No. 15-14220-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections,

Defendant-Appellant/Cross-Appellee,
v.

PRISON LEGAL NEWS,

Plaintiff-Appellee/Cross-Appellant.

On Appeal from the United States District Court
Northern District of Florida, Tallahassee Division
4:12-cv-00239-MW/CAS

BRIEF OF JOHN CLARK, MARTIN HORN, JUSTIN JONES, STEVE MARTIN RON McANDREW, CHASE RIVELAND, AND JEANNE WOODFORD AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

All of the *amici* are individuals, and accordingly no corporate disclosure statement is required. See Fed. R. App. P. 26.1(a). *Amici* believe that the certificate of interested persons contained in the Plaintiff-Appellee's principal and response brief is complete. See 11th Cir. R. 26.1-2.

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INTEREST OF AMICI CURIAE

Amici curiae are former corrections officials with over 250 collective years of experience managing jails and prisons and advising corrections officials. *Amici* understand and respect the valid security concerns facing corrections officials. *Amici* believe effective prison administration and overall public policy are best served when prison regulations are based on, and applied in accordance with, sound, fact-based assessments of a prison's realistic security needs. In the view of *amici*, the decision by the Florida Department of Corrections ("FDOC") to ban Prison Legal News ("PLN") from its facilities is not such a regulation. FDOC's decision to ban PLN is premised on PLN's advertisements, some of which are for services that prison regulations prohibit inmates from using. But the relationship between the tenuous security concerns posed by PLN's advertisements and FDOC's blunderbuss response is too attenuated for that response to pass constitutional muster.

FDOC is alone among prison systems in the United States in effectively banning PLN. No other prison system has concluded that PLN (and the advertisements it contains) constitutes a material threat to the safety of an effectively managed prison environment. Instead, prisons around the country use a variety of other tools to prevent the inmate

misconduct that purportedly informs FDOC's decision to ban PLN. Such tools are readily available to FDOC, and are far more logical and effective than an outright ban.

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

Amicus Martin Horn currently serves as the Executive Director of the New York State Sentencing Commission. He also served as the New York City Commissioner of Correction from 2003-2009, and the Pennsylvania Secretary of Corrections from 1995-2000. He has over 40 years of corrections experience.

Amicus Justin Jones served as Director of the Oklahoma Department of Corrections from 2005 to 2013, and has more than 35 years of experience in the field of corrections.

Amicus Steve J. Martin served as the General Counsel and Assistant Director of the Texas Department of Corrections in the 1980s. He has over 43 years of corrections experience and has worked as a federal court monitor and an expert for both the U. S. Department of Justice and the

Department of Homeland Security in numerous prisons, jails, detention facilities, and juvenile systems across the United States.

Amicus Ron McAndrew served as a Warden in the Florida Department of Corrections from 1992-2001. He has 23 years of corrections experience.

Amicus Chase Riveland served as Secretary of the Washington State Department of Corrections from 1986 to 1997 and as Executive Director of the Colorado Department of Corrections from 1983 to 1986. He has over 40 years of corrections experience.

Amicus Jeanne Woodford served as Undersecretary of the California Department of Corrections from 2005-2006, as Director of the California Department of Corrections from 2004-2005, and as Warden of California's San Quentin State Prison from 1999-2004. She has over 30 years of corrections experience.

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part, and that no party, party's counsel, or other person other than *amici* or *amici*'s counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUE

Whether the Florida Department of Corrections violates the First Amendment by imposing a wholesale ban of Prison Legal News from its facilities because of security concerns purportedly raised by certain advertisements?

