No. 15-14220

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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
for the Northern District of Florida,
No. 4:12-cv-00239-MW-CAS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, Plaintiff-Appellee hereby certifies that the Certificate of Interested Persons and Corporate Disclosure Statement filed in Plaintiff-Appellee's Opening brief and the Certificates of Interested Persons in subsequently filed briefs are complete and require no modification herein.

Dated: February 16, 2016

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Rule

INTRODUCTION

The Florida Department of Corrections (FDOC) still has not offered any logical reason why it alone among the fifty States, the federal Bureau of Prisons (BOP), and every county jail in the country must censor every issue of *Prison Legal News* (PLN) in violation of the publisher's First Amendment rights. The FDOC falls back on security concerns that it largely disavowed during previous litigation. But the Department cannot renege on its previous representations to this Court. And no developments since that earlier litigation warranted the Department's abrupt change of heart. Indeed, the lack of any documented problems in the period between the FDOC's censorship regimes confirms that the Department had it right before its about-face. While PLN has expanded over the years, the mix and nature of its advertisements have not changed in a way that would undermine the FDOC's prior view—and the current view of every other correctional institution—that PLN's advertising content is safe for distribution within prison walls. Unable to defend its blanket ban based on the specific types of advertisements enumerated in its regulation, the FDOC then shifts nearly all its weight to the rule's catch-all provision. But the small handful of additional advertisements that arguably fall within that clause cannot justify the Department's categorical ban.

At bottom, the FDOC's position amounts to little more than a claim that it can censor any publication anytime it thinks doing so might further a penological

interest. Indeed, nearly its entire argument is devoted to repeating hired expert testimony about hypothetical harms, rather than concrete evidence. But the Supreme Court has never blessed such blind deference to prison officials in this context. Rather, *Turner v. Safley*, *Thornburgh v. Abbott*, and the Court's later cases specifically warn against granting prisons a blank check to deny First Amendment rights. Instead, the Court has imposed a four-part test for evaluating speech-restricting regulations. A restriction on First Amendment rights must have a logical fit with the State's penological interest; simply having a penological interest is not itself sufficient. Courts must also consider whether the injured party has any alternative means of achieving its expression, as well as the likely burdens associated with accommodating the party's First Amendment rights. And even where the other factors are met, prisons may not adopt exaggerated responses to their penological concerns. In applying all these factors, the approach of other prison officials to the exact same publication with the same advertisements is highly probative.

Here, the FDOC's regulations are irrationally aimed at circumstances that the Department previously assured this Court did not require it to censor *Prison Legal News*. There is no new reason for the Department's more restrictive approach. Indeed, with respect to two forms of advertisements, the Department has offered no new reason at all, and with the other two enumerated categories of prohibited advertisements, the Department allows conduct that poses a more direct threat to

prison security. Completely banning a publication based on a small handful of offending advertisements—while allowing more dangerous primary conduct—is not a logical means of achieving security. Nor is the FDOC correct that PLN has abandoned any objection to censorship under the rule's umbrella clause, which hardly played the prominent role below that the FDOC claims it did. The District Court offered no separate analysis under that provision, and in all events a small handful of so-called "concierge" advertisements in some issues of *Prison Legal News* cannot justify a blanket censorship of the voluminous other *protected* speech in each issue of the magazine.

Under the FDOC's current approach, moreover, the harm to First Amendment interests will be dramatic. PLN can neither afford to publish its magazine without advertisements nor produce a Florida-specific edition of each month's publication. And the experiences in other jurisdictions—as well as the FDOC's own experience in the interregnum between its censorship regimes—demonstrate that allowing PLN into Florida prisons poses no actual—as opposed to imagined—harm and that many feasible alternatives that are compatible with the First Amendment exist. No other jurisdiction feels the need to take the FDOC's extreme approach, and there is no evidence that the rest of the country has suffered any harm by allowing PLN through its prison doors. The inescapable conclusion is that the FDOC's alone-in-the-nation censorship is an illogical and exaggerated response to its claimed concerns.

