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 U.S. Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Florida Department of Corrections ("FDOC") is charged with punishing and rehabilitating prisoners while ensuring prison security and protecting the public from inmates in its custody. To carry out those mandates, FDOC bars inmates from engaging in certain conduct that facilitates criminal activity—including three-way calling, soliciting pen pal services, and using postage stamps as currency. It is undisputed that those restrictions are permissible.

Because prisoners do not always follow prison rules, FDOC also seeks "to reduce the temptation for prisoners to commit more crimes and to curtail their access to the means of committing them." App.2. As relevant here, FDOC impounds an incoming publication if ads promoting prohibited services are prominent or prevalent throughout the publication.

After a four-day bench trial, the district court found that FDOC's facially neutral rules are rationally related to legitimate penological goals and have not been misapplied to suppress Petitioner's views. Petitioner does not claim that any of the district court's factual findings are clearly erroneous; nor does Petitioner ask this Court to overrule or modify any of its prior precedents. *See* Pet.i. Accordingly, the question presented is:

Whether, applying settled legal principles to the detailed factual findings made by the district court, FDOC's impoundment policy violates the First Amendment.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Eleventh Circuit:

1) Prison Legal News, Petitioner in this Court, was the plaintiff-appellee and cross-appellant below.

2) Julie L. Jones, Secretary, Florida Department of Corrections, respondent in this Court, was the defendant-appellant and cross-appellee below.

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STATEMENT

1. The Florida Department of Corrections ("FDOC") employs 16,700 officers to oversee 100,000 inmates in 123 facilities throughout the State. App.3. Florida law requires FDOC to "protect the public through the incarceration and supervision of offenders," to protect offenders "from victimization within the institution," and to rehabilitate offenders. Fla. Stat. § 20.315(1), (1)(d). Pursuant to its rehabilitation mandate, FDOC grants inmates phone, pen pal, and correspondence privileges so they can stay in touch with family and friends. Fla. Admin. Code r. 33-210.101(9); *id.* r. 33-602.201 app. 1; *id.* r. 33-602.205(1).

Because those privileges "may open doors to criminal activity," App.5, FDOC carefully limits them. Specifically, FDOC prohibits "three-way calling, which includes any type of call transferring," because such services enable "inmates to circumvent the regulations FDOC has in place to stop them from using prison phones to harass the public, arrange contraband smuggling, and conduct other criminal activity." App.6-7. Given the risk of fraud and the attendant burden associated with monitoring voluminous business mail and phone correspondence, FDOC bars inmates from conducting business while confined, including "any activity in which the inmate engages with the objective of generating revenue or profit while incarcerated." Fla. Admin. Code r. 33-602.207(1)-(2); *see* App.7. For similar reasons, while inmates may have pen pals, they are prohibited from "solicit[ing] or otherwise commercially advertis[ing] for money, goods, or services," which includes

"advertising for pen-pals" and "plac[ing] ads soliciting pen-pals" on social media and inmate pen pal websites. Fla. Admin. Code r. 33-210.101(9). Finally, inmates cannot use "postage stamps as currency to pay for products or services." *Id.* r. 33-210.101(22).

To reduce inmates' temptation to violate these rules and their access to means of doing so, FDOC mailroom staff flag incoming publications for contraband and prohibited communications and forward such materials to the warden or assistant warden, who have exclusive authority to impound publications. *See* Fla. Admin. Code r. 33-501.401(8). As relevant here, the warden or assistant warden may impound a publication that

> 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.

Id. r. 33-501.401(3)(l). The warden or assistant warden may also impound a publication that "otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person." *Id.* r. 33-501.401(3)(m).

FDOC "cannot impound all issues of an entire publication in advance"; instead, prison officials "must separately review and decide whether each issue of a publication violates the" rule. App.10. (citing Fla. Admin. Code r. 33-501.401(5)). The decision to impound an issue of a publication is subject to review by FDOC's Literature Review Committee. Fla. Admin. Code rr. 33-501.401(5), (8), (14)(a).

2. *Prison Legal News* "is a monthly magazine founded in 1990 that reports on legal developments in the criminal justice system and other topics that affect inmates." App.10-11. *Prison Legal News* also features commercial advertising, including advertising for "three-way-calling services," "pen pal services," and "cash-for-stamps services." Pet.6. In 2003, FDOC began impounding issues of *Prison Legal News* that contained such advertisements because they violated Rule 33-501.401(3)(l). App.11-12.

In 2004, PLN sued FDOC to enjoin the impoundments. The next year, after FDOC's telephone vendor assured the Department that it could block inmates' three-way calls, FDOC agreed not to impound issues of *Prison Legal News* as long as any problematic ads were incidental to the overall publication. App.12, 57. The district court therefore dismissed the lawsuit as moot, and the Eleventh Circuit affirmed. *See Prison Legal News v. McDonough*, 200 F. App'x 873, 876-78 (11th Cir. 2006). The district court in this case found "[t]he Rule was not . . . amended to 'moot' the 2005 case." App.47.

3. Three subsequent developments abrogated FDOC's rationale for allowing inmates access to issues of *Prison Legal News*:

First, FDOC administrators concluded that the prior policy did not meet the needs of the Department, because certain "changes in technology proved wrong the FDOC's belief that it had adequate security measures to curb three-way calling and call-forwarding." App.60.

Second, FDOC sought to mitigate the perceived "vagueness of subsection (3)(l)," which "provided that a publication would not be impounded as long as the ads were 'merely incidental to, rather than being the focus of, the publication.'" App.15 n.8. FDOC's clarifying amendment "provided that a magazine could also be impounded if the rule-defying ad was 'prominent or prevalent throughout the publication.'" *Id.*; App.60-61.

Third, PLN "went from 48 pages to 56 pages per issue," App.62, and both "the number and size of rule-defying ads" appearing in *Prison Legal News* "increased after 2005, resulting in their becoming less incidental and more prominent." App.13. For example, "since 2010, PLN has run an offending advertisement on the back cover of [each issue of] the magazine." App.63. At the same time, "officials noticed an increase in the number of inmates sending stamps to cash-for-stamps companies." App.13. They also became concerned about new types of advertisements that began to appear in Prison Legal News after 2005. App.67. Specifically, officials were concerned about ads for "a phone technology called

Voice over Internet Protocol, which makes it harder to detect three-way call attempts by transferring calls over the internet," and ads for "prisoner concierge" and "people locator" services that began to appear in *Prison Legal News* during that period. App.13. FDOC therefore resumed impounding issues of *Prison Legal News* in 2009.