INTRODUCTION AND SUMMARY OF ARGUMENT

Corrections officials manage an environment in which security is a primary concern. Many activities allowed outside of prison are legitimately forbidden to prisoners. However, FDOC's wholesale ban of PLN — on the ground that some advertisements refer to services prisoners may not obtain — is grossly disproportionate to any legitimate government concerns. Advertisements, even for prohibited services, pose little material risk to prison security, because the presence or absence of the advertisements at issue has little impact on whether inmates engage in the underlying prohibited conduct. Consequently, *amici* respectfully submit that denying inmates access to a publication that provides valuable information to inmates — including unique in-depth coverage of prison conditions and legal issues directly affecting inmates' daily lives — is not a reasonable response to prison security concerns, and thus violates the First Amendment, for the following reasons:

First, advertisements for prohibited services do not have any material impact on prison security. Banning a publication because of certain advertisements does not realistically address any security concerns — even concerns about whether inmates will seek to pursue the services being advertised. Whether or not they see a particular advertisement, inmates

are already aware of the potential for violating prison rules through other uncensored channels. For that reason, FDOC officials — like their counterparts in prisons nationwide — employ an extensive array of procedures to deter, detect, and discipline such violations directly.

Second, in contrast to procedures prisons use to regulate inmate conduct, attempting to seal inmates off from information about prohibited services is among the least effective measures possible. Inmates are regularly exposed to information about conduct that is prohibited in the prison environment, both through formally approved content and through the informal exchange of information among an ever-changing inmate population. Yet, in the experience of *amici*, such exposure does not constitute a material threat to prison safety. FDOC fails to provide any plausible explanation of how, in light of the many sources of information to which inmates have access, banning PLN could reasonably be expected to have any material impact on inmates' knowledge of the existence of prohibited services.

Third, in the experience of *amici*, publications such as PLN contribute positively to prison safety. When inmates spend their time constructively, such as by reading publications like PLN that have content relevant to their day-to-day lives, they have less time to engage in troublesome behavior.

Further, PLN provides inmates with uniquely focused, in-depth coverage of their legal rights and prison issues, information to which inmates might not otherwise have access. By providing this information to inmates, PLN increases the safety of the prison environment. As compared to a situation in which inmates are kept in the dark about their rights, an environment in which inmates are aware of their rights is more transparent, and inmates who are aware of legal means to vindicate their rights are less likely to engage in violence when they feel they have been wronged. By contrast, the blanket banning of a publication that informs inmates of their rights is likely to create suspicion and resentment among inmates, potentially increasing hostility in an environment that is already fraught with tension.

ARGUMENT

Amici, with years of experience managing the security of various prison facilities, are well aware of the challenges facing corrections officials charged with maintaining a safe prison environment for staff and inmates. However, even considering these challenges, courts should defer to prison decisions predicated upon purported safety concerns only if the decisions reasonably address those concerns. Among all the prison systems in the United States, *amici* believe that FDOC stands alone in its decision to ban

PLN. As detailed below, FDOC's decision has impermissibly abridged the First Amendment rights of both PLN and FDOC inmates.

In order to withstand First Amendment scrutiny, FDOC's restriction must be "'reasonably related' to legitimate penological objectives," and not "an 'exaggerated response' to those concerns." Turner v. Safley, 482 U.S. 78, 87; 107 S. Ct. 2254, 2260 (1987). The four factors that inform the Turner analysis are:

> First and foremost, "there must be a 'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." *Ibid.* (quoting *Block v. Rutherford,* 468 U.S. 576, 586, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984)). If the connection between the regulation and the asserted goal is "arbitrary or irrational," then the regulation fails, irrespective of whether the other factors tilt in its favor. 482 U.S., at 89-90, 107 S.Ct. 2254. In addition, courts should consider three other factors: the existence of "alternative means of exercising the right" available to inmates; "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and "the absence of ready alternatives" available to the prison for achieving the governmental objectives. *Id.,* at 90, 107 S.Ct. 2254.

Shaw v. Murphy, 532 U.S. 223, 229-30, 121 S. Ct. 1475, 1479 (2001).

Importantly, the Turner standard is not toothless, and courts, even when granting some measure of deference to corrections officials, "are not required to abdicate their responsibility to redress constitutional violations." Bradbury v. Wainwright, 718 F.2d 1538, 1543 (11th Cir. 1983).

