers in

prison. The district court recognized as much, noting the Department's "inconsistent censorship decisions," the "[i]nconsistent application [of the rule] by mailroom staff," that "vagueness is principally responsible for the Rule's disparate application," and that the "most disconcerting," "worrisome fact[] uncovered at trial" "is the Rule's vagueness." (DE-279 at 43, 47 n.24, 50.)[4]

Yet, the district court upheld the rule, contending that the publisher of *Prison Legal News* had asserted its vagueness claim too late—three months before the trial date of May 13, 2013. (DE-279 at 3 n.5.) In essence, the district court held that it could easily discern the facial invalidity of the rule, but was constrained to uphold the rule because the vagueness challenge had not been precisely labeled as such early enough in the litigation. The vagueness of the rule should not have been skirted in this manner because vagueness played a critical role in all aspects of the publisher's challenge. The Eleventh Circuit should have addressed the rule's vagueness.

As this Court has explained, judges, as "expositors of the Constitution," must conduct an independent review of the entire record to ensure that a judgment does not result in a "'forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 511 (1984) (citations omitted). The avoidance below of a patent vagueness problem (as specifically found by the district court) on procedural grounds is distinct, of course, from a district

[4] The notation "DE" indicates a citation to a docket entry in the district court.

court judgment which violates the First Amendment through the imposition of a damage award. But the result is no less problematic. In both instances, the First Amendment is violated. *Amici* urge the Court to cut through the fog that arises from the district court's narrow focus on the petitioner's as-applied challenge and to grant certiorari to address the problem at the heart of this case: the fatal vagueness of an advertising regulation that gives prison officials so much discretion that they can conceal actions taken to prevent the distribution of editorial content with which they disagree. This is a particularly acute problem for the publisher of *Prison Legal News*, given the nature of its editorial content—articles that inform prisoners about their legal rights—and the small number of subscribers (70 Florida prisoners at the time of trial). Of course, if the rule is facially invalid, then it goes without saying that it also is invalid as applied, as *Prison Legal News* contends.

This Court has recognized that an as-applied challenge can result in effective facial invalidation of a challenged law or regulation, even when the parties ask only for a ruling as applied.[5] Facial invalidation is particularly appropriate in First Amendment cases in

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[5] *E.g.*, David A. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the Roberts Court*, 36 HASTINGS CONST. L.Q. 689 (2009) (citing *Fed. Elections Comm'n v. Wis. Right to Life*, 551 U.S. 449 (2007), a case arising from an as-applied challenge to advertising regulation, as an example of this phenomenon); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2340 n.3 (2014) ("petitioners' as-applied claims 'are better read as facial objections to Ohio's law.' . . . Accordingly, we do not separately address the as-applied claims.").

which a holding that a statute is unconstitutional as applied will allow a vague and overly broad statute to chill speech. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253–54 (2012) ("When speech is involved, rigorous adherence to [specificity] requirements is necessary to ensure that ambiguity does not chill protected speech"). If certiorari is granted, the parties should be directed to address this fundamental vagueness issue as well as whether the Eleventh Circuit provided the appropriate level of scrutiny to the challenged rules.

This Court held in *Martinez* that an inmate must be notified of the rejection of material written by or addressed to him, that the author of the material must be given a reasonable opportunity to protest the decision, and that complaints must be referred to a prison official other than the person who originally rejected the correspondence. *Martinez*, 416 U.S. at 418–19. The *Martinez* procedural safeguards, unlike the *Martinez* scrutiny standard, have not been lowered or changed by subsequent decisions and they remain binding today.[6] The Eleventh Circuit has regularly recognized this proposition[7] and did so in this case. *Prison Legal*

[6] *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) (holding in case filed by *Prison Legal News* that the procedural requirements set forth in *Martinez* survived the ruling in *Thornburgh v. Abbott*, 490 U.S. 401 (1989), partially overruling *Martinez*); *Barrett v. Orman*, 373 F. App'x 823, 826 (10th Cir. 2010) (same).

[7] *Daker v. Warren*, 660 F. App'x 737, 742 (11th Cir. 2016) (quoting *Perry v. Secretary, Florida Dep't of Corr.*, 664 F.3d 1359, 1368 n.2 (11th Cir. 2011), which relied on *Martinez*) ("[W]hen a correctional facility is going to reject a letter, mail, or package it must (1) provide written notice to the inmate of mail addressed to

News, 890 F.3d at 976. Indeed, the Eleventh Circuit affirmed the district court's injunction requiring FDOC to provide the procedural safeguards that the rule lacks. But those safeguards cannot prevent unconstitutional censorship where the underlying rule or regulation is fatally vague.

