APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-14220

PRISON LEGAL NEWS, A project of the Human Rights Defense Center, a Not-for-Profit Washington Charitable Corporation,

Plaintiff-Appellee
Cross-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellant
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Florida

Filed: May 17, 2018

Before Ed Carnes, Chief Judge, Dubina, Circuit Judge, and Conway,* District Judge

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OPINION

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* Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

Ed Carnes, Chief Judge:

From time to time we have all followed the advice of Oscar Wilde and gotten rid of temptation by yielding to it.[1] Yielding to the temptation to commit an act that the law forbids can lead to bad consequences, including imprisonment. Prison officials have the duty to reduce the temptation for prisoners to commit more crimes and to curtail their access to the means of committing them. The Constitution does place some limits on the measures that corrections officials may use to carry out that duty, which is what this case is about.

The Florida Department of Corrections has rules aimed at preventing fraud schemes and other criminal activity originating from behind bars, but inmates continually attempt to circumvent measures in place to enforce those rules. The Department, for its part, continually strives to limit sources of temptation and the means that inmates can use to commit crimes. One way it does that is by preventing inmates from receiving publications with prominent or prevalent advertisements for prohibited services, such as three-way calling and pen pal solicitation, that threaten other inmates and the public. In the Department's experience, those ads not only tempt inmates to violate the rules and commit crimes, but also enable them to do so.

One publication the Department impounds based on its ad content is plaintiff Prison Legal News (PLN)'s monthly magazine, *Prison Legal News*. PLN

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[1] Oscar Wilde, The Picture of Dorian Gray 19 (Joseph Bristow ed., Oxford Univ. Press 2006) (1890).

contends that the Department's impoundments of its magazine violate the First and Fourteenth Amendments. After a bench trial, the district court ruled that the impoundments do not violate the First Amendment but the failure to give proper notice of them does violate the Fourteenth Amendment. We agree.

I. Facts and Procedural History

A. Facts

1. The Florida Department of Corrections

Florida law requires the Department of Corrections to "protect the public through the incarceration and supervision of offenders," to protect offenders "from victimization within the institution," and to rehabilitate offenders. Fla. Stat. § 20.315(1), (1)(d). The Department strives to balance those mandates of public safety, prison security, and rehabilitation. That is no small task. It employs 16,700 officers to oversee 100,000 inmates in 123 facilities throughout Florida. Those officers enforce a multitude of rules to ensure prison security and public safety. *See, e.g.*, Fla. Admin. Code rr. 33-602.101, .201, .203 (rules governing inmate care, property, and control of contraband).

To promote its rehabilitation mandate, the Department grants inmates phone, pen pal, and correspondence privileges so that they can stay in touch with family and friends. *Id.* r. 33-210.101(9) (allowing inmates to correspond with pen pals); *id.* r. 33-602.201 app. 1 (authorizing inmates to keep up to 40 stamps for correspondence); *id.* r. 33-602.205(1) (granting telephone privileges). Those and similar

privileges pose problems in Florida prisons and elsewhere. Inmates have the time, talent, and tendency to use their phone, pen pal, and correspondence privileges to conduct criminal activity, thwarting efforts to protect inmates and the public. The record is heavy with evidence of that unfortunate reality.

James Upchurch, the Department's Assistant Secretary for Institutions and Re-entry, testified that "[g]iven uncontrolled and unverifiable telephone access, inmates have been found to use such opportunities to harass the general public, [D]epartment employees, their victims[,] and to search for new victims." He cited the example of incarcerated Mexican mafia members in California who used a network of prison phones to sell drugs and conduct other illegal activity. *Prison Legal News* itself has reported on instances of inmates abusing their phone privileges. *See News in Brief: Florida*, Prison Legal News, Nov. 2011, at 50 (reporting how an inmate discovered that the county jail's phone system provided double refunds each time a call did not go through, prompting the inmate to make calls and then hang up until he had made the $1,250 he needed for bail); Mark Wilson, *Reach Out and Defraud Someone: Oregon Jail Prisoners Commit Phone Scams*, Prison Legal News, Nov. 2010, at 24-25 (reporting on inmates' use of prison phones to conduct identity theft scams, one of which resulted in the indictment of an inmate on 35 counts of identity theft); *News in Brief: Florida*, Prison Legal News, Sept. 2010, at 50

