

No. 18-355

IN THE
Supreme Court of the United States

PRISON LEGAL NEWS,

Petitioner,

v.

JULIE L. JONES, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

**BRIEF OF FORMER CORRECTIONS OFFICIALS
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are former corrections officials with over 320 collective years of experience managing jails and prisons.¹ *Amici* have an interest in ensuring that the constitutional rights of publishers and prisoners are restricted only for legitimate reasons.²

INTRODUCTION AND SUMMARY OF ARGUMENT

The Florida Department of Corrections' (FDOC) total ban on *Prison Legal News* violates the First Amendment. The ban lacks a valid, rational connection to FDOC's interests in prison security. It is ineffective, unneeded, and unknown in any other corrections system in the United States.

Corrections officials manage an environment in which security is a primary concern. Many activities allowed outside of prison are legitimately forbidden to prisoners. *Amici* do not wish to see corrections officials' legitimate exercise of their authority to maintain that security curtailed. A decision to completely censor *Prison Legal News* is not, however, legitimate. While FDOC says that its total censorship policy is justified because the magazine's advertisements raise safety and security concerns, *amici* know

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

² For further information about the individual *amici*, see Interest of Former Corrections Officers as *Amici Curiae* in Support of Petitioners *infra* at 25-27.

from working in and running corrections systems—including FDOC itself—that any such claims are premised on unfounded speculation at best.

Specifically, *amici* have experience working in, directing, and overseeing corrections facilities in California, Colorado, Florida, Maryland, New York, Oklahoma, Pennsylvania, Texas, and Washington, as well as the Federal Bureau of Prisons. Each of these systems has rules in place to protect prison safety and security, including rules relating to permissible restraints on incoming mail. But none of these systems have seen it fit or necessary to implement such a wholesale ban on speech as FDOC has instituted.³ This disparity exists because of the tenuous connection between FDOC’s stated security concerns and total censorship of *Prison Legal News*.

I. The Eleventh Circuit improperly deferred to FDOC in upholding the total ban of *Prison Legal News* under the First Amendment. In *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), this Court identified four factors for courts to consider when determining whether a prison’s restriction of a prisoner’s constitutional right is legitimate:

1. Whether there is a “valid, rational connection” between the regulation and the prison’s interest (“first *Turner* factor”);
2. Whether there are “alternative means” for the prisoner to exercise the right restricted by the regulation (“second *Turner* factor”);

³ See *infra* Part II(C)(1).

3. What impact accommodating the asserted constitutional right “will have on guards and other inmates, and on the allocation of prison resources generally” (“third *Turner* factor”);
4. Whether there are “ready alternatives” for furthering the prison’s interests, or whether the regulation is an “exaggerated response” to prison concerns (“fourth *Turner* factor”).

Rather than faithfully apply this precedent, the Eleventh Circuit applied a minimal scrutiny standard that drew every inference in favor of FDOC and against the prisoners’ and the publishers’ constitutional rights.

II. Under a proper application of *Turner*, FDOC’s decision to ban *Prison Legal News* should be rejected:

A. *Prison Legal News* uniquely benefits prisoners and the prison environment. In construing this factor, the Eleventh Circuit ignored the intertwined right of *prisoners* to read the publication, focusing only on Petitioner Prison Legal News’ (“PLN”) right of access to FDOC prisoners. Consequently, the court failed to take notice of the singular role the publication has in the lives of prisoners. *Prison Legal News* is uniquely tailored to serve the prison population. The magazine promotes respect for both the law and the rule of law, which are critical concepts in rehabilitating the men and women who find themselves in prison or jail. Because there are no “alternative means” for a prisoner to exercise the right restricted by the regulation, the restriction therefore fails the second *Turner* factor. 482 U.S. at 89-90.

B. Denying prisoners access to *Prison Legal News* is not a reasonable response to the overstated safety concerns put forth by FDOC because the ban will not affect whether prisoners use prohibited services. The ban neither prevents prisoners from learning about these prohibited services nor decreases the likelihood that they will use these services. Accordingly, banning *Prison Legal News* will not impact the prison environment. Because there is no “valid, rational connection” between the regulation and the prison’s interest, the restriction must fail the first *Turner* factor. *Id.* at 89. Moreover, because accommodating the prisoners’ First Amendment rights will have no impact on officers and other prisoners, or the allocation of prison resources generally, it also violates the third *Turner* factor. *See id.* at 90.