The fact that this dispute involves prisons does not grant the Department blanket immunity to violate PLN's core First Amendment rights. And the constitutional injury in this case is not limited to PLN. The Department's blanket ban keeps out of Florida's prisons a publication that is written and distributed to inform prisoners of their constitutional rights and alert them about instances of abuse. It is a core exercise of expressive liberty that is being denied based solely on fuzzy regulations purportedly aimed at a small percentage of advertisements in the magazine. The Constitution does not permit this sort of blunderbuss censorship. This Court should protect PLN's First Amendment rights and hold the FDOC's regulation unconstitutional as applied to PLN.

ARGUMENT

I. The FDOC's Previous Representations To This Court Preclude Its Arguments In This Case.

The FDOC has already told this Court that PLN's advertising content does not pose a sufficient risk to warrant blanket censorship. The last time this issue was before this Court, in an effort to have the litigation dismissed as moot, the FDOC insisted that PLN's advertisements do not pose a material security risk and that the FDOC had "'no intent to ban PLN based solely on the advertising content at issue in this case' in the future." *Prison Legal News v. McDonough*, 200 Fed. App'x 873, 878 (11th Cir. 2006). Although it was concerned that "the FDOC previously wavered on its decision to impound the magazine," the Court took the Department

at its word "that the magazine will not be rejected based on its advertising content" and accordingly dismissed the case as moot. *Id.* But only two years later the FDOC revised its rules and resumed censoring PLN. The FDOC got it right in its previous representations to this Court, and it is barred from arguing otherwise this time around.

The FDOC's about-face is prohibited by judicial estoppel. The Department's application of its current rule is plainly "inconsistent with [its] claim … in [the] previous proceeding." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (quotations and citation omitted). Last time, it secured dismissal by insisting that it would not censor PLN based on advertising content; now it insists that it may censor PLN under its new, more onerous regulation of advertising content. This sort of inconsistency is not a new development for the FDOC. Even during the previous litigation, "the FDOC changed its position several times" before finally convincing this Court that it would no longer censor PLN. *McDonough*, 200 Fed. App'x at 875. And in other contexts, this Court has prevented the FDOC from engaging in similar gamesmanship. *Cf. Rich v. Sec'y, FDOC*, 716 F.3d 525, 530-32 (11th Cir. 2013) (refusing to dismiss an RLUIPA case as moot where the FDOC announced a kosher-meal policy only for the plaintiff's facility).

Had this Court known that the FDOC would so quickly reinstate its censorship policy against PLN, it almost certainly would have refused to dismiss the case under

the voluntary cessation rule. *See, e.g.*, *id.*; *Harrell v. Fla. Bar*, 608 F.3d 1241, 1265-68 (11th Cir. 2010). Under that exception to the mootness doctrine, courts will not endorse late-breaking actions that "attempt to manipulate jurisdiction" by disingenuously promising to stop the complained-of conduct. *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011). Now that the FDOC's manipulation is clear, this Court should likewise estop it from "deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1814 (2001).

The FDOC claims that times have changed and it has new reasons to censor *Prison Legal News*. Specifically, it argues that its previous position underestimated the threat posed by three-way-calling advertisements and that PLN is now publishing concierge-service advertisements that pose previously unforeseen threats. *See* Appellant's Response and Reply Br. 16-19. But a party cannot evade judicial estoppel anytime it second-guesses its earlier representation. The FDOC made a calculated strategic decision to secure dismissal by insisting that it would no longer ban PLN based on three-way-calling advertisements. It then turned around and did exactly that. The same is true for the other types of advertisements enumerated in subsection (l), for which the FDOC does not even attempt to argue changed circumstances. Thus, even if the small number of concierge-service advertisements in *Prison Legal News* were not covered by the FDOC's previous representations to

this Court, every enumerated element of the new rule is. At the very least, then, the FDOC is precluded from relying on any security interest related to *those* forms of advertisements. And as explained below, its blanket ban cannot stand based on concierge-service advertisements alone.

