IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Case No. 15-14220

PRISON LEGAL NEWS, a project of the Human Rights Defense Center,
a not-for-profit Washington charitable corporation,
Plaintiff-Appellee/Cross-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
Northern District of Florida, Tallahassee Division
Case No. 4:12-cv-239-MW/CAS

Brief of Amici Curiae Florida Press Association, Inc., First Amendment Foundation, Inc., Reporters Committee for Freedom of the Press, American Society of News Editors, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association, and Association of Alternative Newsmedia in Support of Prison Legal News and Reversal of the Judgment

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, Amici Curiae hereby certify that Florida Press Association, Inc., First Amendment Foundation, Inc., The Reporters' Committee for Freedom of the Press are not-for-profit charitable corporations. Amici curiae further certify that Washington Newspaper Publishers Association is trade association representing 131 member newspapers. No publicly held corporation owns 10% or more of the stock of any of the Amici Curiae. Amici Curiae also certify that the following is a complete list of the trial judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case on appeal.

1. Abudu, Nancy Gbana, Counsel for Prison Legal News
2. Allied Daily Newspapers of Washington
3. American Civil Liberties Union Foundation of Florida, Inc., Counsel for Prison Legal News
4. American Society of News Editors
5. Association of Alternative Newsmedia, Amicus Curiae
6. Bancroft PLLC, Counsel for Prison Legal News
7. Berg, Randall C. Jr., Counsel for Prison Legal News
8. Bondi, Pamela Jo, Attorney General, State of Florida
9. Clement, Paul D., Counsel for Prison Legal News
10. First Amendment Foundation, Inc. Amicus Curiae

11. Florida Justice Institute, Inc., Counsel for Prison Legal News
12. Florida Press Association, Inc., Amicus Curiae
13. Garland, Cedell Ian, Counsel for Secretary Jones,
14. Gellis, Sean, Counsel for Secretary Jones
15. Human Rights Defense Center, Inc., a not-for-profit Washington charitable corporation
16. Isani, Jamie, Counsel for Amici Curiae
17. Jones, Julie L., Secretary, Florida Department of Corrections
18. Julin, Thomas R., Counsel for Amici Curiae
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21. Neelakanta, Sabarish, Counsel for Prison Legal News
22. Neff, Lance Eric, Counsel for Secretary Jones
23. Prison Legal News, a project of the Human Rights Defense Center
24. Reporters' Committee for Freedom of the Press, The, Amicus Curiae
25. Stampelos, Hon. Charles, United States Magistrate Judge
26. Stevenson, Benjamin James, Counsel for Prison Legal News
27. Tietig, Lisa, Counsel for Secretary Jones
28. Trevisani, Dante P., Counsel for Prison Legal News
29. Walker, Hon. Mark, United States District Judge
30. Washington Newspaper Publishers Association, Amicus Curiae
31. Weber, Lance, Counsel for Prison Legal News

32. Wright, Paul, Editor of Prison Legal News and Executive Director of the Human Rights Defense Center

I also certify that no publicly traded company or corporation has an interest in the outcome of the case or appeal and thus no stock ticker symbol will be entered in the web-based CIP. I will complete the web-based CIP by entering "nothing to declare".

s/ Thomas R. Julin
Thomas R. Julin

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INTEREST OF THE AMICI CURIAE

The Florida Press Association, Inc. was founded in 1879 as a nonprofit corporation to protect the freedoms and advance the professional standards of the press of Florida. Authority to file has been provided by its general counsel. Its purpose includes the promotion and encouragement of higher standards of journalism to the benefit of the industry and the public.

The First Amendment Foundation, Inc. believes that government openness and transparency is critical to citizen trust and involvement in our democratic society – without Government in the Sunshine, civic engagement cannot bloom. Through ongoing monitoring of the state's public records and open meetings laws, and the education of government officials and citizens, the Foundation promotes the public's constitutional right to oversee and to participate in the governance process. Authority to file has been provided by its executive director.

For more than 40 years, the Reporters Committee for Freedom of the Press has provided free legal advice, resources, support and advocacy to protect the First Amendment and Freedom of Information rights of journalists working in areas where U.S. law applies, regardless of the medium in which their work appears. Authority to file has been provided by its legal defense director. Founded in 1922 to "defend the profession from unjust assault," the American Society of News Editors is an organization of news leaders. It fosters public discourse essential to

democracy; helps editors maintain high quality standards, improve their craft,, and promotes core journalistic values. Authority to file has been provided by its president and executive director.

Allied Daily Newspapers of Washington and Washington Newspaper Publishers Association are trade associations for newspapers. Authority to file has been provided by their executive directors. They are interested in this case because Paul Wright, editor and co-founder of *Prison Legal News* was imprisoned for 17 years in Washington State until his release in 2003. Mr. Wright founded *Prison Legal News* in 1990 while imprisoned. Since then he has successfully litigated a wide variety of censorship and public records issues against prison systems, benefitting the public and the press generally. He is a 2007 recipient of the James Madison Award from the Washington Coalition for Open Government.