C. FDOC is the only corrections system in the country that institutes a total ban on *Prison Legal News*. FDOC stands alone in using a bludgeon to restrict the First Amendment in response to perceived concerns about the magazine’s advertising content. Yet FDOC has at its disposal readily available alternatives that are far better suited to achieve the penological interests purportedly served by FDOC’s draconian policy. FDOC can enforce and monitor compliance with existing rules that prohibit the same type of misconduct that it claims *Prison Legal News* might encourage. The complete censorship of *Prison Legal News* is a quintessential example of an “exaggerated response” to prison concerns for which “ready alternatives” are available, and thus fails the fourth *Turner* factor. *Id.* at 90.

ARGUMENT

I. The Eleventh Circuit's Decision Conflicts with Binding Supreme Court Precedent.

This Court has made clear that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner*, 482 U.S. at 84. At the same time, “the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere.” *Beard v. Banks*, 548 U.S. 521, 528 (2006). The “complex and intractable” problems that prisons present, and the inherent difficulties of managing these institutions, counsel substantial deference to the judgment of corrections officials on issues of prison administration. *Turner*, 482 U.S. at 84-85 (quoting *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)). Reconciling these intertwined principles, this Court has held that a restrictive prison regulation is constitutional if it is “reasonably related to legitimate penological interests” and is “not an ‘exaggerated response’ to such objectives.” *Beard*, 548 U.S. at 528 (quoting *Turner*, 482 U.S. at 87). To determine the reasonableness of the restriction at issue, this Court has set forth four factors courts must consider, *see supra* at 2-3.

The Eleventh Circuit failed to properly apply these standards. First, the court failed to demand a genuinely *rational* connection between FDOC’s impoundment of *Prison Legal News* based on the magazine’s advertising content and the officials’ concerns about prison security and public safety. *See Prison Legal News v. Fla. Dep’t of Corr.*, 890 F.3d 954

(11th Cir. 2018). Rather, it found that such a connection exists based on the conclusory testimony of a single expert for FDOC. *See id.* at 967-72. The expert stated that each type of advertisement at issue—including advertisements for three-way calling, pen pal solicitation, cash-for-stamp exchange, prisoner concierge, and people locator—would help “create the possibility, the real possibility” of prisoners “doing an end run around prison rules.” *Id.* at 969 (alterations and quotations omitted). Contrary to this Court’s precedent, the court failed to demand “more than a formalistic logical connection between a regulation and a penological objective.” *Beard*, 548 U.S. at 535.

Second, the Eleventh Circuit misapplied the second *Turner* factor requiring consideration of “whether there are alternative means” for a prisoner to exercise the restricted constitutional right. 482 U.S. at 90. The court acknowledged that the inquiry was “a close call,” but nonetheless concluded that this factor favored FDOC because PLN had other means of exercising its right of access to Florida prisoners. 890 F.3d at 972-73. The court reasoned that PLN had the ability to send other publications to prisoners. *Id.* at 973. The court emphasized that *Turner* does not require the publisher’s right of access to be “ideal.” *Id.* at 973. The Eleventh Circuit erred in narrowly defining the constitutional right at issue as solely PLN’s right of access to Florida prisoners. As an initial matter, the court improperly disregarded the fact that PLN has no alternative means for delivering its content to prisoners in Florida. *See id.* Moreover, the court ignored “inmates’ intertwined right to receive written materials from PLN.” *Prison Legal News v. Stolle*, 319 F. Supp. 3d 830, 846 (E.D. Va. 2015); *see*

also *Turner*, 482 U.S. at 90 (explaining that the inquiry is whether alternative means “remain open to prison inmates”); *Prison Legal News v. Livingston*, 683 F.3d 201, 218 (5th Cir. 2012) (evaluating First Amendment alternatives available to “prisoners and PLN”). The Eleventh Circuit’s application of this factor thus overlooked the unique role the magazine plays in prisons and the lives of prisoners.