In *Martinez*, the plaintiff argued that the regulations allowing censorship of prisoner mail in that case were vague enough to allow "censorship of constitutionally protected expression without adequate justification." *Martinez*, 416 U.S. at 401–02. This Court did not address the argument in *Martinez* because the regulations had not been challenged below on vagueness grounds. *Id.* Here, the publisher of *Prison Legal News* did attack the rule on vagueness grounds. (DE-14 at 13.) During the pleadings stage, the publisher did not specifically denominate one of its counts as a vagueness challenge. When it sought to do so in order to alleviate any doubt about the nature of its challenge, the district court refused to allow the amendment and then declined to adjudicate the vagueness of the rule (while still expressing its opinion that the rule was vague). In doing so, the district court shirked its obligation to decide whether the rule suffered from undue vagueness. The requirement of clear and specific criteria is a fundamental component of both due process, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)

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him; (2) provide the author of the mailing with a 'reasonable opportunity to protest th[e] decision;' and (3) have an official other than the one who made the initial rejection of the correspondence review the complaint.").

("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."), and First Amendment challenges, *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office[.]"). The publisher of *Prison Legal News* attacked the rule on both vagueness and substantive grounds in its First Amended Complaint and through its appeal to the Eleventh Circuit; it continues to do so in its petition for a writ of certiorari here. The Court should require the parties to address this issue.

Amici have a particular interest in ensuring that the Court does not allow the vague rule at issue here to stand because, as discussed above, *Amici* and the news organizations and journalists they represent also are subject to the rule when they send their newspapers and magazines to Florida prisoners. *Amici* recognize that other forms of distribution licensing, such as newsrack regulations, are constitutionally justifiable by the legitimate interest that a city may have in safety and aesthetics, *see generally City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), just as prison regulations may be justified by legitimate penological interests. But this Court has recognized that such regulations sometimes may be used for improper censorial purposes if the discretion of those administering the regulations is not carefully restricted by clear and specific guidelines. *Id.* at 772. This Court has explained that facial attacks on vagueness

grounds are allowed because "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. And these evils engender identifiable risks to free expression that can be effectively alleviated only through a facial challenge." *Id.* at 757 (citations omitted). Those risks, this Court held, include the risk that the licensor's discretion will intimidate parties into censoring their own speech and that such self-censorship will be "immune to an 'as applied' challenge." *Id*.

The rule at issue has multiple vagueness problems that can be exploited for improper censorial purposes. Initially, the rule directs prison officials to determine whether a publication carries an advertisement promoting "three-way calling services," "pen-pal services," purchases by postage stamps, or "conducting a business or profession." Yet, none of these terms is defined by the rule or otherwise. Their meanings are far from clear. Next, the rule does not entirely ban the advertising that it describes. It only bans advertising that is the focus of, rather than incidental to, the publication or that is prominent or prevalent throughout the publication. These highly-subjective words allow prison officials wide discretion to favor certain publications over others, notwithstanding that they all carry the same type of advertising. Because the terms are so vague, they do not provide judges with meaningful standards by which they can assess whether prison authorities have impounded or rejected a publication because it carried content which constitutionally can be

banned or because it carried content that is protected by the First Amendment, such as political endorsements or criticism of prison regulation or administration. The danger that such censorship will be imposed is quite apparent from the fact that *Prison Legal News* has been a critic of prison policies and practices across the country since its creation by a former prisoner. A vague and standardless licensing scheme like the one before this Court, that allows administrators to achieve indirectly what they cannot achieve directly, simply cannot stand.

II.

The Court Should Grant the Writ to Clarify That Content-Based Prison Correspondence Rules are Subject to Stricter Scrutiny Than *Turner v. Safley* Provides

Ignoring the vagueness of the rule, the Eleventh Circuit proceeded directly to review of the substance of the rule and, in doing so, applied the wrong standard—the four-part standard this Court articulated in *Turner v. Safley* for the review of content-neutral prison regulations. The Eleventh Circuit noted that "under *Turner* we owe 'wide-ranging' and 'substantial' deference to the decisions of prison administrators because of the 'complexity of prison management, the fact that responsibility therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems.'" *Prison Legal News*, 90 F.3d at 965 (citations omitted).

