Appeal No. 15-14220

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PRISON LEGAL NEWS

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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE PRISON LEGAL NEWS

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* Pursuant to Fed. R. App. P. 29(c), *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

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STATEMENT OF THE ISSUES

1. Whether the Florida Department of Corrections' censorship of *Prison Legal News* violates the First Amendment, especially in light of modern jurisprudence which tends toward ever-greater protection for speech.

2. Whether, consistent with due process, the Florida Department of Corrections can decline to notify Prison Legal News that additional copies of its magazine are being impounded once the Department sends one notification.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici are law professors who have previously published on, or have an interest in, the issue of free speech. *Amici* have no personal stake in the outcome of this case, but do have an interest in seeing that First Amendment doctrine develops in a way that promotes rather than censors free speech. They are listed in the appendix to this brief.

SUMMARY OF ARGUMENT

Modern First Amendment jurisprudence trends toward more protections for speech rights, a direction that should inform this Court's analysis. In the main, modern Supreme Court cases are increasingly protective of First Amendment rights. And the Court stays this course even when confronted with potentially harmful speech, such as violent video games, funeral protests, and crush videos. While there are cases where the Court was not as protective as it could have been, those cases involved unique situations, such as supporting terrorist organizations. Even *Beard v. Banks*, which upheld a censorship rule in a prison, was unique in the prison-speech context, because the regulation only applied to the "worst of the worst" and was justified by rehabilitation; neither characteristic is present here.

A court conducting the delicate balance between constitutional rights and the necessities of running a prison must be cognizant that speech rights today are ever-more protected. The right at issue here—access to current legal information—is vitally important in prison. The Supreme Court has said access to legal materials is part of the right to court access; and even in *Banks*, the regulation restricting magazines and correspondence from the "worst of the worst" had an exception for legal materials.

Here, the Florida Department of Corrections ("FDOC") attempts to justify abridging that right by asserting that *Prison Legal News* threatens prison safety, but

the connection between this justification and the censorship is tangential at best. It requires three assumptions: prisoners notice certain advertisements in the magazine, prisoners buy from the advertisers, and the services bought lead to activity that threatens security. Such a gap between a cause and effect is not the type of valid, rational connection required when censoring important First Amendment rights. Moreover, experience confirms that that as applied to *Prison Legal News*, the regulation is not a close fit with the asserted justification. The FDOC is the only prison system in the country that censors *Prison Legal News* because of its advertisements. That fact alone should make this Court "particularly conscious of the measure of judicial deference owed to corrections officials." *Turner v. Safley*, 482 U.S. 78, 90 (1987). Indeed, the experience in Florida undermines the asserted justification. Separate FDOC facilities have censored the same issues of *Prison Legal News* on different grounds; and there are instances where some facilities admitted issues while others censored them.

Finally, Prison Legal News should be notified each time the FDOC suppresses one of its magazines. The process due an individual involves a balance that includes the private interest at stake. And as the private interest becomes more important, more process is due. The rights at stake in this case are important, especially when viewed in light of modern free-speech caselaw. Therefore, more process is required than the bare minimum the district court ordered.

ARGUMENT AND CITATION OF AUTHORITY

The last five years have been transformative for the First Amendment. The Supreme Court has rejected bans on corporate political speech, false speech, and the sale of violent video games to minors; it has rejected a claim for emotional distress based on derogatory speech hurled at a grieving father; and it has overturned a conviction for the possession of videos depicting animal cruelty. As the Court has become more protective of speech rights, it has deferred less and less to the other branches of government when it comes to justifying bans on speech.

This trend should not pass over those, who in many ways, are most in need of speech rights regarding legal issues: prisoners. Indeed, the Supreme Court's test for whether a regulation impinging a prisoner's constitutional right is legitimate leaves ample room for a reviewing court to consider the importance of the right at stake. And with the benefit of recent insights into the importance of free-speech rights, this Court has the opportunity to strike the appropriate balance by recognizing that the regulation at issue is not valid in light of the right at stake.