(reporting how a county inmate used the prison phones to call in bomb threats).[2]

Like phone privileges, pen pal privileges may open doors to criminal activity. Inmates abuse pen pal privileges by soliciting kind-hearted but gullible people and then defrauding them. Pen pal scams are so common that the United States Postal Service warns customers that pen pal ads have "proliferated in recent years" and that "many ads placed by prisoners are part of a sophisticated mail fraud scheme that misuses postal money orders to bilk consumers out of their hard earned savings."[3]

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[2] PLN submitted into evidence every issue of *Prison Legal News* from 2002 through 2014.

[3] *Prison Pen Pal Money Order Scam*, U.S. Postal Inspection Service, http://www.postalinspectors.uspis.gov/investigations/mailfraud/fraudschemes/othertypes/penpalfraud.aspx [https://web.archive.org/web/20170204190103/postalinspectors.uspis.gov/investigations/mailfraud/fraudschemes/othertypes/penpalfraud.aspx]; *see also Woods v. Comm'r of the Ind. Dep't of Corr.*, 652 F.3d 745, 747 (7th Cir. 2011) (recounting that 350 inmates had placed ads soliciting pen pals on websites, that "the majority of these inmates had . . . misrepresented themselves to the public in their postings on the sites," and that several pen pals felt deceived after "sending money to prisoners who had lied about their release dates and offenses of conviction"); *United States v. Brown*, 7 F.3d 1155, 1158 (5th Cir. 1993) (stating that a Mississippi inmate scammed thousands of dollars out of a 65-year-old Florida retiree he met through a "lonely hearts pen-pal club"). [In keeping with Eleventh Circuit Internal Operating Procedure 10, "Citation to Internet Materials in an Opinion," under Federal Rule of Appellate Procedure 36, a copy of the internet materials cited in this opinion is available at this Court's Clerk's Office.]

Inmates also abuse correspondence privileges. For instance, one Florida inmate sent threatening letters to a federal magistrate judge, one of which informed the judge that someone would "stick a curling iron up [the judge's] twat and plug that sucker in," while another stated that the inmate was coming to kill her. See *United States v. Adamson*, No. 4:00cr52, 2007 WL 2121923, at *1 (N.D. Fla. July 23, 2007) (unpublished). Another way inmates abuse correspondence privileges is by using their stamps as a currency in the underground prison economy to buy drugs, sexual favors, and anything else they can bargain for. *See United States v. Becker*, 196 F. App'x 762, 763 & n.1 (11th Cir. 2006) (unpublished) (noting how one inmate ran a prison gambling operation where inmates paid him with stamps and another inmate used stamps to pay for heroin); *United States v. Martin*, 178 F. App'x 910, 911 (11th Cir. 2006) (unpublished) (stating how an inmate used letters with hidden compartments to smuggle heroin into the prison, which he then gave to another inmate in exchange for stamps). The problems associated with stamps increase when inmates can send their stamps to "cash-for-stamps" companies that will exchange the stamps for cash at a percentage of the stamps' face value. Inmates can use the cash to purchase goods and services outside prison walls, which facilitates contraband smuggling and the corruption of prison guards.

Recognizing that when inmates abuse their privileges it threatens other inmates and the public, the Department has sought to prevent that abuse. First, it has prohibited three-way calling, which includes any type of call transferring. Fla. Admin.

Code r. 33-602.205(2)(a). Three-way calling allows inmates to circumvent the regulations the Department has in place to stop them from using prison phones to harass the public, arrange contraband smuggling, and conduct other criminal activity. The Department's regulations restrict inmates to calling no more than ten people on a pre-approved list and require each outgoing call to begin with an automated message informing the recipient that the call is coming from a Department prison. *Id.* r. 33-602.205(2)(a), (g). The Department also monitors and records some inmate calls. *Id.* r. 33-602.205(1).