See also Pesci v. Budz, 730 F.3d 1291, 1299 (11th Cir. 2013) ("[D]eference to the professional judgment of the facility administration is not tantamount to carte blanche permission to deny the fundamental rights of free speech and free expression. ... [W]e again observe that the Turner standard is a deferential one, but it is not toothless."). As the Supreme Court has explained, under Turner, "[t]he real task is . . . determining whether the [evidence] shows not just a logical relation [but] a reasonable relation." Beard v. Banks, 548 U.S. 521, 533, 126 S. Ct. 2572, 2580 (2006).

FDOC's blanket ban of PLN because of certain advertisements fails that test because there is no valid, reasonable connection between the decision banning PLN and the purported goal of eliminating the security risks posed by certain third-party services advertised within PLN. Banning PLN simply because some of PLN's advertisements are for prohibited services will not prevent inmates from using those services. Rather, that goal is better achieved by using tools that are a standard part of sound prison administration (such as telephone call recording and monitoring, and mail inspection) to target the underlying inmate conduct which is ultimately of concern. Also, inmates are regularly exposed to advertisements and other information — including word-of-mouth among inmates — that depicts or describes prohibited conduct, yet FDOC does not

purport to ban all such content and likely could not do so as a legal or practical matter. This further underscores that FDOC's decision to ban PLN in particular bears no reasonable relationship to security concerns. Finally, in the experience of *amici*, publications such as PLN actually benefit prison security, as they provide valuable information to prisoners and promote transparency and justice in the prison environment.

I. BANNING ADVERTISEMENTS FOR PROHIBITED SERVICES DOES NOT PREVENT INMATES FROM USING PROHIBITED SERVICES.

Amici understand that FDOC purports to justify its banning of PLN on the ground that PLN contains advertisements for the following services: (1) services that allow an inmate to run a business; (2) pen-pal services; (3); postage stamp services; (4) three-way calling and call forwarding, and; (5) "prisoner concierge" services (which include "people locator services" allowing inmates to locate individuals, among other services).

Amici are familiar with the potential fraud and security concerns that may result from inmate use of each of those services. In particular, use of pen-pal services, three-way calling and call forwarding may make it difficult for prison staff to ascertain with whom inmates are communicating outside of prison walls. People locator services may allow inmates to obtain the contact information of people they might attempt to harm. Permitting

inmates to use postage stamps as currency may lead to conflicts and violence among inmates. *Amici* take no issue with FDOC's concerns about these activities. Nevertheless, any concerns related to safety and security posed by the underlying services cannot be used as a pretext to grant blind deference to prison administrators who seek to broadly silence undesirable speech. See Pesci v. Budz, 730 F.3d 1291, 1300 (11th Cir. 2013).

While framed as a safety and security issue, FDOC's decision to ban PLN has only the most tenuous connection to addressing the underlying security concerns presented by the services advertised in PLN. At bottom, the ban neither prevents inmates from learning about those services, nor does it diminish the possibility that inmates will use those services. Like all other prison systems, FDOC directly prevents inmates from using those services – irrespective of the presence of absence of PLN in its facilities – by using the ready alternatives that are at its disposal. Yet, FDOC stands alone in keeping PLN out of its prisons on the basis of its advertising content.

A. Banning a Publication Because of its Advertising Content Has No Effect on Prison Security

In the experience of *amici*, inmates are aware of the prohibited services at the center of FDOC's regulation, and inmates who want to use those services will attempt to do so whether or not they are exposed to advertisements in a certain publication. At most, FDOC's decision to ban

PLN may prevent inmates from becoming aware of particular providers of prohibited services through the advertisements in PLN. In truth, however, the ban is unlikely to have even that limited effect. Any interested inmate may easily get specific information on these advertisers from associates in the community who subscribe to or obtain PLN (or other publications advertising such services). The information is easily communicated through phone calls, visits, letters, or the inmate grapevine. If such information is considered at all valuable, it can easily become common knowledge among prisoners. Ultimately, in the view of *amici*, a regulation that targets only one communication channel through which inmates can learn of a given method for breaking a rule will provide no meaningful benefit to prison security, as precisely the same information will still be conveyed through other communication channels.