4. PLN filed this lawsuit, raising two claims under 42 U.S.C. § 1983: that Rules 33-501.401(3)(l) and (3)(m), as applied to *Prison Legal News*, violate the First Amendment, and that FDOC had failed to provide PLN with proper notice for each impounded monthly issue, in violation of PLN's right to procedural due process. After a four-day bench trial, the district court issued detailed findings of fact and ruled against PLN on the First Amendment claim and for PLN on the due process claim, entering an injunction requiring FDOC to provide PLN with notice each time it impounds an issue of the magazine and the reason for the impoundment. *See* App.48-114.

As a threshold matter, the court rejected PLN's argument that FDOC's impoundments of *Prison Legal News* constituted impermissible content-based regulation of expression. Citing this Court's caselaw, the court explained that a rule is "neutral" so long as it "'draw[s] distinctions between publications solely on the basis of their potential implications for prison security.'" App.83. The court found that FDOC had done precisely that. *Id.*

The court also found that FDOC had not targeted *Prison Legal News* because of the viewpoints expressed therein. App.83. "PLN did not show, for

instance, that the FDOC disparately censors publications critical of its institutions." *Id.* In addition, "PLN failed to offer *any* evidence showing that the FDOC does *not* censor other publications containing similar advertising content, or that the only other publications that the FDOC censors contain editorial content similar to *Prison Legal News*." App.65. By contrast, FDOC produced evidence "that it has repeatedly rejected other publications on (3)(l) grounds, some of which on their face do not resemble *Prison Legal News." Id.* The court therefore found that PLN had not shown "unlawful animus on the part of FDOC administrators" or that "FDOC applies Rule 33-501.401(3)(l) and (m) in a biased fashion." App.84.

The court then turned to the four-factor test established by *Turner v. Safley*, 482 U.S. 78 (1987), explaining that FDOC was required to identify "legitimate governmental interests underlying its regulation," and that PLN had "the ultimate burden of showing that the regulation in question, as applied, is not reasonably related to legitimate penological objectives." App.82.

FDOC, the court concluded, "identified public safety and prison security as the underlying legitimate governmental interests." App.82. Based on its assessment of the record, the court found that PLN had not carried its burden of disproving the "rational connection between the censorship at issue and the stated penological objectives." App.84-92. The court had little difficulty finding that FDOC's policy served legitimate penological interests: "[E]ven PLN's expert," the court noted, "agree[d] that the underlying

services addressed in Rule 33-501.401(3)(l) and (m)," such as three-way calling and stamps-for-cash services, "unquestionably compromise public safety and prison security," which "is why the FDOC forbids prisoners from using them." App.85 (citations omitted). "The logic is straightforward. Without question, the proper, initial response to the dangerous services is forbidding prisoners from using them. Though not surprisingly, [prisoners] do so anyway. So the FDOC has adopted prophylactic safeguards in addition to bare proscription." *Id.* (citations omitted).

The court found that "Rule 33-501.401 is such a safeguard. Advertisements compromise security because they convert a publication into a 'one-stop shop' . . . for dangerous services. By limiting inmates' exposure, the Rule seeks to reduce the likelihood that inmates will use those services." App.85-86 (citation omitted). And while "'*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective,'" "FDOC met that burden by providing the testimony of several administrators who, 'relying on their professional judgment, reached an *experience-based* conclusion that [censorship] . . . further[s] [the] legitimate prison objectives.'" App.86 (quoting *Beard v. Banks*, 548 U.S. 521, 533, 535 (2006)). "And, as additional support, the FDOC provided expert testimony to establish that [censorship] will help curb prisoners' use of the services." App.86 (citation and internal quotation marks omitted).

The court rejected PLN's argument that FDOC was required to show "a concrete, unfortunate incident caused by an inmate using a banned service,

which the inmate learned about in *Prison Legal News*." App.86-87. "[E]ven if such evidence were required," moreover, the court found that "FDOC administrators provided examples, both in Florida and throughout the country, of problems associated with specific services that adverti[s]e, or have adverti[s]ed, in *Prison Legal News*." App.87. For example, "FDOC officials learned of a company that had been sending prisoners money for stamps, and how such companies could distribute money for prisoners to people in the outside world in exchange for stamps; this company had previously adverti[s]ed in *Prison Legal News*." *Id.*

The court also rejected PLN's argument that "other FDOC regulations undermine the Rule to such a great extent that they render the Rule's connection to security irrational," because the court credited the testimony of an FDOC administrator who "explained each conflicting rule" to the court's satisfaction. App.90. Specifically, PLN identified "a regulation permitting inmates to list cell phone numbers on their preapproved contact list and another allowing inmates up to 40 stamps at any given time." *Id.* While "[c]ell phones have three-way calling and call forwarding capabilities identical to, or better than, the services adverti[s]ed [i]n *Prison Legal News*," cell phones are also "ubiquitous in modern society." *Id.* at 90-91. The court therefore found that "[p]rohibiting inmates from calling cell phones would effectively preclude them from speaking with many of their loved ones who no longer carry land lines. The FDOC could theoretically impose such a draconian rule, but it would surely lead to increased tension within prisons." *Id.* at 91.

Likewise, "FDOC allows inmates to have stamps and allows families to send inmates stamps despite their contention that they are a serious hazard in prisons." *Id.* at 91. FDOC had previously considered "a rule that would have embargoed stamps sent by family members," but "[f]amilies and friends of prisoners vehemently opposed the proposal, expressing concern that the rule would increase the likelihood that their imprisoned loved ones would either be victimized or simply not purchase any stamps at all." *Id.* "Moreover, FDOC officials testified that implementing the accounting measures proposed by PLN to counteract the problems with stamps would be too costly and require amending state statutes." *Id.*

The court found that "[t]he remaining [*Turner*] factors tilt in the FDOC's favor as well." App.92. First, "[t]he Rule leaves open sufficient alternatives for PLN to express their point of view to inmates," as "the Rule does not completely prevent PLN from corresponding with inmates. There are countless other written materials that PLN may send prisoners." App.92 (citation omitted). Moreover, "even *Prison Legal News* is not invariably censored." App.92. While the Court agreed "that advertisements are necessary," "PLN ha[d] not proven that it is unable to adopt advertising rubrics that would help bring its magazine in line with prison regulations." App.92-93.