Second, the Department does not allow inmates to "solicit or otherwise commercially advertise for money, goods, or services," which includes "advertising for pen-pals" and "plac[ing] ads soliciting pen-pals" on social media and inmate pen pal websites. *Id.* r. 33-210.101(9). Third, inmates cannot use "postage stamps as currency to pay for products or services." *Id.* r. 33-210.101(22). Fourth, inmates cannot conduct a business while confined, which includes "any activity in which the inmate engages with the objective of generating revenue or profit while incarcerated." *Id.* r. 33-602.207(1)-(2). That rule exists because inmate businesses increase the risk of fraud and burden Department staff with monitoring more mail and phone activity. *Id.* r. 33-602.207(2).

Just as some inmates abuse their privileges, some also evade or break the rules restricting their privileges. For example, the Department's telephone security vendor can detect three-way call attempts by the clicking noise that occurs when a call is transferred, but inmates will blow into the receiver

when transferring a call to mask that clicking noise. There are nearly 700,000 three-way call attempts each year in Department prisons, leading officials to believe that inmates would not make so many attempts if some were not succeeding. Disciplinary reports confirm that some attempts do succeed. Despite the rule prohibiting pen pal solicitation, some inmates manage to post profiles on pen pal solicitation websites. Inmates also succeed in exchanging stamps for cash—one cash-for-stamps company deposited over $50,000 into inmates' accounts over several years. And as for the prohibition against conducting a business, one inmate, a jailhouse lawyer known as "H&R Block," lived up to his nickname by running a tax filing business where he would file tax returns on behalf of other inmates. *See News in Brief: Florida*, Prison Legal News, Apr. 2010, at 50. Of course, those tax returns were false, and the inmate faced up to 90 years in prison for his scheme. *Id.*

2. The Department's Admissible Reading Material Rule

Because some inmates abuse their privileges and break the rules put in place to stop that abuse, the Department takes additional steps to help increase prison security and public safety. As Department official Upchurch testified, protecting the public "goes further than just . . . keeping the inmates inside the fence and not allowing them to be out committing the crimes that they commit." Prison security challenges evolve. Upchurch cited the availability of contraband cell phones, which give inmates unregulated internet access and have been used in other states to orchestrate prison riots and arrange assaults on

prison staff. PLN's expert acknowledged that Department officials must be proactive in addressing security problems. As Upchurch testified, "act[ing] after the fact [in the prison business] risk[s] someone's life."

One of the ways the Department tries to stay a step ahead of inmates is to screen all incoming publications for content that might enable them to break prison rules. *See* Fla. Admin. Code r. 33-501.401(3). Under the Department's Admissible Reading Material Rule, inmates can "receive and possess publications . . . unless the publication is found to be detrimental to the security, order or disciplinary or rehabilitative interests of any institution of the [D]epartment . . . or when it is determined that the publication might facilitate criminal activity." *Id.* For example, to bolster the Department's ban on inmates possessing firearms or other dangerous weapons, *id.* r. 33-602.203(2), the rule prohibits inmates from receiving publications that "describe[ ] procedures for the construction of or use of weapons," *id.* r. 33-501.401(3)(a).

The Admissible Reading Material Rule applies that same logic to ads for prohibited services. A publication is impounded if it contains ads for three-way calling services, pen pal solicitation services, cash-for-stamps exchange services, or for conducting a business, but only "where the advertisement is the focus of, rather than being incidental to, the publication[,] or the advertising is prominent or prevalent throughout the publication." *Id.* r. 33-501.401(3)(*l*). The Department can also impound any publication that "otherwise presents a threat to the

security, order or rehabilitative objectives of the correctional system or the safety of any person." *Id.* r. 33-501.401(3)(m). Once mailroom staff impound an issue of a magazine for violation of the rules, it is withheld from inmates until the Department's Literature Review Committee makes a final decision about whether the issue does violate the Admissible Reading Material Rule. *Id.* rr. 33-501.401(5), (8), (14)(a).[4] Mailroom staff cannot impound all issues of an entire publication in advance; instead, they must separately review and decide whether each issue of a publication violates the Admissible Reading Material Rule. *Id.* r. 33-501.401(5).[5]