Nor was there any valid basis for the FDOC's about-face. The FDOC's previous representations that the enumerated categories of advertisements pose no material threat do not just estop the Department from changing course. They also confirm the FDOC's own previous conclusion that PLN's advertising conduct did not pose a sufficiently serious security threat to warrant censorship. That judgment was no mere guess: The FDOC allowed *Prison Legal News* into Florida prisons for approximately 13 years before it first began censoring the publication, and the Department has presented no evidence of any material threat posed by the magazine's advertisements during that long period of actual, real-world experience. After the FDOC mooted the previous litigation, there was a 55-month interregnum where *Prison Legal News* was again allowed into Florida's prisons uncensored. For that period, too, there is no evidence that PLN's advertisements ever caused any concrete security threat. Given the failure of the sky to fall during those 13-year and 55-month stretches of real-world experience, the FDOC's hypothesized harms and scenarios cannot be given blind deference. Prison officials sometimes must take action based on conjecture and hypothesis—they need not see how prisoners from

rival gangs will interact before deciding to segregate them—but they are not free to ignore real-world evidence that demonstrates that their fears (and responses) are exaggerated. *See, e.g.*, *Prison Legal News v. Cook*, 238 F.3d 1145, 1150-51 (9th Cir. 2001).

The FDOC responds that prison officials may be proactive in banning materials that pose a risk and need not wait until a disaster to take protective measures. *See* Appellant's Response and Reply Br. 24-25. This was the District Court's view as well. But that principle cannot be stretched so far as to justify *any* measure that a prison claims is aimed at improving security. Otherwise, *Turner* and *Thornburgh* would be toothless standards—which the Supreme Court has always said they are not. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 414, 109 S. Ct. 1874, 1882 (1989). Moreover, this case presents unique circumstances where evidence of a material change is necessary in light of the Department's previous position. The point is not that the FDOC must wait until a specific incident occurs. The point is that the FDOC affirmatively told this Court that the types of advertisements listed in subsection (l) do not pose a material security threat, and then abruptly changed its view after the lawsuit was dismissed as moot. In these circumstances, the lack of an intervening incident is highly relevant because the FDOC had already made its views clear and now it must reasonably justify its departure from those views.

Nor is it sufficient that PLN's advertising grew as the magazine itself expanded. The FDOC harps on the increase in the absolute number of relevant advertisements in PLN's more recent publications. *See* Appellant's Response and Reply Br. 17-18. But the FDOC's strange insistence that the proportion of offending advertisements is irrelevant is belied by the text of its own rule, which *requires* a relative assessment: A publication is rejected only when an offending "advertisement is *the focus of*, rather than being *incidental to*, the publication or the advertising is prominent or prevalent *throughout the publication*." Fla. Admin. Code. R.33-501.401(3)(l) (emphasis added). This proportion-based standard underscores the Department's own view (outside of this particular litigation) that the percentage of prohibited advertisements within the overall publication is what matters. The testimony of FDOC officials confirmed this understanding. *See* Jan. 6 Tr. 91:9-12. The FDOC cannot base its rule on the ratio of the numerator to the denominator—whether the advertisements are "prominent or prevalent"—and then insist that its assessment of *Prison Legal News* has changed just because the numerator has increased. As explained in PLN's opening brief, the proportion of relevant advertisements to the overall length of the magazine has not materially changed. Appellee's Principal and Response Br. 34-35. Advertising has never constituted more than 25% of *Prison Legal News'* content and has never been the focus of the publication. *See* Jan. 5 Tr. 41:25-42:6, 57:20-22. And the FDOC cannot

impose a *de facto* length limit on PLN by renewing its censorship regime anytime *Prison Legal News* expands its content.

II. There Is No Logical Fit Between The FDOC's Censorship of *Prison Legal News* And Its Claimed Penological Interests.

The FDOC has failed to provide specific evidence showing that the connection between its objectives and its censorship of PLN "is not so remote as to render the policy arbitrary or irrational." *Cook*, 238 F.3d at 1150. Instead it rests on the say-so of its expert witnesses that each category of advertisements might lead to dangerous behavior.

But that alone is not sufficient to prove that the FDOC's *specific* application of its policy to PLN is reasonable. *See Thornburgh*, 490 U.S. at 414, 109 S. Ct. at 1882. As the Supreme Court has emphasized, "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535, 126 S. Ct. 2572, 2581 (2006). Prison officials may not pile "conjecture upon conjecture," as the FDOC does here, to justify the violation of First Amendment rights. *Reed v. Faulkner*, 842 F. 2d 960, 963-64 (7th Cir. 1988). Thus, it is not enough for prison officials merely to assert that "in our professional judgment the restriction is warranted." *Beard*, 548 U.S. at 556, 126 S. Ct. at 2593 (Ginsburg, J., dissenting); *id.* at 535, 2581 (majority opinion) (agreeing that the standard is much higher). Rather, "[i]n order to warrant deference, prison officials *must present credible evidence* to support their stated

penological goals." *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) (emphasis by court); *see also, e.g., Walker v. Sumner*, 917 F.2d 382, 385-86 (9th Cir. 1990); *Ramirez v. Pugh*, 379 F.3d 122, 128-29 (3d Cir. 2004); *Whitney v. Brown*, 882 F.2d 1068, 1074 (6th Cir. 1989).