As for the third factor, "[t]he evidence demonstrate[d] that accommodating the specific way in which PLN seeks to exercise its right—through a publication containing dangerous amounts of advertising content—would 'significantly less[en]

liberty and safety for everyone else, guards and other prisoners alike.'" App.93.

The final factor—whether there are "'easy alternatives' indicating that the regulation is not reasonable, but rather an 'exaggerated response' to prison concerns," App.93 (quoting *Turner*, 482 U.S. at 90)—also weighed in FDOC's favor. PLN pointed to New York's decision not to censor *Prison Legal News* and to instead "attach[] a notice warning prisoners that the services adverti[s]ed are prohibited." App.94. However, "[e]ven if this is the sounder policy," the court explained, "FDOC is not required to implement the least restrictive regulation." *Id.* "[T]he alternatives suggested by PLN to eliminate the security concerns either have equally unattractive side effects or are costly to implement." *Id.* "Moreover, the FDOC may be constrained in ways that New York's department of corrections is not." *Id.* at 94-95. "Comparing different states' department of corrections is difficult, and in this case the parties did not submit sufficient evidence to do so." App.95.

Because "all *Turner* factors support[ed] the FDOC," the court ruled that "PLN failed to show that the FDOC's censorship of *Prison Legal News* is not 'reasonably related to legitimate penological interests.'" App.97 (quoting *Turner*, 482 U.S. at 89).

The district court accepted Petitioner's due process claim, holding that FDOC violated the Fourteenth Amendment insofar as it failed to notify Petitioner when it impounded issues of *Prison Legal News* for the first time. App.107-10.

5. A three-judge panel of the Eleventh Circuit unanimously affirmed. The Eleventh Circuit found the impoundments of *Prison Legal News* "content neutral" under this Court's decision in *Thornburgh* "because they are based 'solely on . . . [the magazine's] potential implications for prison security.'" App.24 (quoting *Thornburgh*, 490 U.S. at 415-16). "And PLN [did] not dispute that the Department's asserted interests for the impoundments—prison security and public safety—are legitimate." *Id.* Thus, the court explained, the only remaining question was "whether the Department's impoundments of Prison Legal News are 'reasonably related' to prison security and public safety." App.25 (quoting *Turner*, 482 U.S. at 89).

Addressing the first *Turner* factor, the court rejected Petitioner's argument that FDOC had to "present evidence of an actual security breach" in order to show a rational connection between its policy and its legitimate interest in protecting prison security and ensuring compliance with prison rules. App.26. Under *Turner*, the court explained, "prison officials must be able to 'anticipate security problems and . . . adopt innovative solutions' to those problems to manage a prison effectively." App.26 (quoting *Turner*, 482 U.S. at 89; emphasis omitted). The court cited decisions of the Seventh, Eighth, and Ninth Circuits reaching the same conclusion. App.26-27.

At any rate, the court explained, there was "plenty of evidence that preventing inmates from viewing prominent or prevalent ads for prohibited services will reduce the possibility that they will use those services." App.27.

> The ads not only make the prohibited services available to inmates but also appear along with articles about inmate phone scams, the role of Green Dot cards in prison gang extortion schemes, and the nationwide problem with smuggling contraband like drugs and cell phones into prisons. An inmate reading Prison Legal News not only reads articles about inmates putting the prohibited services to dangerous use, but also sees ads that enable him to obtain those same prohibited services.

App.27-29.

In addition, the court stressed, expert testimony supported a finding that "the ads 'create [the] . . . real possibility' of inmates doing an end run around prison rules." *Id.* at 29. Notably, FDOC's expert provided detailed testimony explaining "how that possibility exists for each type of ad at issue in this case: (1) three-way calling ads, (2) pen pal solicitation ads, (3) cash-for-stamps exchange ads, and (4) prisoner concierge and people locator ads." *Id.* The court provided an extended analysis of that and other pertinent evidence supporting the district court's factual findings as to each of those four categories of ads. App.29-34.

The court rejected Petitioner's argument that, "if the ads are as dangerous as the Department makes them out to be, then the Department should impound a publication with even one suspect ad, which it could do." App.34. FDOC's expert "testified that the Department adopted the 'prominent or prevalent' standard to 'moderate[ ]' the 'focus of' requirement in

Rule 3(l) and provide 'some leeway' to *Prison Legal News* and other publications with questionable ads, . . . even though that more moderate approach amounted to 'giv[ing] in on some security concerns.'" App.34. The Court rejected Petitioner's implicit contention that "moderation in pursuit of safety is a constitutional vice" and declined to "condemn the Department for permitting more expression than it was required to." App.34-35.

In sum, the court concluded, the extensive factual findings made by the district court after a four-day bench trial supported its determination that there is "a rational connection between [FDOC's] impoundments of Prison Legal News based on the magazine's ad content and prison security and public safety interests." App.35.

Petitioner argued that the second *Turner* factor—"'whether there are alternative means' available to PLN to exercise its right of access to its inmate subscribers," *Turner*, 482 U.S. at 90—weighs in PLN's favor "because the district court found that PLN could not afford to publish its magazine without advertising revenue, and publishing a separate Florida-only version without the rule-defying ads would be cost prohibitive." App.35. The court rejected that argument because it focused "solely on [PLN's] ability to send *Prison Legal News* to Florida inmates." App.37. This Court, the Eleventh Circuit explained, "has made clear that prisons do not have to provide exact, one-for-one substitutes to provide alternative means." App.36 (citing *Turner*, 482 U.S. at 92).

The third factor—"'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, weighed in FDOC's favor because "if the Department admits an issue of [*Prison Legal News*], it 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." App.38.