Third, the Eleventh Circuit was impermissibly deferential in assessing the alleged risks posed by *Prison Legal News* to officers, prisoners, and the allocation of prison resources generally under the third *Turner* factor. The court’s reasoning was remarkably thin: FDOC has been “impound[ing] every monthly issue of *Prison Legal News* during the five-year period for which there is evidence.” 890 F.3d at 973. Therefore, according to the court, FDOC “would have to allocate more time, money, and personnel in an attempt to detect and prevent security problems engendered by the ads in the magazines.” *Id.* However, the advertisements do not increase the burden on prison officials because prisoners inevitably learn of prohibited services through other means, *i.e.*, through exposure through television or the internet, through the prisoner grapevine, and through the FDOC regulations themselves. Accordingly, the ban does not meaningfully impact the prison environment. Moreover, by denying prisoners access to critical legal information, the ban paradoxically increases, rather than decreases, the allocation of resources, as *Prison Legal News* disseminates information about viable claims and thereby reduces frivolous litigation. See *infra* at 12 & n.13. The Eleventh Circuit failed to

properly weigh the prisoners' constitutional rights in assessing the ban's impact on the prison environment.

Fourth, the Eleventh Circuit failed to properly conclude that the FDOC's total ban on *Prison Legal News* was an exaggerated response to its purported concerns under the fourth *Turner* factor. *See id.* at 974-76. The court reached its inapposite conclusion to the contrary despite the fact that FDOC is the only prison system in the country to impose such a ban, and despite the fact that FDOC already prohibits the conduct it claims is encouraged by the advertisements. As discussed further *infra* Part II(C), FDOC already enforces and monitors compliance with rules that prohibit three-way calling and call forwarding, soliciting pen pals, using stamps as currency, or conducting a business. Combined with the fact that prisoners will learn of the existence of prohibited services through other means, these rules render a total ban on the magazine a quintessential exaggerated response to FDOC's purported concerns for which ready alternatives exist.

II. A Proper Application of Supreme Court Precedent Requires Relief for Prison Legal News.

A. *Prison Legal News* Uniquely Benefits Prisoners and the Prison Environment.

In determining the legitimacy of a prison's restrictions of a prisoner's First Amendment right, a court must consider "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90 (setting forth

the second *Turner* factor). The availability of alternative means militates in favor of deferring to corrections officials gauging the validity of the regulation. *Id.* at 90.

Prison Legal News is singularly valuable to prisoners.⁴ *Prison Legal News* was founded by Paul Wright, a prominent former prisoner.⁵ It contains articles from a range of voices—including current and former prisoners, law professors, journalists, activists, attorneys, and judges.⁶ The magazine covers a

⁴ See Giovanna Shay, Response, *One Market We Do Not Need*, 160 U. Pa. L. Rev. PENumbra 319, 324 (2012) (describing *Prison Legal News* as “the leading publication for prisoner rights.”); Christopher Zoukis, *Prison Publication Provides a Voice for Those Behind Bars*, New York Daily News (July 19, 2016), <http://www.nydailynews.com/life-style/prison-publication-voice-behind-bars-article-1.2717628> (describing *Prison Legal News* as the “premier outlet for news about prison reform and legislative developments that pertain to prisoners”).

⁵ David L. Hudson, Jr., *Ex-Con Fights for Prisoner Rights and Battles Censorship*, ABA J. (Oct. 2016), http://www.abajournal.com/magazine/article/prison_legal_news_wright_profile.

⁶ See, e.g., *id.*; Ronald Kuby, *Silencing the Oppressed: No Freedom of Speech for Those Behind Walls*, Prison Legal News (May 15, 1995), <https://www.prisonlegalnews.org/news/1995/may/15/silencing-the-oppressed-no-freedom-of-speech-for-those-behind-the-walls>; Alan Prendergast, *At the Federal Supermax, When Does Isolation Become Torture?*, Prison Legal News (Sept. 2, 2018), <https://www.prisonlegalnews.org/news/2018/sep/2/federal-supermax-when-does-isolation-become-torture>; Mumia Abu-Jamal, *Prieto’s Promise: An End to Death Row?*, Prison Legal News (Aug. 10, 2016), <https://www.prisonlegalnews.org/news/2016/aug/10/prietos-promise-end-death-row>; Alexander Volokh, *Do Faith-Based Prisons Work?*, Prison Legal News (July 10, 2014), <https://www.prisonlegalnews.org/news/2014/jul/10/do-faith-based-prisons-work>; Chief Judge Jon O. Newman, *Not All Prisoner Lawsuits Are Frivolous*, Prison Legal News (Apr. 15,

wide array of pertinent topics for prisoners and their families, including current affairs in prisons, updates in the law, and relevant political news. Examples of recent articles include coverage of litigation over extreme temperatures in prisons, the opportunity of certain reformed offenders to seal their convictions, and a ballot initiative to reform felon disenfranchisement in Florida.⁷