The Association of Alternative Newspapers is a 501c(6) organization, which represents 112 alternative newsmedia organizations throughout North America. AAN member publications reach more than 38 million active, educated and influential adults. Authority to file has been provided by its executive director.

Although this case involves prison regulations and the regulations at issue have a particularly harsh impact on those publications such as *Prison Legal News* that specialize in serving the prison community, the case is of great important to the Amici for a variety of reasons as well.

First, advertising that is carried by the press often is as important to their readers as the editorial content they carry. In some instances, the advertising is of even greater importance because it informs readers not just about the availability of products and services they may wish to buy, but it advises them of products and services that allow readers to improve themselves and their communities. The advertising also often helps advertisers to reach a mass market for their products and services, keeping costs low and achieving vital efficiencies that help the economy. The United States Supreme Court, reflecting on these same points, recently invalidated restrictions on commercial speech in *Sorrell v. IMS Health Inc.*, 131 S. Ct. 653 (2011). The Court commented that "a 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue'" and pointed out that the marketing data at issue in that case "can save lives." *Id.* at 2664 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)). Amici respectfully ask the Court to keep this in mind when evaluating the rule at issue in this case that advertising is a form of speech protected by the First Amendment.

Second, the Florida Department of Corrections (FDOC) has failed to afford Prison Legal News due process by giving it notice each time a prison official regards its publication as carrying advertising that prisoners are prohibited from possessing so that it can contest the state's determination before its right to

communicate is terminated. Members of the Florida Press Association are directly threatened by the FDOC's actions in this regard because they distribute publications such as *The Tallahassee Democrat,* the *Gainesville Sun, The Miami Herald* and many others within the Florida prison system and their publications also are subject to the restrictions imposed on the plaintiff's publication. Their publications also carry advertising for many goods and services, including telephone and other communications services that prisoners might wish to use now or in the future but are currently prohibited from using. If the FDOC fails to follow existing rules that require notice of impoundment to be given to a publisher whenever a prison intercepts a publication that has been deemed to carry prohibited advertising, the publishers will be denied due process to challenge the determination. State compliance with procedural due process requirements is vital to the protection of the speech rights of the Amici in other contexts as well. Publishing companies face threats to their speech rights when, for example, municipalities deem newsracks to be in violation of valid ordinances imposing reasonable time, place, and manner restrictions. The courts should ensure that whenever regulations are imposed to restrict First Amendment rights, notice of that action and an opportunity to oppose it is protected.

Third, government regulation of advertising often poses a direct threat to the ability of the press to report the news and information that is of public importance

when the regulations are so flexible that they can be used to punish criticism of the government or the reporting of news that leads to criticism of the government. Unless government discretion to regulate advertising is appropriately circumscribed, the discretion may be used for purposes of censorship forbidden by the First Amendment.

Fourth, this case is of importance to the Amici because the history of this case shows that serious dangers to First Amendment principles are created when the federal courts decline to adjudicate the constitutionality of regulations because the state temporarily has halted enforcement of those regulations. Amici note that Prison Legal News filed a similar action in 2004 seeking a declaration that the FDOC violated the First Amendment by (1) refusing to allow delivery of *Prison Legal News* to prisoners because it contained ads for three-way calling services and pen-pal services and allowed subscriptions to be purchased with postage stamps, and (2) prohibiting prisoners from accepting compensation for articles they wrote for newspapers and magazines. *See Prison Legal News v. Crosby*, No 3:04-cv-14-J-16TEM (M.D. Fla. July 28, 2005) (DE-87 – Order, Findings of Fact and Conclusions of Law) at 2-3.

In apparent reaction to the suit, FDOC amended its rules effective March 16, 2005, to provide that a publication such as *Prison Legal News* would not be rejected based on its inclusion of the restricted advertisements for prohibited

products or services, as long as those advertisements were 'merely incidental to, rather than being the focus of, the publication.'" *Id.* at 8-9 ¶¶18-19. After the amendment, FDOC then allowed distribution of *Prison Legal News* to continue.