I. THE MODERN TREND IN FREE-SPEECH LAW DEMANDS A NUANCED ANALYSIS UNDER *TURNER V. SAFLEY*

Turner v. Safley sought to balance the competing interests of prisons and their populations. 482 U.S. at 84. Running a prison is, of course, "an inordinately difficult undertaking" that requires limiting prisoners' freedom. *Id.* at 85. At the

same time, the Constitution's protections do not end at the prison gates. *Id.* at 84. The balance of these interests and the deference accorded prison officials must be informed by the modern direction of free-speech jurisprudence.

A. Recent First Amendment Cases Are Increasingly Protective of Speech

On the whole, modern Supreme Court cases have been increasingly protective of free-speech rights. For example, in *Citizens United v. Federal Election Commission* the Court concluded the government could not restrict independent political expenditures by nonprofit corporations. 558 U.S. 310, 365 (2010). The Court reached that conclusion even though it had to overrule cases that had been decided less than twenty years earlier: *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and *McConnell v. FEC*, 540 U.S. 93 (2003). *See Citizens United*, 558 U.S. at 365.

Similarly, in *United States v. Alvarez* the Court deemed unconstitutional a law that criminalized lying about having a military medal. 132 S. Ct. 2537, 2543 (2012). And even though the Court had previously and repeatedly said there was "no constitutional value in false statements," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988), the *Alvarez* Court concluded that false speech was protected, 132 S. Ct. at 2545–46 (plurality op.); *id.* at 2553 (Breyer, J., concurring in the judgment).

This movement toward more protection for speech survives even when the speech at issue has the potential to harm. In *United States v. Stevens* the Court struck down a federal statute that criminalized the production and sale of animal-cruelty videos. 559 U.S. 460, 481–482 (2010). Though the statute was directed at the "growing" market for videos in which helpless animals are "intentional[ly] torture[d] and kill[ed]," the Court concluded that "animal cruelty" was not an unprotected class of speech. *Id.* at 465, 481. Likewise, in *Brown v. Entertainment Merchants Association* the Court struck down a California law that banned the sale of violent video games to minors even though the state had concluded those games "harm[ed]" the "moral development" of minors. 131 S.Ct. 2729, 2741 (2011). And in *Snyder v. Phelps* the Court concluded the First Amendment protected protestors at a military funeral who held signs bearing slogans such as "Thank God for Dead Soldiers," even though a jury had awarded the soldier's father more than $10 million for emotional distress. 562 U.S. 443, 448, 450, 459 (2011).

Although some cases buck this protectionist trend, each of those cases concerned particular speakers or exceptional situations. For instance, *Garcetti v. Ceballos* rejected a First Amendment retaliation claim by a deputy district attorney who had criticized the legitimacy of a search warrant. 547 U.S. 410 (2006). But the Court was careful to explain that Ceballos had made his criticism "pursuant to [his] official duties" as a government employee, thus he was "not speaking as [a]

citize[n] for First Amendment purposes." *Id.* at 421. *Morse v. Frederick* presented another unique situation: a student at a school-sanctioned event. 551 U.S. 393 (2007). The Court upheld a principal's decision to suspend a student who held a banner reading "Bong Hits 4 Jesus," because "[t]he special characteristics of the school environment and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that . . . promot[es] illegal drug use." *Id.* at 397, 408 (internal quotation marks and citation omitted).

Holder v. Humanitarian Law Project, a notable aberration in modern free-speech law, was singular. 561 U.S. 1 (2010). The Court held Congress could ban an association from facilitating the "lawful, nonviolent purposes" of foreign terrorist groups because the government had an "urgent objective of the highest order"—combating terrorism. *Id.* at 8, 28. Whatever might be said about the Court's departure from First Amendment principles, *see* Peter Margulies, *Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers' Free Speech*, 43 U. MEMPHIS L. REV. 319, 366 n.207 (2012) (collecting articles critical of the opinion), it is clear that any deviation is properly limited to the context in which it arose—support for terrorist organizations.