As FDOC itself noted in the court below, "[d]espite the FDOC having rules forbidding the solicitation of pen pals by inmates, forbidding stamps from being used as a currency by inmates, and forbidding three way calling and call forwarding by inmates…such conduct by FDOC inmates continues to be widespread." [Doc. No. 135 at 7]. In other words, FDOC concedes that, notwithstanding its decision to ban PLN and the fact that the contested advertisements were not entering the prison via PLN, inmate use

of those services remained "widespread." This concession undermines the credibility of FDOC's assertion that its ban on PLN is reasonably related to FDOC's penological interests in prohibiting the underlying services.

Turner is instructive on this point. There, the government generally prohibited inmates from marrying other inmates, citing the possibility that marriage among inmates could lead to "love triangles," which could lead to violence. Turner, 482 U.S. at 97, 107 S. Ct. at 2266. The Supreme Court saw through this argument, noting that "[c]ommon sense suggests that there is no logical connection between the marriage restriction and the formation of love triangles," because love triangles could form whether inmates got married or not. Id. at 98, 107 S. Ct. at 2266. Similarly, here, in the experience of *amici*, common sense suggests there is no connection between PLN's advertisements and prison security. Just as inmates can become involved in love triangles whether or not they are allowed to marry, so too inmates can, and will, attempt to use prohibited services whether or not they happen to see PLN advertisements for those services.

The Court need not speculate on this point, for FDOC has conceded in the court below that inmate use of prohibited services remains "widespread", even though PLN has been banned since 2009. If PLN's advertisements were somehow driving security problems, its removal from

the prison for more than half a decade would presumably have helped improve conduct at the prison. Yet FDOC's concession demonstrates that this did not occur.

B. The Comparative Ineffectiveness of Banning PLN Demonstrates That the Ban is an Exaggerated Response

FDOC has at its disposal readily available alternatives far better suited to achieve the penological interests purportedly served by FDOC's ban of PLN. These alternatives include directly detecting and preventing use of prohibited services. In the experience of *amici*, these alternatives have been used effectively in the prison systems that have not banned PLN. And as detailed below, these alternatives are already in use by FDOC.

In well-managed prison systems, clear rules provide direction to inmates as to what conduct is not allowed, and punishments are in place to deter inmates from engaging in such conduct. Surveillance of inmates gives prison staff the ability to directly oversee inmate behavior, so that they can detect attempts to engage in misconduct and prevent those attempts. By contrast, banning PLN because it contains advertisements for certain services is an unnecessary and demonstrably ineffective means of attempting to police inmate misconduct. Given the existence of readily available alternatives, FDOC's decision to ban PLN is not reasonable, but is

an unconstitutional "exaggerated response" to prison concerns. Turner, 482 U.S. at 90, 107 S. Ct. at 2262.

1. Rules and punishment

In the experience of *amici*, the first line of defense against inmate misconduct is to have in place clear rules defining misconduct and clear consequences for inmates who violate those rules. For instance, like most prison systems, FDOC has rules prohibiting inmates from using call forwarding and three-way calling services. Fla. Admin. Code r.33-602.205(2)(a). FDOC also limits the amount of telephone numbers on a prisoner's call list to ten, each of which must be approved by FDOC. Id. Similarly, FDOC limits the number of stamps a prisoner can possess to forty, and limits the number of stamps a prisoner can receive in the mail to twenty. Id. r.33-602.207 & 33-210.101(2)(e). Inmates are prohibited from soliciting for pen-pals. Id. r.33-210.101(9). Finally, the behavior that may result from inmates using these prohibited services, whether by using three-way calling, call forwarding, pen-pal services, or people locator services to facilitate criminal activity outside of the prison's walls, or potential violence resulting from conflicts over stamps inside the prison's walls, is all prohibited by FDOC rules. See id. r.33-601.314.