Prison Legal News insisted that the amended rule posed a continuing threat to it notwithstanding that its distribution was being permitted. U.S. District Judge John H. Moore, II, conducted a three-day bench trial and found that the FDOC's prior prohibition of distribution served no governmental purpose whatsoever because FDOC effectively could stop the inmates from using the advertised services whether they saw advertising for them or not. *Id.* at 14-15. But, Judge Moore also entered judgment as a matter of law for FDOC because it was no longer prohibiting distribution of *Prison Legal News*. *Id.* at 16. This Court agreed that FDOC mooted the challenge by adopting an amended regulation and then not invoking it to prohibit further distribution. *Prison Legal News v. McDonough,* 200 Fed. Appx. 873, 877-78 (11th Cir. 2006). The Court agreed with the district court that the FDOC had shown "'no intent to ban PLN based solely on the advertising content at issue in this case' in the future." *Id.* at 878. But the Court added: "We have no expectation that FDOC will resume the practice of impounding publications based on incidental advertisements. As to the current rule, we offer no opinion on its constitutionality." *Id.* This ruling allowed FDOC to escape an adjudication that its amended rule violates the First Amendment.

In light of this history and FDOC's invocation of the rule, as it was amended further in 2009,[1] now to ban distribution of *Prison Legal News* once again, the Court should view with great skepticism FDOC's arguments regarding its asserted negligent application of its rule. As will be discussed, the 2009 amendment to the rule exacerbated the vagueness of the 2005 rule by banning possession not only of publications containing non-incidental restricted advertising, but also banning

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[1] The amended rule now provides:

> (3) Inmates shall be permitted to receive and possess publications per terms and conditions established in this rule unless the publication is found to be detrimental to the security, order or disciplinary or rehabilitative interests of any institution of the department, or any privately operated institution housing inmates committed to the custody of the department, or when it is determined that the publication might facilitate criminal activity. Publications shall be rejected when one of the following criteria is met:
>
> * * *
>
> (l) It contains an advertisement promoting any of the following where the advertisement is the focus of, rather than being incidental to, the publication or the advertising is prominent or prevalent throughout the publication.
>
> 1. Three-way calling services;
>
> 2. Pen pal services;
>
> 3. The purchase of products or services with postage stamps; or
>
> 4. Conducting a business or profession while incarcerated.
>
> (m) It otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or to the safety of any person.

those that containing restricted ads that are either "prominent" or "prevalent" throughout the publication. Because FDOC resumed impounding and rejecting of *Prison Legal News* on the basis of its advertising content, the constitutionality of the existing rule is squarely at issue.

STATEMENT RE PREPARATION OF BRIEF

No party's counsel authored this brief in whole or in part. No party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

Whether the Court should facially invalidate the FDOC rule in light of its vagueness and the chilling effect it will continue to have on First Amendment rights if it is not facially invalidated.

Whether the FDOC's rule and its actions violated the substantive limits that the First and Fourteenth Amendments impose on the discretion of prison authorities to prevent the plaintiff from publishing material to prisons as those limits were delineated in *Turner v. Safely,* 482 U.S. 78 (1987).

Whether the FDOC's rule and its actions violated the requirements of procedural due process because the rule lacks procedural safeguards and specific guidelines to prevent its use for censorial purposes.

SUMMARY OF ARGUMENT

The Court should not confine itself to determining whether the FDOC applied its rule in violation of the First Amendment rights of the plaintiff. It should invalidate the rule facially due to its vagueness and overbreadth, The Supreme Court has taken this approach in other First Amendment cases and it serves the important purpose of preventing the chilling of future speech.

Point I. Under well-established standards applicable to First Amendment challenges to prison regulations restricting speech rights, the rule at issue and the actions of the FDOC in applying the rule violated the First Amendment.

Point II. When speech rights are affected, procedural due process requires regulations to contain certain procedural safeguards and to use specific guidelines to ensure that the regulations cannot be used to engage in prohibited censorship. The FDOC rule at issue here contains neither the required guidelines nor the necessary specificity.

INTRODUCTION

At the heart of this appeal lies a vague regulation of advertising. The district court recognized as much, noting "inconsistent censorship decisions," Doc. 279 at 43, "[i]nconsistent application [of the rule] by mailroom staff" Doc. 279 at 43, "vagueness is principally responsible for the Rule's disparate application," Doc. 279 at 47 n. 24, and the "most disconcerting" "worrisome fact[] uncovered at

trial" "is the Rule's vagueness," Doc. 279 at 50. Yet, the district court upheld the rule, contending that the plaintiff has asserted its void-for-vagueness claim just three months before the May 13, 2013, trial date, and, after the trial date was postponed for more than a year, the plaintiff did not again move to assert the claim until trial. Doc. 279 at 3 n.5. In essence, the district court seems to be saying that it easily discerned the facial invalidity of the rule, but was constrained to uphold it because the challenge to the rule was not precisely labeled. The plaintiff, in its brief, is appropriately respectful of the district court's approach and properly shows in its argument that the vagueness of the rule cannot, in any event, be skirted because vagueness plays a critical rule in both the substantive and procedural as-applied challenges that it was allowed bring. The Amici take the same approach in their argument below brief. They also suggest here, however, that the Court can and should take a more direct approach to the vagueness problem in light of the Court's constitutional responsibility to ensure that a judgment does not infringe on First Amendment rights. As the Court has opined on multiple occasions, "'First Amendment issues are not ordinary.'" *Flanigan's Enters. v. Fulton County, Ga.*, 596 F. 3d 1265, 1276 (11th Cir. 2010) (*quoting ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1203 (11th Cir. 2009) (*citing CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1268 (11th Cir. 2006)). They trigger special responsibilities for judges, as "expositors of the Constitution," to conduct