But this Court has been clear that the *Turner* standard is to be used only where the challenged regulation is "neutral," *Thornburgh*, 490 U.S. 401 at 414–16, meaning that the regulation applies "without regard to the content of the expression." *Turner*, 482 U.S. at 90. If the regulation is content-based, then the *Turner* standard does not apply. Instead, at least the heightened standard of review established in *Martinez* must be applied. In *Martinez*, the Court had before it regulations which directed inmates not to write letters in which they "'unduly complain'" or "'magnify grievances.'" *See Martinez*, 416 U.S. at 399. The regulations defined as contraband those writings "expressing inflammatory political, racial, religious or other views or beliefs" and "provided that inmates may not send or receive letters that pertain to criminal activity; are lewd, obscene, or defamatory; contain foreign matter, or are otherwise inappropriate." *Id.* at 399–400 (internal quotation marks omitted). These content-based rules necessitated review to assess whether they "further[ed] an important or substantial governmental interest unrelated to the suppression of expression," and also were "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* at 413. The *Thornburgh* decision overruled *Martinez* only with respect to its application to *content-neutral* rules, not *content-based* rules.

Thus, if FDOC had adopted a regulation that prohibited political advertising that criticized Governor Rick Scott, the rule would not stand if it were merely reasonably related to a legitimate penological

objective. It would be upheld only if it survived *Martinez*-type intermediate scrutiny, or perhaps even strict scrutiny. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (citations omitted) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

The rule at issue here clearly targets the content of ads that offer services that are prohibited by FDOC. Such ads communicate to prisoners in Florida that those services are available to prisoners in the jails of other states, likely causing Florida prisoners to wonder: why aren't those services available to us? In *Beard v. Banks*, 548 U.S. 521 (2006), Justice Stevens wrote: "What is perhaps most troubling about the prison regulation at issue in this case is that the rule comes perilously close to a state-sponsored effort at mind control." *Beard*, 548 U.S. at 552 (Stevens, J., dissenting). While the majority found that the regulation at issue in that case—which had been designed as a form of punishment and denied most types of publications to the worst prisoners—did not cross that line, the regulation at issue here does cross that line, and a more searching form of scrutiny than that afforded by *Turner* was required.

This argument should not be misread as expressing any disagreement with the petitioner that the rule

should be invalidated under *Turner*.[8] The *Turner* standard "'is not toothless.'" *Thornburgh*, 490 U.S. at 414 (citation omitted). In *Turner* itself, the Court applied the standard to invalidate a regulation that allowed an inmate to marry only if the prison superintendent found compelling reasons to allow the marriage. *Turner*, 482 U.S. at 82, 99. In *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005), the Ninth Circuit applied the standard to reject the Washington Department of Corrections' arguments that allowing *Prison Legal News* in its prisons increased the risk of contraband in the mail, increased the volume of prison mail, increased the risk of fire, and reduced the efficiency of inmate cell searches. In *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001), the Ninth Circuit applied the standard to reject the Oregon Department of Corrections' arguments that allowing *Prison Legal News* in its prisons made it hard to find contraband in the mail, created an undue fire hazard, allowed inmates to hide contraband in their cells, and reduced correctional officer efficiency. In *Prison Legal News v. Columbia County*, Case No. 3:12-cv-00071-SI, 2012 WL 1936108 (D. Or. May 29, 2012), a district court applied the standard to preliminarily enjoin a prison rule

[8] *Amici* agree that the rule for review here cannot survive even the lower standard set by *Turner* for content-neutral rules because the *Turner* standard actually does impose significant limits on discretion. But even if the rule could survive *Turner* scrutiny, the Eleventh Circuit decision should be reversed because *Martinez* scrutiny, at a minimum, is required.

forbidding correspondence other than postcards.[9] In *Miniken v. Walter*, 978 F. Supp. 1356 (E.D. Wash. 1997), a district court applied the *Turner* standard to conclude that, although a prohibition against delivery of bulk mail to inmates may be constitutional, an inmate's right to receive his personal subscription to *Prison Legal News* was violated by application of that policy. And, in *Prison Legal News v. County of Ventura*, No. 14-0773-GHK (EX), 2014 WL 2736103 (C.D. Cal. June 16, 2013), the court preliminarily enjoined similarly restrictive mail policies under the *Turner* standard.

In other contexts, the *Turner* standard also has required invalidation of actions of individual prison officials.[10] The standard clearly has teeth and, properly applied, requires invalidation of the FDOC rule. Judge John H. Moore's decision in the initial *Prison Legal News* lawsuit cried out for a finding that no rational

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[9] A final judgment for the plaintiffs later was entered. *Prison Legal News v. Columbia Cty*., 942 F. Supp. 2d 1068 (D. Or. 2013).