All speech is unique. But *Prison Legal News* is also distinct from other prisoner-related media. A review of the available literature tailored to prisoners shows that *Prison Legal News* is unique in the breadth and depth of the subject matter that its articles cover, and its diverse and accomplished array of contributors. While publications such as *News & Letters*⁸ and

1996), <https://www.prisonlegalnews.org/news/1996/apr/15/not-all-prisoner-lawsuits-are-frivolous>.

⁷ See, e.g., Matt Clarke & Christopher Zoukis, *Litigation Heats Up Over Extreme Temperatures in Prisons, Jails*, Prison Legal News (June 29, 2018), <https://www.prisonlegalnews.org/news/2018/jun/29/litigation-heats-over-extreme-temperatures-prisons-jails>; Derek Gilna, *New York Law Gives Reformed Offenders an Opportunity to Seal Convictions*, Prison Legal News (May 7, 2018), <https://www.prisonlegalnews.org/news/2018/may/7/new-york-law-gives-reformed-offenders-opportunity-seal-convictions>; David M. Reutter, *Lawsuit, Ballot Initiative Seek to Reform Felon Disenfranchisement in Florida*, Prison Legal News (Sept. 2, 2018), <https://www.prisonlegalnews.org/news/2018/sep/2/lawsuit-ballot-initiative-seek-reform-felon-disenfranchisement-florida>.

⁸ *News & Letters*, published by the News and Letters Committees, is a Marxist-Humanist newspaper focused on raising “the voices of revolt” and the abolition of capitalism. *About Us*, News and Letters Committees, <https://newsandletters.org/about-us> (last visited Oct. 11, 2018).

*Prisoner Express*⁹ are narrowly focused, *Prison Legal News*, as a general interest magazine, explores these same topics in addition to many more.¹⁰ Unlike other literature geared toward prisoners, moreover, *Prison Legal News* provides uniquely valuable information about matters taking place in prisoners' local communities. For example, the magazine recently published a number of articles on issues central to the lives of Florida prisoners, such as non-violent protests against unpaid wages, changes to disability accommodations pursuant to a settlement by FDOC, and prisoners' right to receive kosher meals.¹¹

Prison Legal News is also unparalleled in its ability to speak to prisoners about the issues most relevant to their current circumstances. By informing

⁹ *Prisoner Express* seeks to promote rehabilitation through creative self-expression. See *About Prisoner Express*, Prisoner Express, <https://prisonerexpress.org/about/> (last visited Oct. 11, 2018).

¹⁰ See, e.g., *Attention Artists*, Prison Legal News (Dec. 15, 1992), <https://www.prisonlegalnews.org/news/1992/dec/15/attention-artists> (calling for art by prisoners for the Free U.S. Political Prisoners and Prisoners of War art show).

¹¹ See, e.g., Dale Chappell, *Florida Prisoners 'Laydown' in Non-Violent Protests*, Prison Legal News (June 16, 2018), <https://www.prisonlegalnews.org/news/2018/jun/16/florida-prisoners-laydown-non-violent-protests>; David M. Reutter, *Florida Prisoners with Disabilities to Receive Accommodations Under Settlement*, Prison Legal News (Mar. 6, 2018), <https://www.prisonlegalnews.org/news/2018/mar/6/florida-prisoners-disabilities-receive-accommodations-under-settlement>; David Reutter, *Eleventh Circuit: Florida Prisoners Must be Provided Kosher Meals*, Prison Legal News (Oct. 10, 2017), <https://www.prisonlegalnews.org/news/2017/oct/10/eleventh-circuit-florida-prisoners-must-be-provided-kosher-meals>.