an independent review of the entire record to ensure the judgment does not result in a forbidden intrusion on the field of free expression. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 511 (1984). The district court's avoidance of a patent vagueness problem (as specifically found by the district court) on procedural grounds is distinct, of course, from a district court judgment which violates the First Amendment by lacking evidentiary support. But the result is no less problematic. In both instances, the First Amendment is violated. So the Amici urge the Court to cut through the fog that arises from the as-applied posture in which this appeal arises and to proceed directly to the problem at the heart of this case: the fatal vagueness of an advertising regulation that allows officials so much discretion that they can use the vagueness to conceal their actions that are taken to prevent the publication of editorial content with which they disagree as nothing more than applications of the rule. This is a particularly acute problem for the plaintiff given the nature of its editorial content – scholarly articles that advice prisoners about their rights. If, of course, the rule is facially invalid, then it goes without saying, that it also is invalid as applied, as the plaintiff contends.

This approach would not require the Court to break any new ground. An as-applied challenge can result in effective facial invalidation of a challenged law or regulation even when the parties ask only for a ruling as applied. *E.g.,* David A. Franklin, *Looking Through Both Ends of the Telescope: Facial Challenges and the*

Roberts Court, 36 Hastings Const. L.Q. 689 (2009) (citing *Federal Elections Commission v. Wisc. Right to Life,* 127 S. Ct. 2652 (2007), a case arising from an as-applied challenge to advertising regulation, as an example of this phenomenon); *see also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2340 n.3 (2014) ("petitioners' as-applied claims 'are better read as facial objections to Ohio's law.' . . . Accordingly, we do not separately address the as-applied claims"). Facial invalidation is particularly appropriate, of course, in First Amendment cases where holding a statute is unconstitutional as applied will allow a vague, and hence, overly broad statute to chill speech. *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("When speech is involved, rigorous adherence to [specificity] requirements is necessary to ensure that ambiguity does not chill protected speech").

ARGUMENT

I.

The Rule Does Not Meet the Substantive Requirements of *Turner v. Safley*

This Court frequently and recently has examined the constitutionality of regulations that impose restrictions on First Amendment rights of both prisoners and the public and the press that seek access to prisoners. An appropriate starting point for analysis, therefore, is those prior decisions.

The most recent decision is *Perry v. Secretary, Florida Department of*

Corrections, 664 F.3d 1359 (11th Cir. 2011). The plaintiffs in that case operated three pen pal services. The FDOC interpreted its rules as prohibiting inmate possession of advertisements from those companies promoting their services, but it also allowed a third pen pal service called Christian Pen Pals to solicit one-to-one matching of non-inmates and inmates as pen pals. The plaintiffs claimed this violated the Equal Protection Clause and that their solicitations were protected by the First Amendment. The Court noted that that the Supreme Court historically had articulated two different standards for evaluating First Amendment challenges to prison regulations restricting speech rights – one set forth in *Procunier v. Martinez,* 416 U.S. 396 (1974) (examining censorship of prisoner mail and prisoner marriages), and a lower standard articulated in *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (examining restrictions on journalists' rights to interview inmates face-to-face). In decisions after *Martinez* and *Pell*, the Supreme Court regularly applied only the lower decision from *Pell* and in *Turner v. Safley,* 482 U.S. 78 (1987), the Court set out a four-part test providing guidelines for applying the lower standard. The standard requires the Court to consider:

1. Whether a valid, rational connection exists between the regulation and a legitimate and neutral governmental interest to justify it.

2. Whether alternative means of exercising the right are available.

3. How accommodation of the asserted constitutional right impacts guards and other inmates and the allocation of prison

resources generally.

4. Whether ready alternatives are available to the prison for achieving the governmental objectives.

Shaw v. Murphy, 532 U.S. 223, 228-30 (2001) (citing *Turner*). The first of these factors is fatal to any regulation if the connection between the regulation and the asserted goal is arbitrary or irrational, "irrespective of whether the other factors tilt" in favor of upholding the regulation. *Id.* at 229-30. In *Thornburgh v. Abbott*, 490 U.S. 401 (1989), the Supreme Court made clear the *Turner* standard is required even "when the regulation at issue affects the sending of a publication to a prisoner." *Perry,* 664 F.3d at 1365 (citing *Thornburgh*, 490 U.S. at 413; *see also Lawson v. Singletary,* 85 F. 3d 502 (11th Cir. 1996). There is therefore no doubt today that the *Pell* standard as discussed in *Turner* applies in this case.