3. *Prison Legal News* and the First Impoundments of It

Prison Legal News is a monthly magazine founded in 1990 that reports on legal developments in the criminal justice system and other topics that affect

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[4] The Admissible Reading Material Rule defines "impoundment" as the action taken by mailroom staff "to withhold an inmate's incoming publication . . . pending review of its admissibility by the Literature Review Committee." Fla. Admin. Code r. 33-501.401(2)(b). When the Committee upholds an impoundment, that is a "rejection" and the issue is considered contraband. *Id.* r. 33-501.401(2)(j). The difference between an impoundment and rejection is immaterial here, so we use the term "impound" to refer to the Department's decision to withhold a particular issue from an inmate subscriber.

[5] For example, if the Department decides that the January issue of *Prison Legal News* violates the Admissible Reading Material Rule, then it impounds that issue. Fla. Admin. Code r. 33-501.401(8). But when the February issue arrives, mailroom staff must review that latest issue to determine whether it complies with the rule. *Id.* r. 33-501.401(5).

inmates. About 70% of the magazine's 7,000 nationwide subscribers are inmates. It has subscribers in all 50 state prison systems and the Federal Bureau of Prisons. Only about 70, or one percent of the 7,000 subscribers, are Florida inmates. *Prison Legal News* began carrying advertisements in 1996 to cover its publication costs. Not surprisingly, the ads are placed by companies whose target audience is prisoners. Two examples are law firms specializing in prisoner litigation and schools offering inmate correspondence courses. Nothing wrong with that.

In 2003 the Department began impounding some *Prison Legal News* issues based on ad content. The problem ads included ones for pen pal solicitation, cash-for-stamps exchange services, and three-way calling services. The ads for pen pal solicitation offered inmates the opportunity to post on the company's website a profile with a photo and address, and the public could search for that profile by the inmate's age, race, and other features. The cash-for-stamps ads gave inmates the opportunity to exchange stamps for cash at a percentage of the stamps' face value. The three-way calling ads offered discount phone services on collect calls from inmates. The Department determined that those phone services fell under its broad definition of "three way calling" because the companies forwarded or transferred the inmates' collect calls to the call recipient's home phone, cell phone, or blocked home phone number.[6] The

[6] PLN asserts that *Prison Legal News* has never run ads for three-way calling, but its brief and one of its trial exhibits contradict that assertion. It acknowledges that its magazine

Department determined that all three types of ads violated Rule (3)(*l*), but it was especially concerned with the ads for three-way calling because it believed that its telephone security vendor could not trace inmate calls made through the discount phone services.

PLN sued the Department in 2004 to stop the impoundments. After the Department's telephone vendor gave assurances that it could block three-way call attempts, the Department agreed in 2005 not to impound *Prison Legal News* as long as all the problematic ads were incidental to the overall publication. Because the Department began allowing inmate subscribers to receive *Prison Legal News* we rejected PLN's argument that an injunction was necessary to stop the impoundments, and we affirmed the district court's grant of judgment as a matter of law to the Department. *See Prison Legal News v. McDonough*, 200 F. App'x 873, 876-78 (11th Cir. 2006) (unpublished).

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contains ads for discount phone services that allow subscribers to avoid long distance charges by assigning the inmate a local number to call, and then transferring that call to the final call recipient (so if a Miami inmate wants to call his mother in Kansas, the Miami inmate can call a Miami number and the call is then transferred to Kansas). That type of call service falls under the Department's definition of three-way calling. *See* Fla. Admin. Code r. 33-602.205(2)(a) ("Inmates shall not make three-way telephone calls nor make calls to numbers on the list which are then transferred to other telephone numbers."). And PLN's trial exhibit shows that almost every issue of *Prison Legal News* from January 2002 to December 2014 included ads for the prohibited services. One of the columns in that exhibit is labeled "3-Way Calls."