prisoners of their rights in a clear, digestible way, *Prison Legal News* helps prisoners better comprehend the law. Moreover, by giving prisoners the tools to redress their grievances through legal channels, the magazine helps reduce the likelihood that prisoners will use violence against prison officials based on perceived grievances.¹² The magazine also informs prisoners of their rights and disseminates information about viable and nonviable claims, thereby reducing meritless litigation by *pro se* prisoners.¹³

Prison Legal News is becoming increasingly important as Florida's movement toward digitization of legal materials thwarts the ability of many prisoners to gain access to such materials.¹⁴ Many prisoners are unfamiliar with legal subscription databases such as LexisNexis and Westlaw and have trouble navigating

¹² See Justin Brooks, *Addressing Recidivism Legal Education in Correctional Settings*, 44 Rutgers L. Rev. 699, 735 (1992) [hereinafter Brooks, *Addressing Recidivism*] (“[I]t is important that inmates learn how to legally cope with everyday dilemmas, both inside and outside of correctional facilities. Without these skills there is increased crime and violence inside correctional facilities, and inmates continue to come in and out of the system because they cannot deal with their problems in society.”).

¹³ See, e.g., *Frivolous Dismissal Reviewed Under Abuse of Discretion Standard*, Prison Legal News (July 15, 2002), <https://www.prisonlegalnews.org/news/2002/jul/15/frivolous-dismissal-reviewed-under-abuse-of-discretion-standard>; Matt Clarke, *Florida Court of Appeals: Prison Guards Can Raise “Stand Your Ground” Defense*, Prison Legal News (Dec. 3, 2014), <https://www.prisonlegalnews.org/news/2014/dec/3/florida-court-appeals-prison-guards-can-raise-stand-your-ground-defense>.

¹⁴ See Adam Wisnieski, *Access Denied: The Digital Crisis in Prisons*, The Crime Report (Aug. 6, 2018), <https://thecrimereport.org/2018/08/06/access-denied-the-digital-crisis-in-prisons>.

digital material.¹⁵ Often, the limited number of computers available to the large group of prisoners seeking to use them leaves prisoners with little time to adequately conduct research.¹⁶ *Prison Legal News* offers an accessible way for prisoners to access pertinent updates.

Furthermore, reading *Prison Legal News* allows prisoners to spend their time in a constructive manner. Corrections officers understand that prisoners who spend their time reading and studying are less apt to cause problems. “A lack of understanding regarding the prison rules and processes leads to conflict, frustration, and diminished self-esteem that accompanies feelings of powerlessness.”¹⁷ *Prison Legal News* not only helps keeps prisoners positively engaged, but also provides them access to critical legal information that has a number of beneficial effects.

B. There is No Rational Connection Between the Ban on *Prison Legal News* and Prison Security, as the Ban Will Not Meaningfully Impact the Prison Environment.

For a restriction of a prisoner’s constitutional rights to be permissible, there must be “a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)) (setting forth

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See Brooks, Addressing Recidivism*, *supra* note 12, at 736.

the first *Turner* factor). A lack of a rational connection is fatal to any regulation, “irrespective of whether the other factors tilt” in favor of upholding the regulation. *Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001). In the absence of any evidence that *Prison Legal News* constitutes an actual and meaningful threat to institutional order, safety or security, FDOC’s unsubstantiated concerns cannot be used as a pretext to grant blind deference to prison administrators who seek to broadly silence undesirable speech. *See Pesci v. Budz*, 730 F.3d 1291, 1300 (11th Cir. 2013).

Similarly, courts must also consider “the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.” *Turner*, 482 U.S. at 90 (setting forth the third *Turner* factor). “When accommodation of an asserted right will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.” *Id.*

FDOC suggests that *Prison Legal News*’ advertising content raises potential fraud and security concerns because it provides information about conduct that FDOC prohibits. The prohibited services include: (1) services that allow an inmate to run a business; (2) pen pal services; (3) postage stamp services; and (4) three-way calling and call forwarding, amongst others. Brief for Appellant at 41, *Fla. Dep’t of Corr. v. Prison Legal News*, 890 F. 3d 954 (11th Cir. 2018) (No. 15-14220). While *amici* are familiar with the concerns associated with these services in the prison context, banning *Prison Legal News* is not an effective mechanism for preventing prisoner use of

such services. Prisoners are aware of the prohibited services that FDOC alleges are reflected in *Prison Legal News*' advertising content. Accordingly, prisoners who wish to use these services will attempt to do so whether or not they are exposed to advertisements about them.