Before proceeding to examine whether the challenged FDOC rule and conduct meets this lower standard, the Amici pause to emphasize that even the lower standard imposes significant limits on the discretion of the state to adopt policies that restrict the dissemination of news and information to prisoners. Justice Stevens, dissenting in *Thornburgh,* accused the majority of adopting "a manipulable 'reasonableness' standard . . . that too easily may be interpreted to authorize arbitrary rejections of literature addressed to inmates." *Id.* at 428. But the majority rejected this characterization of it action, asserting to the contrary that the standard "'is not toothless'" and insisted that it would impose an effective

check on the arbitrary exercise of discretion serving no legitimate penological purpose. *Id.* at 414 (quoting petitioners' petition for certiorari).

Indeed, the standard has proven not to be toothless in its application. In *Turner* itself, the Supreme Court applied the standard to invalidate a prison regulation that allowed an inmate to marry only with the permission of the superintendent of the prison, and provides that such approval should be given only "'when there are compelling reasons to do so.'" *Turner,* 482 U.S. at 82. In *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005), a federal appellate court applied the standard to reject the Washington Department of Corrections' arguments that allowing *Prison Legal News* in its prisons increased the risk of contraband in the mail, reduced the volume of prison mail, reduced the risk of fire, and increased the efficiency of inmate cell searches. In *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001), an appellate court applied the standard to reject the Oregon Department of Correction's arguments that allowing *Prison Legal News* in its prisons made it hard to find contraband in the mail, created an undue fire hazard, allowed inmates to hide contraband in their cells, and reduced correctional officer efficiency. In *Prison Legal News v. Columbia County*, No. Case No.: 3:12-cv-00071-SI, 2012 WL 1936108 (D. Ore. May 29, 2012), a district court applied the standard to preliminarily enjoin a prison rule forbidding

correspondence other than postcards.[2] In *Miniken v. Walter*, 978 F. Supp. 1356 (E.D. Wash. 1997), a district court applied the *Turner* standard to conclude that although a prohibition against delivery of bulk mail to inmates may be constitutional, an inmate's right to receive his personal subscription to *Prison Legal News* was violated by application of that policy. And, in *Prison Legal News v. County of Ventura,* No. 14-0773-GHK (EX), 2014 WL 2736103 (C.D. Cal. June 16, 2013), the court preliminarily enjoined similarly restrictive mail policies under the *Turner* standard.

The standard therefore clearly has teeth and should not be treated as inevitably requiring deference to the judgment of state authorities to restrict First Amendment rights.[3] Turning, then, to the specific rule and conduct at issue, it is

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

[3] In the most recent Supreme Court case applying the *Turner* standard, *Beard v. Banks,* 548 U.S. 521 (2006), a majority could not agree with respect to whether the rule violated the *Turner* standards. Two justices concluded that it did. *Id.* at 552 (citations omitted) (Stevens, J., dissenting, joined by Ginsburg, J). Two others concluded that it would pass the first prong of *Turner* but fail the second because "by design" it did not provide an alternative means for inmates to exercise the rights they have been given. *Id.* at 541 (Thomas, J., concurring in the judgment, joined by Scalia, J.). Those justices then declined to apply the third and fourth *Turner* factors due to their dissatisfaction with *Turner* as the appropriate standard. *Id.*. Four justices wrote that the prison officials had provided an adequate basis for upholding the rule under the *Turner* standards. *Id.* at 524-42 (Breyer, J., announcing the judgment of the Court in an opinion joined by Roberts, C.J. &

apparent that they do not satisfy any, let alone all four of the *Turner* standards.

Judge John H. Moore's decision in the initial *Prison Legal News* lawsuit against the FDOC all but required a finding that no valid, rational connection exists between the regulation and a legitimate and neutral government interest. As noted, Judge Moore ruled after a bench trial that the state is fully capable of preventing prisoners from using the services that are the subject of the challenged rule whether the prisoners see the advertisements or not. No contradictory evidence was offered by the state at trial. Judge Moore's ruling shows that the rule serves no legitimate penological purpose whatsoever, it simply restricts prisoners from viewing advertising that offers a service they cannot use and that restriction operates to prevent prisoners from receiving *Prison Legal News* and all of the other content that prisoners may find useful.

The second *Turner* factor also weighs in favor of invalidation of the rule because enforcement leaves Prison Legal News no alternative means of distributing the banned advertising and, worse, no economically viable means of continuing its distribution to Florida prisoners at all. As the record shows, Prison Legal New has a small base of approximately 7,000 subscribers across the country and its operation is supported by a small number of advertisers and a small group

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Kennedy & Souter, JJ.). Because Justice Alito did not participate in the case, no majority could address whether the rule satisfied the *Turner* standards.

of employees. Revenues barely meet expenses. Continued not-for-profit publication is the product of the plaintiff's devotion to serving the informational needs of prisoners rather than any desire for financial gain. The record also shows that publication of a separate edition of the *Prison Legal News* that excludes restricted advertisements would be cost prohibitive, so the company would have no alternative other than to halt all distribution in the Florida prison system if the rule is enforced.