The final factor, "whether the impoundments of *Prison Legal News* are 'an exaggerated response to prison concerns,'" App.39, also weighed in FDOC's favor. Petitioner argued that "no other corrections department in the nation impounds this particular magazine based on its ad content." App.39. This Court, however, "has made it patently clear that the Constitution does not mandate a lowest common denominator security standard whereby a practice permitted at one penal institution must be permitted at all institutions." App.40 (citations and internal quotation marks omitted). The court rejected the suggestion that every state is required to adopt the same approach as New York, which merely "remind[s] inmates not to use the prohibited services." App.42. Mandating such an approach, the court noted, could have troubling implications for prison security: After all, a prison could "simply post signs reminding inmates not to escape," but that does not mean that prison officials may not deny prisoners access to tools and information that may help them to escape. *See id.*

Because the record favored FDOC with respect to every *Turner* factor, the court held "that the

impoundments of *Prison Legal News* under Rules (3)(l) and (3)(m) do not violate the First Amendment."

REASONS FOR DENYING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS OR THE DECISIONS OF ANY OTHER CIRCUIT.

A. The Eleventh Circuit's Decision Does Not Conflict With This Court's Precedents.

1. Petitioner argues that the decision below conflicts with this Court's precedents because those precedents "recognize that First Amendment rights are not extinguished within prison walls and that outlying policies like the FDOC's ban demand closer scrutiny." Pet.18 (capitalizations omitted). That argument fails.

Contrary to Petitioner's suggestion, the Eleventh Circuit expressly and repeatedly recognized that "First Amendment rights are not extinguished within prison walls," *id.* Quoting this Court, for example, the Eleventh Circuit explained that "'[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.'" App.18 (quoting *Turner*, 482 U.S. at 84); *see id.* at 2, 19. Similarly, the Eleventh Circuit affirmed that "publishers like PLN have a First Amendment right of access to their inmate subscribers." *Id.* at 19.

Petitioner is wrong to argue that the Eleventh Circuit's decision conflicts with this Court's

precedents because policies of the kind at issue here "demand closer scrutiny" than the Court of Appeals applied. Pet.18; *see id.* at 19-20. As a threshold matter, this case is not a good vehicle for resolving that issue. In the proceeding below, both parties to this case "agree[d] that the deferential standard established by [this] Court in *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), governs PLN's First Amendment challenge to the impoundments" at issue here, App.18; that is the standard the Eleventh Circuit applied, *see id.* at 24-43; and Petitioner should not now be heard to complain that the Court of Appeals should have applied a more demanding standard.

At any rate, the cases Petitioner cites do not support its assertion that "the nature of the FDOC's policy should also have triggered more demanding scrutiny under this Court's case law." Pet.20 (citing *Overton v. Bazzetta*, 539 U.S. 126, 134 (2003); *Procunier v. Martinez*, 416 U.S. 396, 413 n.14 (1974); *Holt v. Hobbs*, 135 S. Ct. 853 (2015)). In *Overton*, this Court held that certain regulations limiting prison visitation did not violate the First Amendment because they had "a rational relation to legitimate penological interests." 539 U.S. at 132. Far from establishing that "more demanding scrutiny" is required in the circumstances present here, *Overton* stressed that courts "must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Id.* As the Court of Appeals recognized, the same principle applies here. *See* App.20; *id.* at 21-24.

Petitioner does not establish a conflict with *Overton* by noting that this Court "might" have "reach[ed] a different conclusion" if it had been presented with "a *de facto* permanent ban on all visitation for certain inmates" in the context of a challenge to "a particular application" of the inmate-visitation regulation there at issue. *Overton*, 539 U.S. at 134; *see* Pet.20. That "suggest[ion]," Pet.20, was not the holding of *Overton*, and Petitioner does not argue otherwise. In addition, the Court did not say that it would have applied a different legal standard if it had been reviewing a "permanent ban on all visitation"; instead, it suggested that application of the *Turner* standard "might" have yielded a different result in materially different circumstances—i.e., that "the [two-year] restriction on visitation for inmates with two substance-abuse violations" might not have had a rational connection to a legitimate penological goal if that already "severe" restriction had been permanent rather than temporary in duration. 539 U.S. at 134.

In any event, this case does not involve any restriction on prisoner "visitation," and still less does it involve "a *de facto* permanent ban on all visitation for certain inmates," *id.* Under the challenged regulations, all inmates are allowed access to publications that do not contain prominent advertisements for prohibited services; the district court found that the challenged rules do not have the purpose or effect of banning, temporarily or permanently, disfavored views (App. 65, 83-84); and Petitioner does not ask this Court to rule that that factual finding was clearly erroneous.

Petitioner's contention that the decision below conflicts with footnote 14 of this Court's decision in *Martinez*, Pet.20, is similarly unavailing. For one thing, this Court overruled *Martinez* in *Thornburgh*, which left *Martinez* intact only insofar as that decision addresses "outgoing correspondence," 490 U.S. at 413, a subject not at issue here. In addition, *Martinez* did not hold or opine that a prison policy "warrants closer scrutiny" if the policy is a "complete outlier." *See* Pet.20. Instead, the Court simply noted that, "[w]hile not necessarily controlling, the policies followed at other well-run institutions would be *relevant* to a determination of the need for a particular type of restriction." 416 U.S. at 414 n.14 (emphasis added). The Eleventh Circuit expressly acknowledged that principle. App.39 ("Although the 'policies followed at other well-run institutions [are] relevant to a determination of the need for a particular type of restriction,' such policies are not 'necessarily controlling.'").

Finally, Petitioner's passing citation to *Holt v. Hobbs*, 135 S. Ct. 853 (2015), Pet.20, does not help to show a conflict with this Court's precedents. The Court there held that a grooming policy violated RLUIPA insofar as it prevented a prisoner from growing a 1/2-inch beard in accordance with his religious beliefs. 135 S. Ct. at 861-67. As Petitioner's "cf." citation (Pet.20) indicates, *Holt* did not address a First Amendment challenge under *Turner*. Indeed, the Court faulted the district court for "improperly import[ing] a strand of reasoning from cases involving prisoners' First Amendment rights," including *Turner*, in assessing the RLUIPA claim before it. 135 S. Ct. at 862.