Indeed, prisoners will learn about prohibited services in at least three ways. First, the mere presence of FDOC's regulations prohibiting such services itself places prisoners on notice that these services exist.¹⁸ Second, prisoners are frequently exposed to advertisements or information about products or services they are not permitted to obtain or use. For example, prisoners may watch television programs that depict illegal acts or contain advertisements for products or services prohibited to prisoners, such as alcohol or online social networking sites.¹⁹ Such television programs do not impact prison security and there would be no justification for prohibiting prisoners from watching those shows or using the internet altogether. Advertisements containing information about prohibited services likewise do not impact prison security. There is no rational justification for an outright ban on an invaluable magazine based solely on advertising content that tells prisoners what they already know. Third, information about these types

¹⁸ See *infra* Part II(C)(2), discussing prohibitions on certain abuses of mail and telephone privileges.

¹⁹ See, e.g., *Schmidt v. Crusoe*, 878 So. 2d 361, 366 n.6 (Fla. 2003) (referring to a lawsuit filed by a Florida inmate seeking access to satellite television as the network television available to inmates "contained violence and profanity.").

of services, even in the absence of advertising content, is easily communicated through phone calls, visits, letters, or the inmate grapevine; conversations on personal visits; or from the constant flow of prisoners cycling in and out of the prison community on new violations or from other prisons and jails.²⁰ Accordingly, the possibility that advertising content might lead prisoners to evade prison rules is inconsequential. The advertisements simply do not raise the specter that a prisoner will become aware of, or engage in, prohibited services.

Although prison administrators need not wait until an incident actually occurs, *Turner* demands that prison officials' asserted concerns be supported by more than pure speculation that prohibited speech or conduct might possibly impinge on legitimate penological interests. See *Pesci*, 730 F.3d at 1299 (“[D]eference to the professional judgment of the facility administration is not tantamount to carte blanche permission to deny the fundamental rights of free speech and free expression. Care must be exercised to examine each claim individually and particularly.”). The dubious relationship between the advertising content and FDOC’s purported safety and security concerns does not pass this test.

²⁰ See Benjamin Steiner, *Maintaining Prison Order: Understanding Causes of Inmate Misconduct within and Across Ohio Correctional Institutions* 13 (July 21, 2008) (unpublished Ph.D. dissertation, University of Cincinnati), <https://www.ncjrs.gov/pdffiles1/nij/grants/226458.pdf> (noting that in prisons, “[s]trati-fication systems develop to provide materials and services denied by the administration (e.g., alcohol, drugs, weapons, sex, legal advice, protection”).

Allowing prisoners to gain access to the magazine would have no negative impact on the prison environment under the third *Turner* factor. Banning the magazine would have no meaningful impact on prison security because prisoners who seek to use prohibited services will do so regardless of whether they are exposed to information about those services in the magazine. Instead, the availability of *Prison Legal News* may enhance the prison environment for officials and prisoners, as the magazine allows them to spend their time in a constructive manner. Moreover, FDOC already enforces and monitors compliance with rules that prohibit conduct that FDOC alleges will occur as a result of the advertising content in *Prison Legal News*.

C. Censoring *Prison Legal News* Is an Exaggerated Response to Prison Concerns.

A court assessing the legitimacy of a prison's restriction of a prisoner's First Amendment right must also consider whether the restriction is an "exaggerated response" to prison concerns." *Turner*, 482 U.S. at 90 (setting forth the fourth *Turner* factor). The complete ban of *Prison Legal News* is such an exaggerated response that FDOC stands alone as the only penal system in the country that bans *Prison Legal News* in full every month. FDOC has at its disposal readily available alternatives that are far better suited to achieve the penological interests purportedly served by FDOC's policy. These basic alternatives are so "obvious" and "easy" that they are not only used in every other state in the country, they are also currently used by FDOC itself. *See id.* at 90 ("[T]he

existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.”). FDOC can effectively address concerns that it claims are raised by certain advertisements in *Prison Legal News* by enforcing existing rules regarding prison behavior and monitoring compliance with those rules.