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

Even if the burden of creating a separate edition were not cost-prohibitive, the First Amendment does not allow the imposition of such a burden on speech without justification. The Supreme Court has held that "the 'distinction between laws burdening and laws banning speech is but a matter of degree' and that the 'Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.' . . . Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell,* 131 S. Ct. at 2664 (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 812 (2000)).

The Supreme Court also has made clear that states may not ban the advertising of goods or services that are unlawful if the goods or services may lawfully be sold elsewhere. *Bigelow v. Virginia,* 421 U.S. 809 (1975), provides an example of such a ruling. In that opinion the Court invalidated the conviction of a Virginia newspaper editor who had published in Virginia an advertisement for abortion clinics in New York. The Virginia law at issue made it illegal to advertise in Virginia for abortion clinics, irrespective of where they might be located. Justice Blackmun, writing for seven members of the Court, held that the advertisement was speech protected by the First Amendment and that Virginia's interest in protecting its citizens against services that were unlawful in that state could not justify a prohibition of advertising for a service lawfully available in another state. He observed that a state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information that is legal in that State." *Id.* at 824-25. Applying *Bigelow*, the district court in *High Ol' Times v. Busbee*, 456 F. Supp. 1035 (N.D. Ga. 1978), held a state statute outlawing the sale or offer of "drug-related objects" could not be validly applied to prohibit advertisements of such objects in other states where they were lawful.

This principle is of vital importance to the Amici. Daily newspapers distributed in Florida prisons now include advertisements for alcoholic beverages,

firearms and ammunition, and numerous other products or services that the state prohibits prisoners from possessing or using. If the state can prohibit distribution of *Prison Legal News* in Florida prisons simply because it carries advertising for products or services prisoners cannot acquire or use, the state also could prohibit distribution of most publications. Even worse, as far as the amici are concerned, if the Court were to interpret the First Amendment as allowing the challenged rule to survive, local governments that prohibit the sale of certain products and services also could ban newspapers and magazines that carry advertisements for those products and services. Three Florida counties, Lafayette, Madison, and Washington Counties prohibit the sale of alcoholic beverages, and those counties that do allow alcohol sales impose widely varying restrictions.[4] Certain types of gambling are allowed in Florida solely on Indian reservations and in south Florida counties.[5] Still, the Amici's members publish advertising for alcoholic beverages and gambling in all Florida counties. They do not and cannot, in accordance with the Supreme Court's ruling in *Bigelow,* be required to publish separate editions for geographic areas that prohibit the sale of advertised products and services.

A further alternative to halting distribution in Florida or creating a separate

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[4] *See* Samantha Schuyler, *Fla.'s Alcohol Sale Laws Remain A Widely-Varying Patchwork,* http://www.wuft.org/news/2013/08/25/alcohol-sales/.

[5] *See http://www.myfloridalicense.com/dbpr/pmw/track.html.*

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

The third *Turner* factor also weighs against the constitutionality of the challenged rule because the lack of the rule and the distribution of *Prison Legal News* imposes no additional burdens on prison guards' resources. The FDOC already has rules that require monitoring of all correspondence, and therefore that will continue and these rules will be unaffected. The primary impact of invalidation of the rule will be to lighten the FDOC's load by making it unnecessary to determine whether advertising of restricted services is non-incidental, prominent, or prevalent throughout every publication that is sent to prisoners.

Judge Moore's prior ruling established that the fourth factor of *Turner* weighs against the rule because the state has readily available means of preventing

prisoners from using the restricted services without preventing them from viewing advertising with respect to those services.

II.

The Rule Lacks Procedural Safeguards &
Criteria To Prevent its Use for Improper Censorship

The challenged rule also violates the First Amendment and fails to afford due process to Prison Legal News in two additional ways. First, it does not provide Prison Legal News with notice and an opportunity to challenge a decision by a prison official to impound and reject an issue of the *Prison Legal News* that the official contends prisoners are prohibited from possessing. Second, the rule does not provide sufficiently clear standards to prevent its use for censorial purposes that the courts will be able to detect and stop.