4. The Department's Renewed Impoundments of *Prison Legal News*

That peace was short-lived. Several changes after 2005 undermined the truce and led to the current conflict. For one thing, the number and size of rule-defying ads increased after 2005, resulting in their becoming less incidental and more prominent.[7] As the ads became more prominent, Department officials noticed an increase in the number of inmates sending stamps to cash-for-stamps companies. They also became concerned about a phone technology called Voice over Internet Protocol, which makes it harder to detect three-way call attempts by transferring calls over the internet with no noise. That technology had not been an issue in 2005, but in the following years it became more widespread and more of a problem.

New types of ads offering "prisoner concierge" and "people locator" services also began to appear in *Prison Legal News* after 2005. Prisoner concierge companies offer inmates a variety of administrative and financial

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[7] Although the percentage of the magazine containing ads prohibited by Rule (3)(*l*) increased only from an average of 9.21% in 2005 to 9.80% in 2009, those naked percentages don't tell the whole story because the number of full-page and half-page ads increased. The magazine also grew from 48 pages in 2005 to 64 pages in 2014, which allowed PLN to include more problematic ads without changing the proportion of the magazine devoted to such ads.

More importantly, the record does not stop at 2009. PLN's own exhibit shows that the percentage of problematic ads increased from 9.80% in 2009 to 15.07% in 2014, the last year of the impoundments that are covered in the record. That is an increase of more than 50% in the percentage of problematic ads in the most recent five-year period for which there is data.

services. One such company, Prisoner Assistant, ran ads offering inmates "access to hundreds of professional services that have never before been available to prisoners," including money orders, online fund transfers, internet purchases and research, website development, cell phone contracts, and Green Dot cards (prepaid debit cards that can be reloaded and used to send money). That company even provides inmates with an "Executive Assistant to manage [the inmate's] file and provide personal attention to [the inmate's] requests," and claimed in its ad that "[i]f it can be done, we will try to do it." According to the Department, prisoner concierge companies threaten prison security and public safety by, among other things, making it easier for inmates to create an alternate identity that conceals their inmate status from people on the outside, enabling them to violate prison rules and commit crimes.

People locator companies are just that. One such company placed ads claiming that it can find "just about anyone" including "hard to find people [and] unlisted numbers and address[es]." That company has a database of 1.2 billion records and provides inmates with a person's date of birth, email address, any unlisted telephone numbers, and social security number. With reason, the Department fears that inmates will use people locator services to perpetrate scams or allow inmates to find and harm judges, jurors, witnesses, or anyone else the inmate may want to harass or harm.

All of those developments between 2005 and 2009—the increasing number and size of the rule-defying ads, the growth of internet-based phone

technology, and the appearance of prisoner concierge and people locator ads—led the Department to begin impounding *Prison Legal News* again in September 2009.[8] The Department decided that the ads for three-way calling services, pen pal solicitation services, and cash-for-stamps exchange services violated Rule (3)(*l*). It also determined that the ads for prisoner concierge and people locator services violated Rule (3)(m), the provision prohibiting any publication that "presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person." *Id.* r. 33-501.401(3)(m). The Department impounds other publications that violate those rules,

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[8] The Department amended Rule (3)(*l*) in June 2009. The earlier version provided that a publication would not be impounded as long as the ads were "merely incidental to, rather than being the focus of, the publication." The amendment provided that a magazine could also be impounded if the rule-defying ad was "prominent or prevalent throughout the publication." PLN contended at trial that the Department amended the rule to keep *Prison Legal News* out of Florida prisons, but the district court rejected that contention as conjecture and found that the Department amended Rule (3)(*l*) to make it clearer and to address its new security concerns. PLN makes only a cursory attempt to raise that contention here, offering no supporting authority, which means that it is abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he . . . raises it in a perfunctory manner without supporting arguments and authority."). Its assertion that the "prominent or prevalent" language is too vague is not properly before us because the district court denied PLN's motion to amend its complaint to include a void-for-vagueness claim, and PLN did not appeal that ruling. *See Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

but it is the only corrections department in the country that impounds *Prison Legal News* based on its ad content.