1. FDOC Is the Only Corrections System in the Country that Imposes a Total Ban on *Prison Legal News*.

FDOC is the only penal system in the country that imposes total censorship on *Prison Legal News* every month. To prevent prisoners from engaging in prohibited conduct that FDOC alleges is encouraged by the magazine’s advertisements, other penal systems enforce rules that prohibit conduct that would damage prison safety and security.

California, for example, provides an instructive list of “disallowed” correspondence which includes “material obscene in nature” or which “[c]oncerns plans to disrupt the order, or breach the security, of any institution/facility.” Cal. Code Regs. tit. 15, § 3135(c)(5) (2015) (“Disturbing or Offensive Correspondence”). While this list is non-exhaustive, it provides helpful and necessary guidance to officers reviewing materials for contraband to avoid abuses of discretion and allegations of misguided motivations to ensure a neutral process. The list also specifically targets activity that “concerns plans” for dangerous conduct, rather than speculating whether prisoners

will be influenced by the mere suggestion of an activity which is already prohibited. *Id.*

Similarly, Colorado provides for mailroom review of incoming publications, and allows prison officials to censor individual publications that “pose a potential threat to the safety and security . . . by advocating facility disruption or noncompliance with prison rules or regulations.” Colo. A.R. 300-26, at 3 (2017), <https://www.colorado.gov/pacific/cdoc/policies-1>. Maryland provides an exception to the general rule that “correspondence should not be read, rejected, or restricted” when prison officials find “clear and convincing evidence that it poses a threat to the order, security or safety of the facility, public officials or the general public.” Md. Comm’n on Corr. Standards, *Standards, Compliance Criteria, and Compliance Explanations for Adult Correctional Institutions* 52 (2012), <https://www.dpscs.state.md.us/publicinfo/publications/pdfs/MCCS/StandardsManual-ACI-02-2012.pdf>.

Texas has made clear that “policies that ban all or certain publications without proper review should never be implemented.” Brandon Wood, Tex. Comm’n on Jail Standards, *Technical Assistance Memorandum* 2 (2013), <https://www.tcjs.state.tx.us/docs/TAMemoPrisonLegalNews.pdf>. Instead, officials must consider whether prisoner correspondence and publications meet certain baseline standards on a “case-by-case basis.” *Id.* at 1.

2. Enforcing Prison Rules Effectively Addresses Prison Concerns.

No other penal system in the country has seen fit to impose a total ban on a publication's speech. Rather, they have enforced rules that effectively protect prison safety and security. This is because the most effective way to address misconduct in prisons is to institute clear rules and impose direct punishment for violations of those rules. Clear rules provide direction to inmates as to what conduct is not permitted, and punishment deters inmates from engaging in such conduct.

FDOC enforces rules that prohibit the same misconduct that it claims *Prison Legal News* advertisements might encourage, including but not limited to:

- Prohibiting call forwarding and three-way calling services. Fla. Admin. Code r. 33-602.205(2)(a) (2016).
- Limiting a prisoner's call list to ten telephone numbers, and requiring that each number be approved by FDOC. *Id.* r. 33-602.205(2)(a), (g).
- Prohibiting prisoners from soliciting for pen pals. *Id.* r. 33-210.101(9).
- Limiting the number of stamps a prisoner can possess to forty stamps. *Id.* r. 33-602.201.
- Limiting the number of stamps a prisoner can receive in the mail to twenty. *Id.* r. 33-210.101(2)(e).

- Prohibiting prisoners from using postage stamps as currency to pay for products or services. *Id.* r. 33-210.101(22).
- Prohibiting prisoners from conducting a business while confined, which includes “any activity in which the inmate engages with the objective of generating revenue or profit while incarcerated.” *Id.* r. 33-602.207(1)-(2) (2008).

FDOC rules provide penalties for each incident of misconduct, including disciplinary confinement and reducing “gain time.” Gain time provides an opportunity for prisoners to reduce their sentence through good behavior. *See Fla. Stat. § 944.275* (2017). Eligible prisoners may earn 10 days of incentive gain time per month. *See id.* For violations of mail regulations or telephone regulations, prisoners may receive up to 30 days of disciplinary confinement and lose up to 30 days of gain time. *See Fla. Admin. Code r. 33-601.314*(9-14), (9-25) (2014). The imposition of these direct, immediate penalties are effective bulwarks against prisoners’ use of prohibited services.