A. The Rule Lacks Required Procedural Safeguards

In *Perry,* the Eleventh Circuit observed that the Supreme Court's decision in *Martinez* also created a three-part test to decide whether there are proper procedural safeguards for correspondence of a personal nature. The *Martinez* safeguards require an inmate to be notified of the rejection of material written by or addressed to him, that the author of the material be given a reasonable opportunity to protest the decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence. *Martinez,* 416 U.S. at 418-19. The *Martinez* procedural safeguards, unlike the

Martinez standards of scrutiny, have not been lowered or changed by subsequent decisions, so they remain binding on this Court today. *Perry,* 664 F.3d at 1368 ("*Martinez* may still control for due process claims where a prison limits personal correspondence"); *see also Barrett v. Orman,* 373 Fed. Appx. 823, 826 (10th Cir. 2010) ("*Martinez's* procedural requirements survived *Thornburgh*); *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) (same, in appeal by *Prison Legal News*).

The rule challenged by *Prison Legal News* affords no procedural safeguards, let alone the strict procedural safeguards required by *Maritnez.*

The Eleventh Circuit did not apply that *Martinez* test in *Perry* because the communications at issue were "bulk mailings" – bundled materials delivered in bulk for distribution to multiple prisoners. The Eleventh Circuit held that the lower due process standards established in *Mathews v. Eldridge,* 424 U.S. 319 (1976), for the denial of Social Security disability benefits would apply.[6] The Eleventh Circuit did not explain in *Perry* its rationale for distinguishing between bulk mailings and personal correspondence, but it may have been influenced by the

[6] Applying the *Matthews* standards in *Perry*, the Eleventh Circuit held that the plaintiffs' First Amendment rights were sufficiently protected by their ability to "separate and distinguish mail to inmates" concerning pen pal services from other solicitations and to correspond with FDOC officials to challenge the denial of their advertisements. *Perry,* 664 F.3d at 1368.

Supreme Court's decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), which also examined a restriction on "bulk mailings." In that case, the plaintiff was a "self-denominated Prisoners' Labor Union and the mailings at issue were bulk mail solicitations to join a union. The defendant prohibited bulk mailings other than the Jaycee Newsletter and the plaintiff challenged the rule on equal protection grounds. The Court found no violation in light of the distinct threat that solicitations to join a union posed to prison security, not on any distinctions that exist between bulk mailings and personal mail. *Jones* also did not consider what procedural safeguards apply to a decision denying access to mailings of any type. The ruling in *Jones* cannot therefore explain the distinction adopted by the Eleventh Circuit in *Perry* for bulk mailings.

The instant case involves neither bulk mailings nor solicitations of the type at issue in *Jones* or *Perry*. The instant case involves the direct distribution to subscribers of individually addressed copies of a magazine containing a wide variety of news and information of interest to prisoners, as well as some advertising for services that the prison system does not allow prisoners to engage. In *Lehman*, the Ninth Circuit found that mail from Prison Legal news was "sent as a result of a request by the recipient." *Id.* 397 F.3d at 700. The inclusion of that advertising cannot provide a justification for elimination of the *Martinez* safeguards that protect all of the other content because, as discussed, that

advertising does not undermine any legitimate penological interests or otherwise impose burdens on the state that would warrant the banning of the advertising.

B. The Rule Lacks Sufficiently Specific Guidelines to Prevent its Use to Censor the Contents of *Prison Legal News*

In *Martinez*, the plaintiff argued in the Supreme Court that the regulations allowing censorship of prisoner mail suffered from undue vagueness that would allow "censorship of constitutionally protected expression without adequate justification." *Martinez,* 416 U.S. at 401-02. The Supreme Court did not, however, address the argument because the rules had not been challenged below on vagueness grounds. *Id.* Here, the plaintiff has attacked the rule at issue not only on First Amendment grounds but also separately on due process grounds.[7] DE-14 at 13.

The due process claim also is a distinct basis for invalidation of the rule

[7] The plaintiff's failure to denominate one of their counts as a vagueness challenge and the district court's refusal to allow an amendment to add such a count did not relieve the district court of its obligation to decide whether the rule suffers from undue vagueness because the requirement for clear and specific criteria is a fundamental component of both due process, *Grayned v. City of Rockford*, 408 US 104 (1972) ("a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined"), and First Amendment challenges, *Freedman v. Md.*, 380 U.S. 51 (1965) ("In the area of freedom of expression it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office"). The plaintiff challenged the rule on both grounds in its First Amended Complaint.

because courts have held that even when prisoner speech rights may be restricted consistent with the First Amendment, this "does not detract from the continuing requirement[s]" of due process, which includes a right to be free from "poorly delineated prison regulation." *Rios v. Lane,* 812 F.2d 1032, 1039 (7th Cir. 1987).