5. The Department's Failure to Provide Notice to PLN

At the time of trial in January 2015, the Department had impounded every issue of *Prison Legal News* since September 2009, a total of 64 issues (the magazine has 12 issues per year). The Admissible Reading Material Rule requires the Department to send to all publishers a notice form listing the "specific reasons" for an impoundment. Fla. Admin. Code r. 33-501.401(8)(b). Despite that rule, the Department did not send PLN a notice form for 26 out of the 62 monthly issues it impounded between November 2009 and December 2014, which means that PLN did not receive a notice form for 42% of the issues impounded during that time span. That number rises to 87% when defective notice forms that did not list the reasons for the impoundment are considered.

When PLN did receive a notice form for an impounded issue, it appealed the impoundment decision to the Department's Literature Review Committee, which makes the final decision whether an issue violates the Admissible Reading Material Rule. *See id.* rr. 33-501.401(14)(a), (15)(a). Those appeals were unsuccessful, so PLN sued the Department in November 2011 to stop the impoundments.

B. Procedural History

PLN brought two claims under 42 U.S.C. § 1983 against the Department Secretary in her official capacity. First, it claimed that Rules (3)(*l*) and (3)(m),

as applied to *Prison Legal News*, violate the First Amendment. Second, it claimed that the Department's failure to provide PLN with proper notice for each impounded monthly issue violated its right to procedural due process under the Fourteenth Amendment. PLN sought declaratory and injunctive relief against the Department.

After a bench trial, the district court ruled against PLN on the First Amendment claim and for it on the Fourteenth Amendment claim. The court entered an injunction requiring the Department to provide PLN with notice each time it impounded a monthly issue of the magazine and the reason for the impoundment. The Department appeals the court's judgment that it violated PLN's due process rights. PLN cross-appeals the court's judgment that the impoundments of *Prison Legal News* do not violate the First Amendment.[9]

II. Standards of Review

After a bench trial, we review *de novo* the district court's legal conclusions and we review its fact findings for clear error. *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1230 (11th Cir. 2009). "We

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[9] PLN also publishes a book called the *Prisoner's Guerilla Handbook* and sends information packets about its publications to inmates. The Department impounded those publications, and PLN claimed in its amended complaint that impounding them also violated its First and Fourteenth Amendment rights. (PLN claimed that the impoundment of all of its publications violated its constitutional rights; its amended complaint did not contain separate claims for each publication.). Although PLN's brief refers to its "publications," it mentions the handbook and information packets by name only once in its 82-page initial brief. As a result, PLN has abandoned any separate challenge to those publications. *See Sapuppo*, 739 F.3d at 681.

review the decision to grant an injunction and the scope of the injunction for abuse of discretion." *Angel Flight of Ga., Inc. v. Angel Flight Am., Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008).

III. Discussion

A. First Amendment Claim

PLN contends that the Department's impoundments of *Prison Legal News* violate its First Amendment right of access to its inmate subscribers. The parties agree that the deferential standard established by the Supreme Court in *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), governs PLN's First Amendment challenge to the impoundments. PLN has received a helping hand from sixteen law professors acting as amici curiae who claim an "interest in seeing that First Amendment doctrine develops in a way that promotes rather than censors free speech." Br. of Amici Curiae at 1. The amici contend that we should give prison management decisions decreased deference under the *Turner* standard in light of the Supreme Court's recent First Amendment decisions, mostly in other contexts.

On the First Amendment issue we begin by explaining the *Turner* standard, which requires deference to prison officials' decisions. We then address the amici's argument for diminished deference. And then we will discuss the application of the First Amendment to the impoundments.

1. The *Turner* Standard

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84, 107 S. Ct. at

2259. Inmates retain some constitutional rights in prison, *id.*, and publishers like PLN have a First Amendment right of access to their inmate subscribers, *Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S. Ct. 1874, 1879 (1989).