2. Petitioner next claims that, "contrary to this Court's precedents, the Eleventh Circuit granted complete deference to Florida prison authorities" and thus "made it impossible for Petitioner to succeed." Pet.20 (capitalizations omitted); *see* Pet.20-24. That is wrong. The Eleventh Circuit expressly and unambiguously affirmed its understanding that this Court's caselaw calls on courts "[t]o balance judicial deference with 'the need to protect constitutional rights.'" App.19 (quoting *Turner*, 482 U.S. at 85). Petitioner is free to disagree with the outcome of the Eleventh Circuit's careful and fact-intensive balancing inquiry, *see* App.24-43; but Petitioner should not ask this Court to review the decision below on the erroneous premise that the Court of Appeals either articulated the wrong legal standard or else did not mean what it said.

Contrary to Petitioner's argument, the ruling below is consistent with this Court's decisions in *Beard* and *Thornburgh*.

The decision below does not conflict with *Beard*. *See* Pet.20-21, 23. There, six members of this Court rejected a First Amendment challenge to a Pennsylvania policy forbidding certain dangerous inmates *any access* to newspapers, magazines, and photographs. 548 U.S. at 524-35 (plurality opinion of Breyer, J.); *id.* at 536-42 (Thomas, J., concurring in the judgment). Prison officials testified that the policy would "provid[e] increased incentives for better prison behavior" and "that the regulations do, in fact, serve the function identified." *Id.* at 530-31 (plurality opinion). A plurality of four Justices deferred to that conclusion because the connections "between

newspapers and magazines, the deprivation of virtually the last privilege left to an inmate, and a significant incentive to improve behavior, are logical ones." *Id.* at 531-32.

Two members of the Court concluded that the prisoner's First Amendment challenge failed because the state had "sentenced respondent against the backdrop of its traditional conception of imprisonment," which did not afford prisoners unfettered access to magazines, newspapers, and photographs." *Id.* at 540 (Thomas, J., concurring in the judgment); *see id.* at 537-40. In their view, the deferential standard employed by the plurality paid *too little* deference to prison authorities. *See id.* at 536 ("Judicial scrutiny of prison regulations is an endeavor fraught with peril."); *id.* at 536-37, 540-42.

The *Beard* plurality's passing reference to "experience-based conclusion[s]," 548 U.S. at 533, does not support Petitioner's assertion that prison officials' judgments concerning the need for particular security measures "*must* be 'experience-based'" in the sense that they must be supported by empirical data comparing results with and without such measures. Pet.21 (emphasis added); *see id.* at 16, 24. The solitary sentence on which Petitioner so heavily relies simply notes that, in *Overton* and *Beard*, "prison officials, *relying on their professional judgment*, reached an experience-based conclusion that the [challenged] policies help to further legitimate prison objectives." 548 U.S. at 533 (emphasis added). The four-Justice plurality did not rule that, to uphold a challenged prison regulation, a court must find that prison administrators reached an "experience-based

conclusion" supported by empirical data—not just "professional judgment" rooted in practical experience, *see id*.

Petitioner's contrary interpretation cannot be reconciled with the reasoning the plurality employed in approving the challenged policy. The plurality deferred to a prison official's testimony that the policy would "provid[e] increased incentives for better prison behavior" and "that the regulations do, in fact, serve the function identified," because the official's conclusion was logical. 548 U.S. at 530-31. The Court of Appeals, by contrast, had "placed too high an evidentiary burden upon" prison officials, declining to defer to the testifying official's "professional judgment that the Policy deprived 'particularly difficult' inmates of a last remaining privilege and that doing so created a significant behavioral incentive." *Id.* at 535.

Consistent with the plurality's analysis in *Beard*, FDOC's expert in this case, relying on professional judgment rooted in practical experience, testified that the prohibited ads "'create the . . . real possibility' of inmates doing an end run around prison rules." App.29. FDOC witnesses also testified to specific reasons, discussed in detail above, why the ban reduces the likelihood that inmates will circumvent prison rules and why alternatives are less effective or cost prohibitive. *See, e.g.*, App.4, 8-9, 29, 31-35.

In short, *Beard* "confirms that [federal courts] owe deference to the decisions of wardens and other prison officials," App.22; at a minimum, this Court's decision to *uphold* a policy *denying* certain prisoners any

access to newspapers does not compel the conclusion that the court below was bound to *reject* a policy *granting* all prisoners access to newspapers that do not prominently display advertisements for discrete services that prison officials concededly have the right to prohibit. That is why, in the court below, Petitioner's amici "attempt[ed] to distinguish *Beard*" from this case. App.23 n.10. Nevertheless, Petitioner and its amici now urge that a case they previously recognized as unhelpful to their cause—and even sought to distinguish as "exceptional," *see id.*—conflicts with the decision below.

The ruling below likewise does not conflict with this Court's decision in *Thornburgh*. Applying *Turner*'s four-factor test, *Thornburgh* upheld regulations allowing federal prisons to reject any outside publication found "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity." *Id.* at 404 (citation and quotation marks omitted). "Where the regulations at issue concern the entry of materials into the prison," the Court explained, "a regulation which gives prison authorities broad discretion is appropriate." *Id.* at 416. In particular, "the broad discretion accorded prison wardens" by the challenged regulations was "rationally related to security interests" because "publications can present a security threat," and "a more closely tailored standard could result in admission of publications which, even if they did not lead directly to violence, would exacerbate tensions and lead indirectly to disorder." *Id.* (citation and quotation marks omitted). The federal government was not required to provide publishers alternative means of communicating the same message to the

same inmates. It was sufficient that "the regulations at issue in the present case permit a broad range of publications to be sent, received, and read." *Id.* at 417.

The reasoning of *Thornburgh* supports the decision below. FDOC's "prominent or prevalent" standard is no more "standardless," *see* Pet. 22-23, than the federal government's rule allowing the warden to reject any outside publication found "detrimental to the security, good order, or discipline of the institution or if it might facilitate criminal activity," 490 U.S. at 404. Indeed, because this case involves a state penal system, "federal courts have," if anything, "additional reason to accord deference to prison authorities." *Turner*, 482 U.S. at 85.

B. The Eleventh Circuit's Decision Does Not Create A New Conflict Between The Federal Courts Of Appeals.

Petitioner contends that the Eleventh Circuit's decision is more deferential to prison officials than the decisions of other circuits, which, according to Petitioner, require proof of a "correlation" "between [a prison policy] and actual incidents of violence (or some other actual threat to security)." App.26; *see* Pet.24. To the contrary, the decisions cited in the Petition do not require such proof as a matter of course and are entirely consistent with the decision below, requiring a higher threshold of evidence only where, unlike here, the regulation either does not implicate prison security or bears no logical or common-sense connection to the asserted justification.