Here, the evidence shows that the FDOC's censorship is *not* reasonably related to its penological objectives. The question posed by the first *Turner* factor is not merely whether the advertisements in PLN might raise security concerns in the abstract. Instead, the question is whether there is a logical fit between the claimed security concern and the FDOC's policy of banning all issues of *Prison Legal News*. And the FDOC's own experience during the 55 months that it foreswore censorship and the 13 years before it first censored PLN, not to mention the experience of the 49 other States, the BOP, and every jail in America, demonstrates that PLN's First Amendment rights and prison security can coexist. None of the abstract statements by the FDOC's expert witnesses disproved that concrete truth.[1]

[1] Most of all, the Court should give no weight to the self-serving and revisionist suggestion from Margaret Savage that "had she known of the advertisements in PLN when she was a warden, she" might not have allowed the publication into her correctional facility. Appellant's Response and Reply Br. 10. The fact is, *Prison Legal News* was admitted to the Arizona prisons when Ms. Savage was a warden, and the FDOC has pointed to no documented evidence that the magazine's advertisements contributed to any security problem in that facility.

Moreover, as to each specific element of the FDOC's regulation, there are serious fit problems. *First*, the District Court failed to even assess rejections for advertisements involving pen-pal and outside-business services. The FDOC tries to salvage this oversight with respect to pen-pal service advertisements (it makes no similar effort for outside-business advertisements), by arguing that this Court's decision in *Perry v. Sec'y, FDOC*, 664 F.3d 1359 (11th Cir. 2011), allows a blanket ban based on pen-pal advertisements alone.

But there are two fatal flaws with this suggestion. The first is that *Perry* did not address a small group of pen-pal advertisements within a large and otherwise protected publication. Instead, it dealt with direct solicitations from pen-pal services. *See id.* at 1362-63. There is a significant difference between banning solicitations with the *sole purpose* of promoting pen-pal services and banning a core First Amendment publication in its entirety because it contains a few discrete pen-pal service advertisements. In the former, the fit between the penological interest and the policy is tight; in the latter, the policy illogically bans a large amount of valuable, protected speech to stop a few incidental advertisements. Even in the prison context, the First Amendment does not allow the censorship of massive quantities of fully-protected speech in an effort to target a small amount of regulable speech. *Cf. Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245, 122 S. Ct. 1389, 1399 (2002) ("The prospect of crime … by itself does not justify laws suppressing

protected speech."). Thus, *Perry* does not control the answer here.[2] The second flaw is that, in the previous litigation concerning PLN, the FDOC assured this Court that pen-pal service advertisements in *Prison Legal News* were not a sufficient basis for censoring the publication. *See McDonough*, 200 Fed. App'x at 876, 878. The Department has offered no reason why its view then does not hold true now.[3]

Second, with respect to stamp-for-payment advertisements, the FDOC's claimed security concerns are undermined by its previous statements to this Court, as well as its policies allowing inmates to stockpile stamps and to receive stamps from family members. Here, again, the FDOC previously assured the Court that

[2] For a similar reason, the FDOC's repeated reliance on *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 97 S. Ct. 2532 (1977), is misplaced. There, too, the Court upheld a ban on direct solicitations to engage in a prohibited activity. Here, the FDOC is censoring indisputably protected First Amendment conduct on the basis of incidental advertisements in the publications.