[10] *See*, *e.g.*, *Burns v. Martuscello*, 890 F.3d 77, 93 (2d Cir. 2018) (prisoner had First Amendment right not to be punished for refusing to testify falsely against other prisoners or to snitch truthfully on other prisoners); *Shakur v. Selsky*, 391 F.3d 106, 116 (2d Cir. 2004) (guards' confiscation of New Afrikan political literature "pursuant to personal prejudices" violated an inmate's First Amendment rights); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003) ("a prisoner's right to the free flow of incoming and outgoing mail is protected by the First Amendment"); *Meriwether v. Coughlin*, 879 F.2d 1037, 1046 (2d Cir. 1989) (upholding jury verdict finding First Amendment retaliation where inmates who were "outspoken critics of the [prison] administration" were transferred to new facilities).

connection exists between FDOC's rule and a legitimate and neutral government interest. Judge Moore ruled after a bench trial that the state is capable of preventing prisoners from using services that are the subject of the challenged rule whether the prisoners see the advertisements or not. No contradictory evidence was offered by the state at the trial in this case. The rule served no legitimate penological purpose whatsoever and prevented prisoners from receiving the entire contents of *Prison Legal News* that prisoners might find useful.

The second *Turner* factor also weighs in favor of invalidation of the rule because enforcement left the publisher of *Prison Legal News* with no alternative means of distributing the banned advertising and, worse, no economically viable means of continuing the distribution of *Prison Legal News* to Florida prisoners at all. As the record showed, *Prison Legal News* has a small base of approximately 7,000 subscribers across the country, and its operation is supported by a small number of advertisers and a small group of employees. Revenues barely meet expenses. Continued not-for-profit publication is the product of the petitioner's devotion to serving the informational needs of prisoners rather than any desire for financial gain. The record also showed that publication of a separate edition of the *Prison Legal News* that excluded restricted advertisements would be cost prohibitive, so the petitioner had no alternative other than to halt all distribution in the Florida prison system to comply with the rule as it had been enforced.

The fact that prisoners cannot presently use the advertised services also does not diminish the magnitude of the violation of the petitioner's First Amendment right to provide the ads at issue to Florida prisoners because the rule acts as an effective prohibition of distribution of *Prison Legal News* entirely.

Even if the burden of creating a separate edition had not been shown to be cost-prohibitive, the First Amendment would not allow such a burden on speech without justification. "[T]he 'distinction between laws burdening and laws banning speech is but a matter of degree' and [] the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.' . . . Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 565–66 (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812 (2000)).

This Court also has made clear that states may not ban advertising of goods or services that are unlawful if the goods or services may lawfully be sold elsewhere. *See Bigelow v. Virginia*, 421 U.S. 809 (1975) (invalidating conviction for publishing in Virginia an advertisement for abortion clinics in New York). A state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information that is legal in that State." *Id.* at 824–25. This principle is of vital importance because newspapers distributed in Florida prisons include advertisements for alcoholic beverages, firearms, and

other products the state prohibits prisoners from possessing or using.

A further alternative to halting distribution in Florida or creating a separate edition for Florida would be to remove the ads from *Prison Legal News* both in Florida and outside of Florida. This would avoid the cost of creating separate editions, but it also would result in the most grievous violation of First Amendment rights. Other institutions where *Prison Legal News* is distributed do not prohibit three-way calling services, pen pal services, the purchase of products or services with postage stamps, conducting a business or profession, or advertising those services to prisoners. Instead, they allow prisoners to engage in these activities because they find the activities beneficial to the prisoners and society and consistent with penological objectives.

The third *Turner* factor also weighs against the constitutionality of the challenged rule because, in the absence of the rule, the distribution of *Prison Legal News* would impose no additional burden on prison guards' resources. The Department already has rules that require monitoring of all correspondence and these rules will be unaffected if the rule at issue in this case is invalidated. The primary impact of the invalidation of the rule will be to lighten the Department's load by making it unnecessary to determine whether advertising of restricted services is non-incidental, prominent, or prevalent throughout every publication that is sent to prisoners.

Finally, as Judge Moore previously ruled, the fourth factor of *Turner* weighs against the rule because the state has readily available means of preventing prisoners from using the restricted services without preventing them from viewing advertising concerning those services.

CONCLUSION

The Court should grant the certiorari petition and direct the parties to address (1) whether the vagueness of the challenged rule violates the First and Fourteenth Amendments and (2) whether the substance of the challenged rule violates the applicable First and Fourteenth Amendment standards.

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