1. The Ninth Circuit. The decision below does not conflict with *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001). PLN happened to be the plaintiff in *Cook*, just as it is here; but, as Petitioner acknowledges, the Ninth Circuit in *Cook* and the Eleventh Circuit in this case "assessed different prison policies," Pet.25. *Cook* struck down a blanket policy "prohibiting the receipt of standard rate mail, as applied to subscription non-profit organization mail." 238 F.3d at 1146. Thus, and as the Ninth Circuit stressed, *Cook* did not involve a targeted restriction on "speech whose content is objectionable on security or other grounds"; instead, the case addressed a sweeping ban on the delivery of wholly "unobjectionable mail" that did not, in the Ninth Circuit's view, so much as "implicate penological interests," legitimate or otherwise. *Id.* at 1149. In stark contrast, the issue here is whether the challenged regulations permissibly allow FDOC "to screen all incoming publications for content that might enable them to break prison rules," App.9; and the Eleventh Circuit accordingly focused its analysis on whether "[t]here is a rational connection between [FDOC's] impoundments of *Prison Legal News* based on the magazine's ad content and prison security and public safety interests." App.35.

The Ninth Circuit's decisions "[i]n other contexts," Pet.25, likewise do not conflict with the decision below. In *California First Amendment Coalition v. Woodford*, for example, the court found unconstitutional a restriction on public access to executions, ruling that officials "must at a minimum supply some evidence that . . . potential problems are real, not imagined." 299 F.3d 868, 882 (9th Cir. 2002).

That decision is not in tension with the decision below, because *Woodford* found the rule at issue "analogous to the outgoing correspondence restriction in [*Procunier v.*] *Martinez*," in that "neither restriction reasonably implicates security *inside* the prison." *Id.* at 882 (citing 416 U.S. 396 (1974)). The court therefore applied a less deferential standard, requiring a "'closer fit' between [the rule] and defendants' legitimate penological interest." *Id.* at 879.

2. The Third and Seventh Circuits. The decision below does not conflict with *Brown v. Phillips*, which addressed a challenge by certain civilly committed detainees to the Rushville Treatment and Detention Center's policies "restricting their access to movies, video games, and video game consoles." 801 F.3d 849, 851 (7th Cir. 2015). Assessing the summary-judgment record before it, the court found that "[t]he record at this point does not contain *a basis* for linking the ban on media content to Rushville's therapeutic or security goals." *Id.* at 854 (emphasis added). In that context, the Seventh Circuit concluded, "a bare assertion that Rushville's ban on sexual material promotes treatment [was] insufficient to justify summary judgment" for defendants as to the claim challenging the ban on movies and video games, *id.* at 854; summary judgment as to that claim was "premature," the court explained, because "further proceedings [were] needed to see what the defendants based their opinions on." *Id.* at 855.

Significantly, the Seventh Circuit affirmed the grant of summary judgment for defendants as to the ban on video game consoles. *Id.* Of particular

relevance here, that ban was approved based on "record evidence" that does not appear to have included any empirical "data" assessing the effectiveness of that restriction, *see id.* at 852-53, 855; instead, the court relied on assertions in sworn affidavits explaining, based on the knowledge and experience of the treatment facility's employees, that "consoles capable of accessing the internet allow detainees to contact victims of their crimes" and "permit inmates to download, manipulate, share, and store *illegal* pornography." *Id.* at 855 (emphasis in original).

Those rulings are entirely consistent with the decision below. For one thing, the Seventh Circuit in *Brown* applied a "modified" version of the *Turner* standard, because civil detainees "'who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'" *Id.* at 853. The Eleventh Circuit in this case applied the ordinary *Turner* standard, App.18, and it did not rule out the possibility that a less deferential standard might apply to civil detainees raising First Amendment claims.

Assuming *arguendo* that the "modified" *Turner* standard the Seventh Circuit purported to apply is the same as the traditional *Turner* inquiry applicable to prisons "designed to punish" criminals, *but see* 801 F.3d at 853, the Seventh Circuit did not hold that a prison policy that seeks to limit the means by which prisoners may break prison rules and commit crimes must be supported by empirical data. Just the opposite: The court approved the treatment center's

ban on video game consoles based on evidence that access to such consoles would enable or facilitate conduct that the treatment center had the right to prevent. That is just what the Eleventh Circuit did here. *See* App.2 (explaining that "this case is about" the validity of prison rules that seek to "reduce the temptation for prisoners to commit more crimes and to *curtail their access to the means of committing them*") (emphasis added).

Along the lines of the Seventh Circuit's decision in *Brown*, the Third Circuit has held that a bare assertion of "rehabilitative interests" is insufficient to justify a ban on the use of federal funds to distribute certain sexually explicit material to the general population of federal prisoners. *Ramirez v. Pugh*, 379 F.3d 122, 128 (3d Cir. 2004). As the Third Circuit stressed, however, "[w]here the link between the regulation at issue and the legitimate government interest is sufficiently obvious, no evidence may be necessary to evaluate the other *Turner* prongs," *id.* at 130. In this case, the Eleventh Circuit relied on abundant record evidence supporting the reasonableness of the challenged prison restrictions, *see* App.3-16, 55-73; and nothing additional in the way of empirical data was required to justify prison policies that reasonably seek to effectuate a prison's "sufficiently obvious" and legitimate interest in "reduc[ing] the temptation for prisoners to commit more crimes and to curtail their access to the means of committing them," App.2; *see Ramirez*, 379 F.3d at 128.