Inmates who violate these rules are subject to punishment, which may include such sanctions as imposing more restrictive conditions of confinement and rescinding credits previously given toward time served. Id. Of course, if any misconduct is a crime in its own right in addition to being a violation of prison rules, an inmate also is subject to criminal prosecution. In the experience of *amici*, clear rules and the threat of punishment effectively deter many inmates from engaging in misconduct, even if they might happen to become aware of the potential to engage in misconduct by reading a publication that contains advertisements for certain services.

2. Extensive monitoring of inmates effectively prevents and detects misconduct

Although rules and punishment effectively deter many prisoners from engaging in misconduct, *amici* are aware that there are inmates who will not be deterred merely by the threat of punishment. To the extent that a prisoner may not be so deterred, FDOC has tools at its disposal — tools that it currently uses — that enable it to effectively prevent and detect misconduct. By the very nature of the penal system, prison staff have extensive control over the lives of inmates. Every aspect of a prisoner's life may be subject to surveillance. Effective supervision of inmates, not

banning publications for advertisements, addresses prison concerns that inmates will use prohibited services.

a) Tools to prevent three-way calling and call forwarding

FDOC has tools that enable it to prevent inmates from using three-way calling and call forwarding services. With limited exceptions, all inmate calls are subject to recording and real-time monitoring. Fla. Admin. Code. r.33-602.205. This alone is a valuable tool that enables prison staff to listen to inmates' telephone conversations at any time to detect suspicious activity. Further, inmates may only place calls to numbers that are approved by FDOC. Id. Also, *amici* understand from the record below that FDOC contracts with Securus Technologies ("Securus") to provide telephone services. Securus advertises to the public that it offers three-way calling and call forwarding detection services, as well as other services that enable it to detect attempts at engaging in misconduct.[1] In the experience of *amici*, such tools, which are common among prison systems, are highly effective at detecting and preventing misconduct. Indeed, as the District Court found, even though Securus "is not 100% effective" at preventing call transfers directly, Securus has detected "hundreds of thousands of

[1] Securus Website, http://www.securustechnologies.com/solutions/corrections/communication/securus-telephone-service.

attempted calls," and prison personnel have detected other unauthorized call transfers by monitoring inmates' calls.[2] [Doc. 279 at 13-14]. This layered approach to security — involving both direct prevention measures and monitoring by staff for violations — is a typical and appropriate means of enforcing prison rules, and is far more effective than banning one potential source of information for obtaining a prohibited service. Notably, FDOC inmates apparently continue to have ready access to information about call-transfer services, despite FDOC's ongoing ban on PLN and its advertisements, or else there would not be "hundreds of thousands of attempted calls" for Securus to detect.

b) Tools to prevent using stamps as currency, solicitation of pen-pal services, or conducting a business

[2] The court below accepted FDOC's contention that, because of advances in technology, Securus's telephone monitoring system may not detect all three-way or forwarded calls. [Doc. No. 279 at 12]. While *amici* acknowledge that no system of monitoring is perfect, logic suggests FDOC's contention on this point is exaggerated. If Securus were as ineffective as FDOC claims, FDOC would not pay for its services. Automatic detection of call forwarding is the one aspect of Securus services that the district court determined was less effective to the extent inmates used Voice Over Internet Protocol ("VoIP") technology. Id. However, this is only one part of a comprehensive suite of services advertised by Securus. In the experience of *amici*, the comprehensive suite of services Securus provides, which according to Securus includes live call monitoring, call logging, comprehensive call detail reports, and various other tools, are effective tools. *See* Securus Website, http://www.securustechnologies.com/solutions/corrections/communication/securus-telephone-service

FDOC also has tools in place to prevent inmates from using stamps as currency. Specifically, all non-legal mail, incoming and outgoing, is opened by staff to determine whether it contains prohibited items, such as a prohibited number of stamps.[3] Fla. Admin. Code. r.33-210.101(5) (all routine mail opened by employees), 33-210.102(8)(d) (all legal mail opened in presence of inmate) & 33-210.103(5)(a) (all privileged mail opened in presence of inmate). Routine mail is also subject to inspection, and may be read by prison staff. Id. 33-210.101(5). And FDOC already limits inmates to possessing no more than 40 stamps at any given time, thus requiring FDOC to monitor the number of stamps sent to an inmate and how many stamps an inmate has collected. *See* [Doc. 279 at 44].