But that right is limited. *See Lawson v. Singletary*, 85 F.3d 502, 509 (11th Cir. 1996) (noting the "more limited nature of . . . First Amendment rights" in the penal context). "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84-85, 107 S. Ct. at 2259. Those branches are responsible for prison administration, which means that "separation of powers concerns counsel a policy of judicial restraint" and deference to prison officials' management decisions. *Id.* at 85, 107 S. Ct. at 2259. And "[w]here a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." *Id.* To balance judicial deference with "the need to protect constitutional rights," the *Turner* Court held that a prison regulation affecting constitutional rights is valid as long as "it is reasonably related to legitimate penological interests." *Id.* at 85, 89, 107 S. Ct. at 2259, 2261. The Department and PLN agree that the *Turner* standard controls here.

The Department must show "more than a formalistic logical connection between [the impoundments of *Prison Legal News*] and a penological objective." *Beard v. Banks*, 548 U.S. 521,

535, 126 S. Ct. 2572, 2581 (2006) (plurality opinion). But that does not mean that this Court sits as a super-warden to second-guess the decisions of the real wardens. *See Turner*, 482 U.S. at 89, 107 S. Ct. at 2262 (rejecting the view that courts should be the "primary arbiters of what constitutes the best solution to every administrative problem"). Instead, under *Turner* we owe "wide-ranging" and "substantial" deference to the decisions of prison administrators because of the "complexity of prison management, the fact that responsibility therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems." *Al-Amin v. Smith*, 511 F.3d 1317, 1328 (11th Cir. 2008) (quotation marks omitted); *see also Pope v. Hightower*, 101 F.3d 1382, 1384 n.2 (11th Cir. 1996) ("Federal courts must scrupulously respect the limits on their role by not thrusting themselves into prison administration; prison administrators must be permitted to exercise wide discretion within the bounds of constitutional requirements."). The Supreme Court has reaffirmed that point time and time again. *See, e.g.*, *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 2167 (2003) ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."); *Shaw v. Murphy*, 532 U.S. 223, 229, 121 S. Ct. 1475, 1479 (2001) ("[W]e generally have deferred to the judgments of prison officials in upholding [prison] regulations against constitutional challenge."); *Thornburgh*, 490 U.S. at 408, 109 S. Ct. at 1879 ("[T]his Court has afforded considerable

deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world.").

2. The Amici's Diminished Deference Argument

In spite of all of those Supreme Court decisions requiring us to grant substantial deference to the decisions of prison officials, the amici argue that we should not. Claiming clairvoyance, they predict the Supreme Court will overrule its precedents, and they urge us to go ahead and effectively do that ourselves. *See* Br. of Amici Curiae at 2 ("Modern First Amendment jurisprudence trends toward more protections for speech rights, a direction that should inform this Court's analysis."). The amici discern a trend from several recent Supreme Court decisions, nearly all of which have nothing to do with *Turner* or challenges to prison regulations, to argue that increased protection of free speech requires decreased deference under *Turner*. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 713-15, 729-30, 132 S. Ct. 2537, 2542-43, 2551 (2012) (holding that the Stolen Valor Act violated the First Amendment); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805, 131 S. Ct. 2729, 2741-42 (2011) (striking down on First Amendment grounds a statute that prohibited the sale of violent video games to minors); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365, 130 S. Ct. 876, 913 (2010) (holding that the government "may not suppress political speech on the basis of the speaker's corporate identity"). In any event, our duty is to follow

Supreme Court decisions, not to use them to map trends and plot trajectories.

The only Court that can properly cut back on Supreme Court decisions is the Supreme Court itself. *See Hohn v. United States*, 524 U.S. 236, 252-53, 118 S. Ct. 1969, 1978 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 284 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) ("The Court has told us, over and over again, to follow any of its decisions that directly applies in a case, even if the reasoning of that decision appears to have been rejected in later decisions.").