[3] The FDOC also attempts to downplay the incongruence between its "prominent or prevalent" standard and its practice of blanket censorship of PLN by arguing that *Thornburgh* upheld an "all-or-nothing" rule that "allow[ed] prison officials to return an entire publication to a publisher if even just one page of a book presents an intolerable security risk." Appellant's Response and Reply Br. 27 (citing *Thornburgh*, 490 U.S. at 431 (Stevens, J., dissenting)). But the FDOC has not adopted an all-or-nothing rule, and its previous representations to this Court indicated that such a rule is not warranted here. Moreover, *Thornburgh* does not hold that an all-or-nothing policy is permissible in all circumstances. Rather, it dealt with a *facial* challenge, and it remanded for the lower court to determine whether the rule was unconstitutional as-applied to any of the specific publications. *See id.* at 419. This case, of course, is an *as-applied* challenge to the FDOC's regulation and thus requires a specific analysis of the fit between the FDOC's penological interest and its specific application of its rule to censor PLN.

there was no material security threat that would warrant censorship of PLN. *See id.* Although the FDOC now claims that it noticed an increase in cash-for-stamps transactions, Appellant's Response and Reply Br. 3, the FDOC was not aware of that at the time of the rule change, and therefore such transactions had no bearing on the decision to change the rule. *See* Jan. 6 Tr. 62:19-21; Pl's Ex. 30, #2. Moreover, the Department's other policies undermine its aggressive stance on these advertisements. Cash-for-stamps advertisements in *Prison Legal News* only arguably pose a threat to prison security because the Department already enables prisoners to possess the means for a stamp-based economy. If the primary conduct is acceptable, it is hard to see a logical need to ban any publication that includes advertisements that raise only a secondary concern. Other courts have granted relief where a prison's policy contains similar "loopholes that undermine its rationality and the credibility of [the prison's] concerns." *Cal. First Amendment Coal. v. Woodford*, 299 F.3d 868, 881 (9th Cir. 2002); *cf. Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (rejecting prison's claimed security interest in prohibiting beards where the prison allowed prisoners to keep long hair on their heads). And the Department supports its ban here only through the piling of conjecture upon conjecture, which it cannot do. *See, e.g.*, *Beard*, 548 U.S. at 535, 126 S. Ct. at 2581; *Reed*, 842 F.2d at 963-64.

Again, this situation is unlike *Perry*. There, the Department prohibited advertisements for certain pen-pal services while allowing advertisements for other

pen-pal service that raised less of a security risk. Here, the Department censors *Prison Legal News* based on its stamp advertisements, while adopting a permissive attitude toward primary conduct that poses *more* of a security risk. The FDOC's distinction in *Perry* at least made sense; its approach here does not.

The Department's existing policy of screening all incoming and outgoing mail makes its advertisement ban even more unnecessary. The prison knows when prisoners receive cash from outside sources and presumably can block mail from known cash-for-stamps services, which would accomplish directly what the advertising rule attempts to accomplish only indirectly. (The fact that the FDOC knows that cash-for-stamps services are depositing money in prisoners' accounts but does not prohibit the deposits just further underscores the illogic of censoring PLN while allowing more serious primary conduct.) In addition to being the logical approach to stopping the problem the FDOC perceives, it would do so without burdening the core free speech rights of *Prison Legal News*. When faced with the choice between a direct means of stopping a threat that lies within the prison's core authority and an overly broad indirect measure that restricts important constitutional rights, the reasonable approach is the former not the latter.

Third, there is no fit between the concerns with three-way calling advertisements and the FDOC's blanket ban on PLN. As explained in the opening brief, *Prison Legal News* has never run advertisements for three-way call services.

See Appellee's Principal and Response Br. 36-37. The only phone-call advertisements contained in any issue of *Prison Legal News* are those for discount phone services that allow parties to connect through a local number to avoid long-distance rates. *See id.* at 36. The subscribers to these services, moreover, are not prisoners but their friends and family members outside the prison. The Department, like the District Court, simply ignores these facts.[4] Instead, it offers generalized comments from its experts on the problems with three-way calls. But those types of calls are not at issue, and abstract concerns are not sufficient. If they were, then there would be little left of the *Turner* standard, despite the Supreme Court's insistence otherwise in *Thornburgh* and *Beard*.

Here, as well, the FDOC allows primary conduct that undermines its stated rationale. The Department allows prisoners to call cell phones even though the prison cannot be sure who receives those calls and where. Given that the FDOC allows this direct threat to its stated security concern, it has no logical basis for censoring an entire magazine based on a claimed incidental threat posed by a small number of advertisements for discount phone call services—despite the nationwide consensus that the threat (if it exists at all) does not justify censorship of PLN. There

[4] The advertisement proffered by the FDOC at page 33 of its brief is not for three-way calling, but instead offers a service that anyone outside of prison (but not prisoners) can already set up without that company's help.

is simply no lawful grounds for rejecting *Prison Legal News* based on the FDOC's three-way call advertisement prohibition.