3. The Fifth Circuit. In *Turner v. Cain*, 647 F. App'x 357 (5th Cir. 2016), the court held that an

inmate's speech was not a "grievance" and therefore was not *per se* unprotected by the First Amendment. *Id.* at 363-64. The court expressly declined to decide whether the alleged retaliation was permissible under the four-factor test established by *Turner v. Safley*; instead, it remanded the case and instructed the district court to conduct that inquiry in the first instance. *Id.* at 364. In a separate opinion, Judge Weiner offered his view that the warden had not "produced evidence of *any* legitimate penological interest that would have permitted him to restrict" the inmate's speech. *Id.* at 367-68 (Weiner, J., concurring) (emphasis in original). Contrary to Petitioner's assertion, that view was not the "holding" of the case. Pet.27; *see* 647 F. App'x at 364. And, even if it was, that would not help Petitioner here. Judge Weiner's concurrence addresses only "the absence of *any* justification" by the defendant, *id.* at 368; it does not endorse or apply Petitioner's proposed "requirement that prison officials come forth with" particular kinds of evidence to show a reasonable relationship between a prison's policy and its asserted justification. *See* Pet.27; 647 F. App'x at 368.

II. THE DECISION BELOW IS CORRECT.

"The burden . . . is not on the State to prove the validity of prison regulations but on [the challenger] to disprove it." App.40 n.17 (quoting *Overton*, 539 U.S. at 132). After "careful consideration of all the evidence presented" at a four-day bench trial, the district court made detailed findings of fact germane to Petitioner's First Amendment claim. App.55; *see id.* at 55-73. Applying settled law to those facts, the Eleventh

Circuit correctly concluded that Petitioner failed to carry its burden of proof. App.24-43.

Petitioner's arguments to the contrary are not persuasive. As to the first *Turner* factor, Petitioner asserts that FDOC failed to show a valid, rational connection with legitimate prison objectives. That is wrong. "Everyone, even PLN's expert, agree[d] that the underlying services addressed in Rule 33-501.401(3)(l) and (m)," such as three-way calling and stamps-for-cash services, "unquestionably compromise public safety and prison security." App.85. And, as the district court explained, "the FDOC provided expert testimony" to establish that its impoundments "will help curb prisoners' use of the [prohibited] services." App.86 (citation and internal quotation marks omitted). In addition, FDOC presented testimony by "several administrators who, 'relying on their professional judgment, reached an *experience-based* conclusion'" that the challenged impoundments further legitimate prison objectives. App.86 (emphasis in original).

Petitioner argues that there is no valid, rational connection between FDOC's rule and its security objectives because "FDOC's various loopholes for primary conduct" "undermine its policy." Pet.28. This argument fails because the district court credited the trial testimony "explain[ing] each conflicting rule." App.90. Specifically, Petitioner identified "a regulation permitting inmates to list cell phone numbers on their preapproved contact list and another allowing inmates up to 40 stamps at any given time." *Id.* While "[c]ell phones have three-way calling and call-forwarding capabilities identical to, or

better than, the services adverti[s]ed on *Prison Legal News*," cell phones are also "ubiquitous in modern society." *Id.* at 90-91. The court therefore found that "[p]rohibiting inmates from calling cell phones would effectively preclude them from speaking with many of their loved ones who no longer carry land lines. The FDOC could theoretically impose such a draconian rule, but it would surely lead to increased tension within prisons." *Id.* at 90. Likewise, "FDOC allows inmates to have stamps and allows families to send inmates stamps despite their contention that they are a serious hazard in prisons." *Id.* FDOC had previously considered such "a rule that would have embargoed stamps sent by family members," but "[f]amilies and friends of prisoners vehemently opposed the proposal, expressing concern that the rule would increase the likelihood that their imprisoned loved ones would either be victimized or simply not purchase any stamps at all." *Id.* at 91. "Moreover, FDOC officials testified that implementing the accounting measures proposed by PLN to counteract the problems with stamps would be too costly and require amending state statutes." *Id.*

Petitioner also argues that there is no rational connection between FDOC's policy and its security objectives because FDOC "made no showing that it experienced an uptick in security threats while allowing *Prison Legal News* into its prisons, or a downturn in such threats once it began censoring the publication again." Pet.28-29. The Eleventh Circuit correctly concluded that "[r]equiring proof of such a correlation" would conflict with this Court's precedents because it would insufficiently defer "to the judgment of the prison authorities with respect to

security needs." App.26. It "would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," contrary to *Turner*, 482 U.S. at 89. Indeed, *Turner*, *Thornburgh*, and *Beard* all upheld prison policies based on the testimony of officials that the policies made sense. In none of those decisions did the Court require empirical data measuring the practical effectiveness of the challenged security policies.

Moreover, "even if such evidence were required," the district court found that "FDOC administrators provided examples, both in Florida and throughout the country, of problems associated with specific services that advertize, or have advertized, in *Prison Legal News*." App.87. For example, FDOC officials learned of a company that had been sending prisoners money for stamps, and how such companies could distribute money for prisoners to people in the outside world in exchange for stamps; this company had previously advertized in *Prison Legal News*. *Id.* In addition, as PLN's ads for prohibited services became more prominent, FDOC "officials noticed an increase in the number of inmates sending stamps to cash-for-stamps companies." App.13.

The second question under *Turner* is whether "'other avenues' remain available for the exercise of the asserted right." 482 U.S. at 90. If they do, "courts should be particularly" deferential to prison officials. *Id.* Petitioner argues that this factor weighs in its favor because it would be "cost-prohibitive for PLN . . . to produce a Florida-specific issue or to produce *Prison Legal News* without the problematic advertisements."

Pet.29. That argument is directly contrary to the district court's finding that, while "advertisements are necessary," "PLN has not proven that it is unable to adopt advertising rubrics that would help bring its magazine in line with prison regulations." App.92-93. Moreover, the district court found that FDOC's "Rule leaves open sufficient alternatives for PLN to express their point of view to inmates," as "[t]here are countless other written materials that PLN may send prisoners." App.92 (internal citation omitted). That determination was required by *Thornburgh*, 490 U.S. at 401, in which the Court upheld similar regulations allowing federal prisons to reject outside publications because the regulations "permit[ted] a broad range of publications to be sent, received, and read." *Id.* at 418. As *Thornburgh* makes clear, the State is not required to provide publishers alternative means of communicating precisely the same message to the same prisoners. *See id.* at 417-18.