The upshot is that, to prevent the excessive inflow of stamps, FDOC need only follow its own procedures regarding prison mail — some of the same procedures that it has been using to keep PLN from entering its prisons. Similarly, FDOC's ability to open, inspect, and read outgoing mail can be used to prevent prisoners from soliciting for pen pals or conducting businesses. Another tool commonly used in limiting possession of contraband such as excessive stamps is regular and unannounced searches

[3] FDOC could also ban stamps in their entirety; as PLN pointed out below, some prison systems have already taken this step. [Doc. No. 139 at 28-29].

of prison cells. Like all major prison systems, FDOC presumably makes regular use of this tool. Further, in the event a prisoner succeeds in having stamps delivered to a vendor, FDOC still controls the delivery to the prisoner of any item that may pose a direct threat to institutional security or order.

In addition, for the reasons discussed below, *see* Section II *infra*, it is unreasonable to expect that policies designed to shield inmates from mere *knowledge* about services that accept stamps will have any material effect either on inmates' knowledge, or on the efforts prison staff must undertake to monitor the flow and collection of stamps.

c) Tools to prevent people locator services from being used for criminal purposes

As shown above, written communications between prisoners and those on the outside are subject to routine and pervasive monitoring by prison staff. These tools give FDOC the ability to minimize any misconduct that might result from prisoners using people locator or other prohibited services. These tools are not perfect, and inmates often are able to communicate with family or associates directly through the inmates' own authorized visits or through other prisoners' communications with their visitors. But, by the same token, the limitations of prison monitoring procedures also underscore why, for the reasons discussed in Section II

below, it is unreasonable to expect that policies such as the ban on PLN would have any measurable effect on inmates' knowledge about the existence of prohibited services.

C. The Tools Available to FDOC Will be Used by FDOC Whether it Bans PLN or Not

There is good reason for FDOC to inspect inmate mail, monitor and record inmate phone calls, to contract with Securus to provide extensive telephone security services, and to take other steps, such as the deployment of correctional officers, to prevent violence among inmates. These methods are directly targeted to monitoring inmate behavior, so that any misconduct can be detected and prevented. In the experience of *amici*, well-managed prisons effectively allocate their resources to prevent and detect the kind of inmate misconduct at issue in this case.

There is no evidence that, since it began banning PLN, FDOC has stopped employing these methods of monitoring its inmates. If banning PLN because of the advertisements it contains were an effective means of preventing prisoner misconduct, FDOC would have been able to scale back this comprehensive surveillance regime and deploy its resources elsewhere. Yet, nothing in the record suggests FDOC has done that, and those tools presumably remain necessary to maintain a safe and secure prison environment, whether or not PLN is allowed in FDOC's facilities. This is

consistent with the experience of *amici*. Because advertisements in publications have no direct impact on prison security, banning publications because of some advertisements would not allow a prison system to change its security regime.

Inmates who are intent on breaking prison rules will not be prevented from doing so simply because they do not have access to a publication with advertisements for prohibited services — any regulation that limits that access as a means to prevent rules violations is bound to fail. Instead, inmates are prevented from breaking prison rules through effective deterrence and effective use of the surveillance tools at the disposal of all prison systems, including FDOC. At the same time, an inmate who wants to break the rules by using a service advertised in PLN will have to overcome the comprehensive surveillance regime FDOC has in place; any inmate who successfully uses a prohibited service does not do so because that service may have been advertised in PLN, but rather because FDOC ineffectively used the tools at its disposal.