Finally, the FDOC incorrectly argues that PLN has waived any argument with respect to advertisements for so-called prison "concierge" services, which fall under subsection (m) of the Rule, and suggests that this Court can affirm on that basis alone. But in contrast to the FDOC's heavy emphasis on these advertisements, the District Court never separately considered them in its *Turner* analysis. *See* Amended Order, Doc. 279, at 33-52 (hereinafter "Order"). And for good reason because subsection (m)'s catch-all provision was not the focus of this case. Instead, this case was (and is) predominantly about the four prongs of subsection (l). The fact that advertisements for "concierge" services were occasionally censored under (m) does not change this. Indeed, many of the FDOC's impoundment decisions do not rely on this basis and thus cannot be justified on this ground alone.[5] The FDOC's positional shift in this Court underscores the moving-goal-posts nature of its rule, especially subsection (m)'s indeterminate umbrella clause. Today concierge advertisements are the problem; tomorrow it may be another type of advertisement. None of that matters, though, if PLN obtains the injunction that it seeks: one that

[5] Moreover, the FDOC's insistence that it will reject a publication for "only one violation of (3)(m)," Appellant's Response and Reply Br. 20, underscores the aggressive and arbitrary nature of its rule.

prohibits the FDOC from censoring its magazine based on the enumerated categories of advertisements in subsection (l). If anything, the FDOC's newfound emphasis on subsection (m) simply reveals how weak its arguments are under subsection (l).[6]

In all events, the FDOC cannot be absolved of its unconstitutional censorship by claiming it *could have* rejected PLN under subsection (m)'s catch-all language for any of subsection (l)'s enumerated categories. The First Amendment does not countenance censorship under an indeterminately vague catch-all clause where it would prohibit censorship under a more specific provision. And the same fit problems apply to subsection (m)'s unenumerated category of advertisements. As with the other types of advertisements, the FDOC's experts offered generalized concerns about the concierge advertisements without any concrete explanation why an occasional "concierge" advertisement in *Prison Legal News* justifies categorical censorship of the entire publication. Again, abstract penological concerns are not enough; there must be a logical basis for why a concern requires the *specific* infringement of First Amendment rights at issue. There is none here.

* * *

[6] The FDOC's shift in focus to subsection (m), moreover, attempts to circumvent the 5 years (or over a decade counting the first round of litigation) that the parties have spent litigating the constitutionality of the FDOC's enumerated categories of prohibited advertisements. The FDOC's newest strategy for ducking that question should not be countenanced. The constitutionality of applying subsection (l) to PLN should be resolved here and now.

Beyond these specific flaws, the FDOC's approach is illogically underinclusive in its focus only on publications where the relevant advertisements are "prominent or prevalent." Just as there is no logical explanation for the FDOC's decision to allow all manner of primary conduct while prohibiting publications based on secondary concerns with a handful of advertisements, there is no rational reason (based on the FDOC's proffered justifications) why the FDOC does not ban *all* publications that contain *any* of the relevant advertisements. If there is a concern, for example, with cash-for-stamp advertisements, then a single advertisement would seem to implicate the FDOC's concern to the same degree as prevalent advertising. But while the FDOC's underinclusive prevalence standard makes it a bad fit for the Department's stated concerns, it is well-designed to identify publications that are focused on issues of interest to inmates, which only highlights the First Amendment concerns here. Since advertisements will be related to both readership and the primary content of the publication, the FDOC's prevalence standard censors the publication of greatest interest to the inmate population.

And the woefully indeterminate nature of the standard further compounds its lack of logic. As the District Court noted, "[n]one of the witnesses at trial were able to articulate any reasonably specific guidelines to determining when advertisements were 'prominent or prevalent.'" Order 50. When even the officials tasked with applying "so shapeless a provision" cannot provide any principled ground for its

application, the courts should think twice before allowing the inherently "arbitrary enforcement" it invites. *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2560 (2015). Particular caution is required when important First Amendment liberties are at stake, in order "to ensure that ambiguity does not chill protected speech." *See F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

III. The FDOC's Censorship Of PLN Leaves It With No Alternative, While Accommodating PLN's First Amendment Rights Would Not Unduly Burden Florida Prison Officials.