The Amici have a particular interest in ensuring that the Court does not allow the vague rule at issue here to stand because, as discussed above, the members of the Amici's members also are subject to the rule when they send their newspapers and magazines to Florida prisoners. The Amici also must comply with other forms of distribution licensing such as newsrack regulations. Such regulations are constitutionally justifiable by the legitimate interest that a city may have in safety and aesthetics, *see generally City of Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750 (1988), just as prison regulations are justifiable by legitimate penological interests. But the courts also have recognized that such regulations sometimes may be used for improper censorial purposes if the discretion of those administering the regulations is not carefully restricted by clear and specific guidelines. *Id.* at 772. In *Lakewood*, the Court explained that facial attacks are allowed on vagueness grounds because "a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. . . . And these evils engender identifiable risks to free expression that can be effectively alleviated only through a

facial challenge." *Id.* at 757. Those risks, the Court held, include the risk that the licensor's discretion will intimidate parties into censoring their own speech and that such self-censorship will not be able to present an effective "as applied" challenge. *Id.* at 757-58. This Court has invoked these principles frequently to invalidate speech restrictions.[8] For example, the Court applied these principles in *Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010), to enjoin rules regulating attorney advertising. The court recognized that the Florida Supreme Court, like a prison administrator, has important interests that can justify serious restrictions on advertising, but the court was firm in its insistence that when such restrictions are imposed, that only can be done through clear and specific criteria. The Court quoted this language from *International Society for Krishna Consciousness v. Eaves,* 601 F.2d 809, 822-23 (5th Cir. 1979), to make its point

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[8] *See Atlanta Journal & Constitution v. City of Atlanta Dep't of Aviation,* 322 F.3d 1298, 1311 (11th Cir. 2003) (en banc) (invalidating a licensing scheme that failed to use "clear standards by which to accept or reject a publisher's request"); *Gold Coast Publ'ns, Inc. v. Corrigan,* 42 F.3d 1336, 1349) (11th Cir. 1994) (upholding a licensing scheme that limited discretion through "neutral criteria and procedural safeguards"); *Sentinel Commc's Co. v. Watts*, 936 F.2d 1189, 1196 (11th Cir.1991) (invalidating licensing scheme that "appears to be subject to the completely standardless and unfettered discretion of one bureaucrat working for the DBS in Tallahassee"); *Miami Herald Publ'g Co. v. City of Hallandale*, 734 F.2d 666, 675 (11th Cir. 1984) ("Accompanying . . . discretion is the opportunity to discriminate on the basis of what the licensee intends to say, which in the context of licensing newspaper distribution raises the spectre of prior restraint").

emphatically:

> "All vague statutes are unacceptable partly because they encourage ... arbitrary and discriminatory application; similarly, vague measures regulating first amendment freedoms enable low-level administrative officials to act as censors, deciding for themselves which expressive activities to permit. The very existence of this censorial power, regardless of how or whether it is exercised, is unacceptable."

Harrell, 608 F.3d at 1258. The court also held that when a speech restriction is challenged on vagueness grounds "'it [is] immaterial . . . whether the party challenging the measure even applied for' permission to engage in the challenged conduct," because "'the very existence of [censorial] power is unacceptable, there is little reason [for a court] to forbear entertaining an anticipatory challenge in order to allow that power to be exercised.'" *Id*. (quoting *Eaves,* 601 F.2d at 823).

The rule at issue in this case has multiple vagueness problems that could be exploited for improper censorial purposes. Initially, the rule directs prison officials to determine whether a publication carries an advertisement promoting "three-way calling services," "pen-pal services," purchases by postage stamps, or "conducting a business or profession." Yet, none of its terms that are used are defined by the rule or otherwise and their meaning is far from clear. Next, the rule does not entirely ban the advertising that it describes. It only bans advertising that is not focal, non-incidental, prominent, or prevalent. These highly-subjective words allow prison officials wide discretion to favor certain publications over others notwithstanding that they all carry the same type of advertising. Because the terms

are so vague, they do not provide judges with meaningful standards by which they can assess whether prison authorities have impounded or rejected a publication because it carried content which constitutionally can be banned or content that is protected by the First Amendment such as political endorsements or criticism of prison regulation or administration. The danger that such censorship will be imposed is quite apparent from the fact that *Prison Legal News* has been a critic of prison policies and practices across the country since its creation by a former prisoner himself. A vague and standardless licensing scheme like this that allows administrators to achieve indirectly what they cannot achieve directly simply cannot stand.

CONCLUSION

The Court should affirm those aspects of the district court's ruling that favor the plaintiff and reverse those aspects that disfavor the plaintiff.

Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains approximately 6,987 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically via this Court's CM/ECF system and served via the same on all counsel or parties of record on December 14, 2015.

I FURTHER CERTIFY that pursuant to Eleventh Circuit Rule 31-3, seven (7) paper copies of this brief, including one signed original, have been mailed to the court by using one of the methods outlined in Rule 25(a)(2)(B), Federal Rules of Appellate Procedure and/or Eleventh Circuit Rule 25-3(a), on this October 28, 2015.

s/ Thomas R. Julin
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