Even *Beard v. Banks*, which would seem germane to the current case because it upheld a restriction on prison communications, was unique within the prison context. 548 U.S. 521 (2006). *Banks* upheld a prison policy that "denie[d]

newspapers, magazines, and photographs" to "specially dangerous and recalcitrant inmates" to motivate good behavior. *Id.* at 524–25, 530 (internal quotation marks omitted). The situation in *Banks* was exceptional. First, the regulation applied only to the "worst of the worst"—inmates who had demonstrated a need for a "rigorous regime of confinement." *Id.* at 530 (internal quotation marks omitted). Further, the ban was justified, in the Court's opinion, not by prison security concerns, but by a rehabilitative goal for the prisoners. *Ibid.* Essentially, the Court concluded that the prison was justified in denying recalcitrant prisoners certain benefits in an effort to "motivate better behavior." *Id.* at 530–31 (internal quotation marks and alteration omitted). Finally, and most importantly, the regulation in *Banks* "permitted legal . . . correspondence . . . and legal materials." *Id.* at 526. None of these characteristics are present in the current controversy. The FDOC's censorship applies to all prisoners, not just the "worst of the worst." The FDOC has not relied on a rehabilitative justification. And the FDOC provides no exception for legal materials—indeed, the history of the FDOC's treatment of *Prison Legal News* shows that it targets this particular legal publication. *See* District Court Order 4–6.

Though these cases—*Garcetti*, *Morse*, *Humanitarian Law Project*, and *Banks*—were less protective of speech than the modern jurisprudential trend would suggest, they were all the result of unique circumstances. Cases involving First

Amendment claims free from special concerns, however, resonate the common theme of increasingly robust protection for speech. This progression must inform the deference courts give to prison officials under the *Turner* test.

B. Increased Protection Brings Decreased Deference

At bottom, *Turner* is about deference. And the Supreme Court's reliance on deference has decreased in correlation with its increase in protection for speech. In 1997 the Court upheld the constitutionality of the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997). In doing so, the Court wrote, "Even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end." *Id.* at 196. Contrast that obsequious statement with language from more recent cases. In *Brown* the Court explained that "ambiguous proof" of harm could not support a legislature's ban on free speech. 131 S. Ct. at 2739. And in *Citizens United* the Court noted that Congress offered "only scant evidence that independent expenditures even ingratiate," much less corrupt. 558 U.S. at 360; *see also* Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 18–19 (2012).

Turner itself displays the relationship between the importance of the right and the deference accorded. *Turner* involved prison regulations that restricted two rights: the prisoners' right to correspond with prisoners at other facilities and the prisoners' right to marry. 482 U.S. at 81–82. The Court analyzed these regulations differently, presumably because the rights at stake were of different magnitude. When it came to banning correspondence between inmates, the Court relied on the expertise of the prison officials, reasoning the officials knew better than the Court what harm the communications could cause. *Id.* at 91–93. But when it came to the marriage restriction, the Court gave no weight to the prison officials. *Id.* at 94–99. The Court concluded for itself that restricting marriage was not necessary for prison security or rehabilitation. *Id.* at 97–99. This varying level of deference confirms that the more important the right, the less deference owed.

C. Under a Proper *Turner* Analysis, the Impoundment of *Prison Legal News* Violates the First Amendment

Understanding *Turner* within the framework of a more robust free-speech doctrine readily demonstrates that the FDOC is violating the First Amendment. At stake in this litigation are vital First Amendment rights. Not only does Prison Legal News have a First Amendment right to send its publication to prisoners, *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989), but prisoners have a right to obtain legal publications, which can inform them of their rights, provide current

information on legal developments, and enlighten them as they prepare to reenter society. The Supreme Court has explained that legal materials in prison are vital because they are bound up in the right to court access. *See Bounds v. Smith*, 430 U.S. 817, 826 (1977). Even prison officials recognize that legal materials are important for inmates. The regulation at issue in *Turner* had an exception for inmate-to-inmate correspondence "concerning legal matters." 482 U.S. at 81. And in *Banks* as well, the regulation had an exception for "legal materials." 548 U.S. at 526. The fact that the "worst of the worst" were permitted legal materials underscores the significance of legal information in prison. *See id.* at 530.