With respect to the second and third *Turner* factors, the harm of the FDOC's aggressive policy far outweighs the minimal burdens required to accommodate PLN's First Amendment rights. PLN has no alternative means of pursuing its First Amendment rights under the FDOC's indeterminate regulation. The District Court expressly found that "[w]ithout advertisements PLN could not print *Prison Legal News*…" and that "printing a Florida-only edition of Prison Legal News would be cost-prohibitive." Order 9 n.9 (citing Jan. 5 Tr. 60:23-71:14). As a practical matter, PLN has no other option. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 508 (1991); *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004) (Alito, J.) ("If government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment.").

The FDOC insists that PLN could just adjust its advertising content to comply with the regulation. But that is easier said than done. For one, PLN is not a wealthy organization with financial room to spare; it is a non-profit with exceedingly thin financial margins. *See* Jan. 5 Tr. 38:2-6, 40:11-25, 62:1-19. Each monthly publication of *Prison Legal News*, moreover, is printed for nationwide distribution, and the FDOC has no basis for imposing *de facto* nationwide limits on PLN's advertising content (and thus its revenue and potential expansion). Even if PLN adjusted its advertising nationwide,[7] a decision to make the publication acceptable to the FDOC would convert the FDOC into a nationwide censor, despite the contrary judgments of 49 States, the BOP, and every county jail in the country. This *de facto* nationwide censorship would unconstitutionally harm not just PLN, but also its thousands of subscribers both in and out of prison throughout the rest of the country. *See Bigelow v. Virginia*, 421 U.S. 809, 824, 95 S.Ct. 2222, 2234 (1975) ("A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected….") And PLN can never be sure that its content will satisfy a rule that even FDOC officials

[7] Even if (contrary to fact) this adjustment were feasible, it would come with substantial First Amendment costs. Inmates across the nation would be denied access to advertisements that 49 States and the BOP have found innocuous. In other contexts, the Supreme Court has warned against censoring all speech in a way that renders it appropriate for the most impressionable audience. *See, e.g.*, *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 270-72 (1964).

cannot consistently apply or articulate. *See* Jan. 5 Tr. 65:12-21; Order at 50 ("None of the [FDOC] witnesses at trial were able to articulate any reasonably specific guidelines to determining when advertisements were 'prominent or prevalent.'").[8] In short, "*no* 'alternative means of exercising the right' remain open to" PLN, and the "absence of any alternative thus provides 'some evidence that the regulations [a]re unreasonable.'" *Beard*, 548 U.S. at 532, 126 S. Ct. at 2579-80 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 135, 123 S. Ct. 2162, 2169 (2003)). Without relief, PLN will be forced to cease distributing its publication in Florida prisons—a harm that will be shared by Florida's prisoners, who will be deprived of the important information contained in *Prison Legal News*.

By contrast, accommodating PLN's rights would not have a detrimental effect on prison resources or on the safety of others. There is no evidence that PLN's advertisements have ever undermined the FDOC's security interests, let alone those of any other prison or jail throughout the country. And so there is no reason to believe that allowing PLN's publications once again—as the FDOC did from 1990

[8] The fact that PLN hired an independent witness to spend weeks reviewing all *Prison Legal News* issues for offending advertising content to prepare an exhibit *for trial* says nothing about whether PLN staff can routinely make those determinations in the regular course of business. More important, though, is that PLN's witness did not—and could not—determine which advertisements were "prominent or prevalent *throughout the publication*." That is left to the subjective judgment of the Literature Review Committee. *See* Jan. 7 Tr. 11:24-12:1; Jan. 6 Tr. 139:20-24.

to 2003 and 2005 to 2009—will cause any significant burden on the State's prison system. If anything, taking a less aggressive approach will *reduce* the FDOC's administrative load because it would require less paperwork and fewer review hearings associated with the publication. Administrators would no longer need to attempt to construe the unclear terms of the regulation with respect to every advertisement in every issue of PLN, and they would be relieved of the due process requirements that the Department has largely been ignoring.