The third *Turner* factor provides that courts "should be particularly deferential to the informed discretion of corrections officials" when prison rules have "ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." 482 U.S. at 90. The district court found that "[t]he evidence demonstrate[d] that accommodating the specific way in which PLN seeks to exercise its right—through a publication containing dangerous amounts of advertising content—would 'significantly less[en] liberty and safety for everyone else, guards and other prisoners alike.'" App.93 (quoting *Thornburgh*, 490 U.S. at 418). Moreover, addressing those security problems would require the FDOC "to allocate more time, money, and personnel

in an attempt to detect and prevent security problems engendered by the ads in the magazines." App.38. Petitioner's argument to the contrary is the same as its argument regarding the first factor—that "there was no evidence whatsoever that the FDOC had to bear any of those additional burdens during the 55-month interregnum between the FDOC's censorship of *Prison Legal News*." Pet.30. That argument fails for the reasons discussed above.

As for the fourth factor, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." *Turner*, 482 U.S. at 90 (internal citation omitted). "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91 (citation omitted).

Petitioner contends that this factor weighs in its favor because other prisons in the United States have not impounded *Prison Legal News* and because New York instead "attach[es] a notice warning prisoners that the services advertized are prohibited." App.94. As the district court explained, however, "the alternatives suggested by PLN to eliminate the security concerns either have equally unattractive side effects or are costly to implement." App.94. Even assuming New York's approach "is the sounder policy," "FDOC is not required to implement the least restrictive regulation." App.94. "Moreover, the FDOC may be constrained in ways that New York's

department of corrections is not." *Id.* at 94-95. "Comparing different states' department of corrections is difficult, and in this case the parties did not submit sufficient evidence to do so." App.95. Because Petitioner had the burden on that issue, *see Overton*, 539 U.S. at 132, the failure to present such evidence tilted that factor in FDOC's favor.

* * *

Because all four *Turner* factors weigh in favor of FDOC, the Eleventh Circuit correctly rejected PLN's First Amendment claim.

III. THE QUESTION PRESENTED IS NOT ONE OF EXCEPTIONAL IMPORTANCE

Petitioner asks this Court to decide "whether the Florida Department of Corrections' blanket ban of *Prison Legal News* violates Petitioner's First Amendment right to free speech and a free press." Pet.i. The premise of that question is incorrect: FDOC has not adopted a "blanket ban." Nor could it have: Under applicable regulations, prison officials "must separately review and decide whether each issue of a publication violates" the admissible reading rule. App.9-10. Petitioner's publication has been consistently impounded in recent years, but only because its issues have consistently promoted ads for prohibited services. "[S]ince 2010," for example, "PLN has run an offending advertisement *on the back cover* of [each issue of] the magazine." App.63 (emphasis added).

Notwithstanding its inaccurate assertion of a "complete ban," Petitioner's formulation of the question presented is instructive: Petitioner does not frame its disagreement with the Eleventh Circuit in terms of any clearly articulated legal issue of general applicability; instead, Petitioner asks this Court to decide the case-specific question whether the particular FDOC regulations at issue here comport with the requirements of the First Amendment. *See* Pet.i. In other words, Petitioner calls on the Nation's court of last resort to apply settled legal principles to an "outlier" policy that, according to Petitioner, no other prison system in the country has adopted. *See* Pet.i, 32.

Four federal judges have already conducted that fact-intensive inquiry; all four agree on the result. Assuming *arguendo* that reasonable jurists might come to a different conclusion, Petitioner offers no good reason for this Court to conduct the same inquiry anew. *See* Pet.32-34.

For example, and even assuming that the courts below erred in rejecting Petitioner's First Amendment claim, speculation that the Eleventh Circuit's decision will serve as an "invitation and a roadmap for other jurisdictions to curtail important First Amendment freedoms," Pet.32 (alterations omitted), merely underscores Petitioner's inability to point to any other jurisdiction that has committed the alleged legal errors of which Petitioner complains. Pet.32. The sole example Petitioner proffers does not back up its prediction that the decision below will be used to justify otherwise indefensible arguments. Petitioner cites only one brief filed in federal district court that

even refers to the decision below, and that brief cites the Eleventh Circuit's ruling for the unobjectionable proposition that "'the Supreme Court has not adopted a damn-the-deference, full-speed-approach to First Amendment rights within prison walls.'" Pet.33 (citation omitted).

Petitioner is wrong to claim that, absent this Court's intervention, "thousands of FDOC inmates will not receive a publication designed to inform them of their legal right[s] and of abuse within the FDOC system," Pet.33. In fact, "[o]nly about 70, or one percent of [PLN's] 7,000 subscribers [nationwide], are Florida inmates." App.11. It is no answer to forecast that the decision below "paves the way for censorship" affecting "many more thousands of individuals currently detained within the confines of the Eleventh Circuit." Pet.33. Petitioner chose not to seek rehearing en banc, which would have afforded the full court of appeals the opportunity to decide whether there was a compelling reason to revisit the state of the law "within the confines of the Eleventh Circuit."

In any event, Petitioner offers no basis for prophesizing that the decision below will prompt other prisons within the Eleventh Circuit to "replicate" an "outlier" policy that, according to Petitioner, is not rationally related to any legitimate penological interests. *See* Pet.32-33. Petitioner's casual intimations of bad faith—i.e., its assertion that FDOC and other correctional institutions entrusted with responsibility for protecting prisoners and the public must be "intent on keeping the important content in *Prison Legal News* or other publications away from inmates" and will jump at the chance to use

insubstantial security concerns as a pretext for censorship, *e.g.*, Pet.33—does not fill that gap. The policies challenged in this case are neutral on their face and reasonably calculated to curtail prisoners' access to the means of committing crimes; the district court expressly found that those policies do not have the purpose or effect of suppressing disfavored viewpoints; Petitioner has not asked this Court to rule that those factual findings are clearly erroneous; and, if and when record evidence supports a finding of invidious discrimination or other comparable malfeasance on the part of prison officials, nothing in the Eleventh Circuit's decision would bar a newspaper or prisoner from proving such a claim and obtaining appropriate judicial relief.

Finally, the Petition's bare allegation of "harm [to] the First Amendment rights of PLN and others to reach this critical audience and inform them about legal developments outside of prison walls and illegal abuses within them," Pet.33-34, is not a persuasive reason for granting review. All four judges to have considered the issue have concluded that the challenged FDOC policy does *not* "harm[] the First Amendment rights of PLN," Pet.33-34. Those carefully considered decisions should not be presumed erroneous, and this Court should not have to resolve the question presented in order to assess whether that question is sufficiently important to "warrant[] plenary review," Pet.34.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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