3. Monitoring Prisoner Behavior Effectively Detects and Prevents Misconduct.

Prison officials extensively monitor prisoners to ensure that they do not engage in misconduct or use prohibited services. The nature of the penal system enables monitoring to be quite effective, as prison staff have unique control over the lives of prisoners, and every aspect of a prisoner’s life may be subject to

surveillance. To effectively detect and prevent prisoner misconduct, FDOC uses a layered approach involving staff monitoring and a variety of technological tools. These tools are far more effective than banning one potential source of information for obtaining a prohibited service.

First, FDOC uses critical surveillance tools to detect and prevent misuse of telephones by prisoners, including call-forwarding and three-way calling. With a limited exception for calls placed to attorneys and foreign consulates, FDOC monitors and records prisoner telephone calls. *Id.* r. 33-602.205(1). This enables prison staff to listen to telephone conversations to detect suspicious activity and violations of prison rules. In addition, FDOC contracts with a technology company that provides secure telephone services to prisons, and offers services that prevent misconduct automatically, including three-way calling and call forwarding detection.²¹

Second, FDOC extensively monitors mail to detect and prevent misconduct, including pen pal services and people locator services. Specifically, FDOC staff open every piece of incoming and outgoing non-legal mail to ensure it does not contain prohibited items. *See* Fla. Admin. Code. r. 33-210.101(5) (all routine mail opened by employees); *id.* r. 33-210.102(8)(d) (all legal mail opened in presence of prisoner); *id.* r. 33-

²¹ *See Florida Department of Corrections, Securus Technologies*, <https://securustech.net/fl-doc> (last visited Oct. 11, 2018); *see also Remote Call Forwarding-Call Diverters*, Securus Customer Care, https://securus.custhelp.com/app/answers/detail/a_id/661/kw/three-way%20calling/session/L3RpbWUvMTUzODA3NTk5OC9zaWQvQkdEb0tSWG4%3D (last visited Oct. 11, 2018).

210.103(5)(a) (2012) (all privileged mail opened in presence of prisoner). FDOC also inspects mail on a routine basis. *Id.* r. 33-210.101(5). The extensive monitoring of written communications between prisoners and the outside world is an effective safeguard against the use of prohibited services.

In addition to monitoring prisoners' limited use of telephone and mail services, FDOC conducts routine and unannounced searches of prison cells for contraband. Accordingly, to prevent prisoners from abusing mail privileges—including preventing inmates from soliciting pen pals, using stamps as currency, or using people locator services for criminal purposes—FDOC need only follow its own rules.

CONCLUSION

Amici believe effective prison administration and overall public policy are best served when prison regulations are based on, and applied in accordance with, sound, fact-based assessments of a prison's realistic security needs. The decision by FDOC to ban *Prison Legal News* from its facilities is not such a regulation. *Amici's* experience working in and managing prisons, jails, and corrections systems across ten federal and state jurisdictions, including Florida, does not support FDOC's stated justification for the complete ban on core free speech rights.

The Eleventh Circuit's absolute deference to FDOC sends a dangerous message to corrections systems across the country. It suggests that they need only assert the barest of justifications for their restrictive regulations to pass constitutional muster. The

Turner reasonableness standard is not so toothless.
The Court should grant the petition for certiorari.

Respectfully submitted,

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**INTEREST OF FORMER CORRECTIONS
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Amicus John Clark served as Assistant Director of the Federal Bureau of Prisons from 1991-1997, and served as Warden of U.S. Penitentiary Marion, at the time the highest security correctional facility in the United States. He has over 40 years of corrections experience.

Former Pennsylvania and New York City Corrections Administrator Martin Horn

Amicus Martin Horn has served as Secretary of Corrections of the State of Pennsylvania and Commissioner of Corrections of the City of New York. He has had a career of more than 40 years in corrections including service as Superintendent of New York State's Hudson Correctional Facility. He is now Distinguished Lecturer at John Jay College of Criminal Justice, City University of New York.

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