With a right as important as access to current legal materials, the Court should be "particularly conscious of the measure of judicial deference owed to corrections officials." *Turner*, 482 U.S. at 90 (internal quotation marks omitted). To that end the *Turner* Court identified four factors for courts to consider when determining the legitimacy of a prison's restriction of an inmate's constitutional right: (1) whether there is a "valid, rational connection" between the regulation and the prison's interest; (2) whether there are "alternative means" for the prisoner to exercise the right; (3) what impact accommodating the right will have on guards and other inmates; and (4) any "ready alternatives" for furthering the prison's interest. *Id.* at 89–90.

Examining those factors demonstrates how dubious the FDOC's justification is. First, there is not a "valid, rational connection" between the regulation and the rationale. The FDOC's vague rules permit prisons to censor materials that have "prominent" or "prevalent" advertisements for, *inter alia*, "three-way calling services; [p]en pal services; [or] the purchase of products or services with postage stamps." Fla. Admin. Code Ann. R. 33-501.401(3)(l) (2009) (amended 2010). Justifying this regulation requires three separate assumptions: (1) prisoners notice the advertisements in the magazine; (2) prisoners buy from the advertisers because of the ads they see; and (3) the services or goods bought leads to activity that disrupts the prison's security. Such a gap between an asserted cause and effect is not the type of "valid, rational connection" required when censoring a key First Amendment right. As the Court recently explained, "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard*, 548 U.S. at 535.

The district court concluded prison administrators had "reached an *experience-based* conclusion that censorship furthers the legitimate prison objectives." District Court Order 40 (alterations removed). Even if experience could fill in the logical gaps, the administrators' "experience-based conclusion" is undermined by experience. No other state in the country censors *Prison Legal News* because of its advertising. *See* District Court Order 49. If forty-nine out of

fifty prison systems can admit *Prison Legal News*, it is difficult to understand how this legal publication could be uniquely dangerous in Florida's prisons. *See Holt v. Hobbs*, 135 S. Ct. 853, 865–67 (2015). Indeed, some FDOC facilities have admitted issues of *Prison Legal News* even though other FDOC facilities impounded the same issues. *See* District Court Order 42; *Murchison v. Rogers*, 779 F.3d 882, 890 (8th Cir. 2015) ("The existence of similar material within the prison walls may serve to show inconsistencies in the manner in which material is censored such as to undermine the rationale for censorship or show it was actually censored for its content."). Thus, experience shows there is not a "valid, rational connection" between censoring this fundamental free-speech right and prison security.

The other *Turner* factors confirm the right at stake here outweighs any deference owed to prison officials. There are no other means for inmates to receive the speech contained in *Prison Legal News*, nor is there any other means for Prison Legal News to exercise its First Amendment right in speaking to its subscribers. *See Thornburgh*, 490 U.S. at 407. The district court claimed "there are countless other written materials that [Prison Legal News] may send prisoners." District Court Order 47. But that is not the test. Speech is unique. The fact that a speaker may say other things does not undermine his right to say

what he wants. *Cf. Citizens United*, 558 U.S. at 337–38 (rejecting the argument that since a corporation's PAC can speak, the corporation suffers no real injury).

Moreover, the accommodation of the right in this case will not burden guards or inmates. The fact that forty-nine other states admit *Prison Legal News* dispenses with any contrary claim. In fact, providing an express exception for *Prison Legal News* and publications like it would ease the administrative burden of reviewing every copy sent to inmates. Finally, there are ready alternatives for prison officials who are concerned about the activity certain advertisements in *Prison Legal News* might encourage. Most obvious, officials can enforce the underlying rules regarding prisoner behavior and monitor (as the FDOC does) inmate mail and phone calls.

"Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content." *Citizens United*, 558 U.S. at 340. The district court turned that presumption on its head by placing its full confidence in prison officials, even though they could not justify their ban. Because the FDOC came forward with a weak justification for denying a surpassingly important right, they are owed no deference. They have not pointed to a "direct causal link" and have offered, at best, "ambiguous proof." *Brown*, 131 S. Ct. at 2738–39. If permitted to stand, the district court's order will allow the

FDOC to continue suppressing legal communication "in the realm where its necessity is most evident." *Citizens United*, 558 U.S. at 372.