Banning PLN does not materially increase prison security, and allowing PLN would not materially decrease prison security. Instead, banning PLN is meaningless and ineffective, whereas alternative methods, which FDOC already employs, are very effective. FDOC's decision to ban

PLN violates the First Amendment because it severely abridges the rights of PLN to distribute its publication and the right of FDOC's inmates to read that publication, yet does not reasonably address prison security.

II. PRISONER EXPOSURE TO CONTENT CONCERNING PROHIBITED CONDUCT IS NEITHER UNUSUAL NOR A MATERIAL THREAT TO PRISON SECURITY

Inmates are frequently exposed to advertisements or information about products or services they are not permitted to obtain or use. For example, inmates may watch television programs that depict illegal acts or contain advertisements for products and services prohibited to inmates, such as alcohol or online social networking sites. But, in the experience of *amici*, such television programs are not a security threat, and there would be no justification for prohibiting inmates from watching those shows.

Information also flows to and from prisoners via phone calls, letters, conversations on personal visits, or from the constant flow of prisoners cycling in and out of the prison community on new violations or from other prisons and jails. There is an active, vigorous inmate grapevine and flow of information. In this context, the value of PLN's ads to inmates seeking to evade prison rules is inconsequential. They simply do not present a realistic concern — certainly not a concern sufficient to warrant stifling the beneficial aspects of the publication — as is evident from the fact that no

other prison system has found that PLN's ads pose a threat justifying a ban like FDOC's.

Instead, as described above, prison officials have access to a variety of effective measures to detect and deter problematic *conduct*, a strategy far more effective than attempting to seal off the prison population from undesirable *information*. Prison administrators also have access to the regular sharing of intelligence and best practices among correctional agencies, including meetings and networks established by the Association of State Correctional Administrators (ASCA), the National Institute of Corrections (NIC), and the American Correctional Association (ACA) — all of which are available to FDOC officials. Information about serious security problems moves quickly through these cross-jurisdictional networks. Yet none of the *amici*, all experienced prison administrators, have ever experienced or heard of a disruptive incident or of the introduction of contraband traceable to prisoners' access to an advertisement in any publication.

The most compelling evidence against FDOC's assertion that such advertisements, in PLN or elsewhere, pose a legitimate security threat is the ongoing daily operation of the other 49 state prison systems and the Federal Bureau of Prisons, all of which allow such ads. If the mere presence

of advertisements like those FDOC has objected to had caused security incidents in those systems, prison officials would communicate information about such incidents to their peers around the country, including to FDOC, via the various channels described above. *Amici* are not aware that these systems have communicated information about any such incidents, nor does FDOC seem to be so aware, as FDOC has not made any such incidents in other systems part of the record here.

Although prison administrators need not wait to act until an incident actually occurs, Turner demands that prison officials' asserted concerns be supported by more than pure speculation that prohibited speech or conduct might possibly impinge on legitimate penological interests. See Pesci, 730 F.3d at 1299 ("[D]eference to the professional judgment of the facility administration is not tantamount to carte blanche permission to deny the fundamental rights of free speech and free expression. Care must be exercised to examine each claim individually and particularly.").

III. PUBLICATIONS SUCH AS PLN BENEFIT PRISONERS AND THE PRISON ENVIRONMENT

Finally, although FDOC officials testified below "that they view *Prison Legal News* favorably," [Doc. 279 at 17-18], it does not appear that FDOC made any attempt to rationally weigh the attenuated and hard-to-credit benefits of its ban on PLN against the substantial benefits of allowing

access to publications like PLN. PLN's focus on coverage of prisoners' rights and prison conditions creates a unique resource allowing an underserved population — inmates — to learn about the issues most relevant to their daily lives. For instance, PLN has covered FDOC's decision to expand its contract allowing a private company to control prisoner trust accounts in exchange for a per-transaction commission collected by FDOC[4]; FDOC's partial reversal of a ban on tobacco products for prisoners at work release centers[5]; former FDOC Secretary James Crosby's conviction and sentence for agreeing to receive kickbacks from a company seeking to become an FDOC vendor[6]; and FDOC's decision — under threat of litigation from prisoner-rights organizations — to withdraw a proposed rule that would have prohibited inmates "from establishing or maintaining an account or any other presence on any other internet website," including