IV. The FDOC's Exaggerated Response Is A National Outlier.

Further underscoring the irrationality of its policy, the FDOC is the only prison system in the country (indeed, in the entire world) that feels the need to censor *Prison Legal News* based on its advertising content. *See* Jan. 5 Tr. 72:19-24. Appellant tries to downplay this fact, but it is crucial. Although the policies of other prisons are not dispositive, the practices of "other well-run institutions [are] relevant to [the court's] determination of the need for a particular type of restriction." *Procunier v. Martinez*, 416 U.S. 396, 414 n.14, 94 S. Ct. 1800, 1812 n.14 (1974); *see also Holt*, 135 S. Ct. at 866 (quoting *Procunier*). Here, the practice of every well-run institution outside of Florida is to allow *Prison Legal News* to reach its subscribers with precisely the same advertisements.

The Supreme Court's recent decision in *Holt v. Hobbs* is instructive. In *Holt*, a Muslim prisoner invoked RLUIPA to challenge Arkansas' refusal to allow a half-

inch religious beard. The Court rejected the State's asserted need for a ban on beards in part because the State "failed to show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit inmates to grow ½–inch beards, either for any reason or for religious reasons, but it cannot." 135 S. Ct. at 866. In the Court's view, the fact "[t]hat so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks." *Id.* So too here. Florida has offered no reason at all why it alone in the nation must completely censor PLN based on its advertisements. Although the *Turner* analysis does not impose a least restrictive means analysis like RLUIPA, the Court's reasoning in *Holt* transcends that narrow context: Where States claim the need to violate a prisoner's rights in a manner unlike any other penal jurisdiction, the courts should rightly be skeptical of the claim.[9]

The FDOC, moreover, has many less harmful alternatives. As to phone calls and stamp-payment services, it could stop allowing the primary conduct that poses

[9] The FDOC's competing citation to this Court's decision in *Knight v. Thompson*, 796 F.3d 1289 (11th Cir. 2015), *cert. petition pending*, No. 15-999, does not establish otherwise. In *Knight*, this Court acknowledged *Holt*'s reasoning, but concluded that it was not clear whether the other 39 jurisdictions identified by the plaintiffs "would allow their specific requested accommodation." *Id.* at 1293. Here, there is no dispute that no other jurisdiction in the country censors PLN based on its advertising conduct.

more obvious risks to its purported security concerns. And rather than censor *Prison Legal News* in its entirety, it could adopt New York's policy of attaching a notice to PLN's publications stating that the magazine may have advertisements for services that prisoners are prohibited from using. *See* Jan. 5 Tr. 83:2-18. The FDOC dismisses this option out of hand on the ground that prisoners will not heed its warning. But there is no reason to believe that New York's practice has been unsuccessful. And Florida has offered no concrete reason why it could not adopt this much less costly and less intrusive measure. The mere refusal to budge from its outlier position is not enough to justify the State's severe infringement of PLN's freedom of speech.

* * *

There is simply no reasonable relationship between the FDOC's asserted interests and its alone-in-the-nation restraint on PLN's First Amendment rights. The FDOC assured this Court that the relevant advertisements in *Prison Legal News* did not warrant censorship. Yet, only two years later, the FDOC began censoring the publication again based on the *same* types of advertisements. The mismatch could not be clearer. And both its intervening experience and its permissive attitude toward primary conduct confirms that the FDOC's previous position is more accurate than its current one. Indeed, the Department's view is that it can ban core First Amendment speech so long as it is also banning something that it is arguably

harmful. But that is not a logical position. PLN cannot survive without advertisements, and printing a Florida-only issue each month is infeasible. Accommodating PLN's free speech rights, by contrast, would not pose an onerous administrative burden or any intolerable security risks on Florida's prisons. That is why no other prison system or jail in the entire country considers it necessary to censor *Prison Legal News* on the basis of its advertisements. The FDOC's aggressive application of its rule is an exaggerated measure that cannot stand under the First Amendment.

CONCLUSION

For the reasons set forth above and in Appellee's earlier briefing, this Court should reverse the District Court's First Amendment ruling and affirm and expand its Due Process ruling.

Respectfully submitted,

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February 16, 2016

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Dated: February 16, 2016

s/Michael H. McGinley
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I hereby certify that on February 16, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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