II. BECAUSE THE RIGHT AT STAKE IS IMPORTANT, MORE PROCESS IS DUE THAN THE DISTRICT COURT'S ORDER REQUIRES

Due process, like prisoner's rights, involves a balance between the private interest at stake and the government's interest. *See Procunier v. Martinez,* 416 U.S. 396, 418 (1974). Thus, as the importance of the private interest increases, so too does the amount of process required. Supreme Court cases confirm this relationship. Compare *Mathews v. Eldridge*, 424 U.S. 319 (1976), where the Court did not require elaborate process, with *Goldberg v. Kelly*, 397 U.S. 254 (1970), where the Court did. In *Eldridge* the welfare benefit that was terminated was not granted "based upon financial need." 424 U.S. at 340. But in *Goldberg* the "welfare assistance [was] given to persons on the very margin of subsistence." *Eldridge*, 424 U.S. at 340 (describing *Goldberg*). Thus, in *Goldberg* "the stakes [were] simply too high for the welfare recipient" to allow the government to terminate the benefit without a pretermination hearing. 397 U.S. at 266 (alterations omitted).

Other areas of the law illustrate this relationship. For example, while a biological parent must be afforded a hearing prior to the state taking away his child, *Stanley v. Illinois*, 405 U.S. 645, 657 (1972), a foster parent, having a lesser

interest in the relationship with his foster children, is not afforded as much process prior to removing children from the home, *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845–46 (1977). Similarly, those charged with petty offenses are not constitutionally entitled to a jury trial, *Cheff v. Schnackenberg*, 384 U.S. 373, 375 (1966), whereas defendants charged with serious crimes, because they face serious penalties, are entitled to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968).

Martinez conducted this delicate balance as it relates to prison regulations. 416 U.S. at 418. In particular, *Martinez* confirmed that the author of a publication rejected by a prison must be given a reasonable opportunity to protest the prison's decision. *Ibid.*; *see also Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359, 1368 (11th Cir. 2011). But the district court's order undermines the ability of Prison Legal News to meaningfully protest the prison's decision.

The district court requires the FDOC to notify Prison Legal News only "when it first impounds a particular communication by Prison Legal News." District Court Order 64. It does not require the FDOC to notify Prison Legal News of subsequent impoundments of the same communication. In other words, if it impounds (or does not impound) subsequent copies of the magazine, the FDOC can keep Prison Legal News in the dark. In addition, if separate facilities impound

the same issue of Prison Legal News for different reasons, the FDOC only has to tell Prison Legal News the reason for the first impoundment.

But without knowing each time a copy of its magazine is impounded, Prison Legal News cannot meaningfully challenge the FDOC's decision. It may be that only one facility impounded that issue of *Prison Legal News* and other facilities are admitted it. *See* District Court Order at 42 (noting that the same issue of *Prison Legal News* was admitted by some facilities and impounded by others). Or it may be that different facilities impounded the issue for different reasons. That information will be relevant to the reviewing authorities considering the justification for rejecting particular issues of *Prison Legal News*. And given the importance of the right at stake, the marginal burden imposed on the FDOC is justified.

* * *

Prisoners "may be the least sympathetic group of 'outsiders' in our constitutional jurisprudence." Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. REV. 173, 176 (1995). And because they are a neglected segment of society, a "more searching judicial inquiry" is often appropriate. Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 459 (1998). That is why forty years ago the Supreme Court declared: "When a prison

regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Martinez*, 416 U.S. at 405–406. Because the rights at stake in this litigation are all the more important under modern First Amendment jurisprudence, this case is one in which the Court must discharge its duty to ensure that speech is not denied "in the realm where its necessity is most evident." *Citizens United*, 558 U.S. at 372.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's judgment as to the First Amendment and expand its order regarding due process.

Respectfully submitted,

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December 14, 2015

CERTIFICATE OF COMPLIANCE WITH 11TH CIR. R. 28-1(M)

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 4,046 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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 proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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APPENDIX—LIST OF SIGNATORIES*

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* The views expressed in this brief are those of the individual signatories and not those of the institutions with which they are affiliated.

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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.

*/s/*Jason Burnette
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