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[4] David M. Ruetter, "State Prison Systems Privatizing Prisoner Accounts for Commissions," Prison Legal News, https://www.prisonlegalnews.org/news/2015/nov/13/state-prison-systems-privatizing-prisoner-accounts-commissions/ (loaded Nov. 13, 2015).

[5] David M. Ruetter, "Florida Smoking Ban Scaled Back as Black-Market for Cigarettes Grows," Prison Legal News, https://www.prisonlegalnews.org/news/2015/oct/16/florida-smoking-ban-scaled-back-black-market-cigarettes-grows/ (loaded Oct. 16, 2015).

[6] "Former Florida Prison Chief Released from Federal Prison," https://www.prisonlegalnews.org/news/2015/jan/13/former-florida-prison-chief-released-federal-prison/ (loaded Jan. 13, 2015).

through non-inmates posting information about an inmate.[7] There are few, if any, news sources that provide inmates with ready access to such relevant information. The value of allowing inmates access to this sort of information — including coverage critical of the prison system — should not be taken lightly, as FDOC appears to have done. And as this Court has made clear, "[d]eference to facility administrators and concerns relating to safety and security cannot be used as a pretext to silence undesirable speech." Pesci, 730 F.3d at 1300.

In the experience of *amici*, publications such as PLN provide a benefit to the prison environment for at least two reasons. First, by informing prisoners of their legal rights and prison developments, PLN gives prisoners tools to attempt to redress their grievances through legal channels, reducing the likelihood they will use violence against prison officials based on perceived grievances. Second, reading PLN allows inmates to spend their time in a constructive manner. Not only does access to PLN's editorial content encourage reading in general, PLN also informs inmates about valuable services such as educational programs. One recent

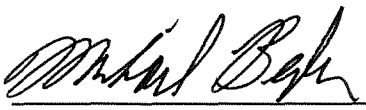
[7] David M. Ruetter, "Florida Withdraws Rule Proposal to Ban Prisoner Internet Presence," Prison Legal News, https://www.prisonlegalnews.org/news/2015/jul/1/florida-withdraws-rule-proposal-ban-prisoner-internet-presence/ (loaded July 1, 2015).

report by the Rand Corporation noted that "inmates who participated in correctional education programs had a 43 percent lower odds of recidivating than inmates who did not." Lois Davis et al., How Effective Is Correctional Education, and Where Do We Go from Here? xv (2014). Any assessment of whether banning PLN is an exaggerated response to the possibility of an inmate learning about prohibited services solely through PLN's ads should also consider that such a policy deprives inmates (and the prison) of substantial benefits in exchange for purely hypothetical (and likely nonexistent) gains in security.

CONCLUSION

Although prison officials are entitled to deference in judging the security needs of their institutions, they are not entitled to have the courts blindly accept their unsupported assertions that a given security concern warrants a restriction on speech. In this case, nothing FDOC has put forward supports — and nothing in *amici*'s own extensive experience corroborates — the notion that effective prison security requires banning PLN for the reasons FDOC has asserted. Such a ban is an exaggerated response to security needs that can be fully addressed by less restrictive, and more effective, means, without the damage to the First Amendment rights of PLN and FDOC's inmates imposed by FDOC's current policy.

Respectfully submitted,



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December 14, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 5,794 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Georgia type.

Dated: December 14, 2015

/s/ Michael Beder

Michael Beder

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2015, 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.

In addition, in accordance with 11th Cir. R. 31-3, I certify that one originally signed brief and six copies are being sent to the Clerk on December 14, 2015, by commercial carrier for delivery within three days.

/s/ Michael Beder
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