Even if it were otherwise, only one of the post-*Turner* decisions that amici cite even mentions *Turner*, and that decision actually confirms that we owe deference to the decisions of wardens and other prison officials. *See Beard*, 548 U.S. at 524-25, 535, 126 S. Ct. at 2575-76, 2581-82 (plurality opinion) (rejecting a First Amendment challenge to a prison rule and stating that the court of appeals erred by offering "no apparent deference to the deputy prison

superintendent's professional judgment");[10] *see also Davila v. Gladden*, 777 F.3d 1198, 1212-13 (11th Cir. 2015) (addressing the *Turner* standard without any hint that it should be applied with decreased deference in light of recent Supreme Court decisions).

The *Beard* decision confirms that whatever the Supreme Court has done in other First Amendment cases, it has not adopted a damn-the-deference, full-speed-ahead approach to First Amendment rights within prison walls. As a result, we categorically reject the amici's argument that we should leap-frog ahead of the Supreme Court in this area. We follow Supreme

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[10] Justice Thomas, joined by Justice Scalia, concurred in the judgment and agreed with the plurality that "[j]udicial scrutiny of prison regulations is an endeavor fraught with peril." *Beard*, 548 U.S. at 536, 126 S. Ct. at 2582 (Thomas, J., concurring). The amici attempt to distinguish *Beard*, which involved a challenge to a prison policy designed to motivate better behavior by barring certain inmates from receiving publications. *Id.* at 524-25, 126 S. Ct. at 2575-76 (plurality opinion). They argue that the *Beard* case was exceptional because it involved maximum security inmates and that the prison's regulations were motivated by its rehabilitative goals. Neither of those distinctions matter. What matters is that the *Beard* Court did not water down *Turner*. *Id.* at 528-33, 126 S. Ct. at 2577-80 (plurality opinion). The amici's argument that the prison policy at issue in *Beard* still allowed inmates to receive legal correspondence, *id.* at 526, 126 S. Ct. at 2576 (plurality opinion), and that *Prison Legal News* is a form of legal correspondence fails on its essential premise because it is not. We agree with the definition in the Florida Administrative Code that legal mail is "mail to and from" courts, attorneys, public defenders, legal aid organizations, agency clerks, and government attorneys. Fla. Admin. Code r. 33.210.102(1)-(2).

Court decisions, here as elsewhere, instead of plotting ways around them.[11]

With the proper level of deference in mind, we will turn now to applying the *Turner* standard to determine whether the impoundments of *Prison Legal News* under its Rules (3)(*l*) and (3)(m) violate the First Amendment.

3. Application of the *Turner* Standard

The *Turner* standard requires the Department to show that its impoundments of *Prison Legal News* are content neutral, *Thornburgh*, 490 U.S. at 415, 109 S. Ct. at 1882, and "reasonably related to legitimate penological interests," *Turner*, 482 U.S. at 89, 107 S. Ct. at 2261. The impoundments are content neutral because they are based "solely on . . . [the magazine's] potential implications for prison security." *Thornburgh*, 490 U.S. at 415-16, 109 S. Ct. at 1883. And PLN does not dispute that the Department's asserted interests for the impoundments—prison security and public safety—are legitimate. *See Perry v. Sec'y, Fla. Dep't of Corr.*, 664 F.3d 1359, 1366 (11th Cir. 2011) ("[P]rotecting the public and ensuring internal prison security are legitimate penological objectives."). Those interests are not only legitimate, but paramount. *See Thornburgh*, 490 U.S. at 415, 109 S. Ct. at 1882 ("[P]rotecting prison security . . . is central to all other corrections goals.") (quotation marks omitted).

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[11] While we categorically reject the contention and supporting arguments of the amici, we do not mean to be unfair. The professors' brief does have good grammar, sound syntax, and correct citation form.

That leaves the issue of whether the Department's impoundments of *Prison Legal News* are "reasonably related" to prison security and public safety. *Turner*, 482 U.S. at 89, 107 S. Ct. at 2261. The *Turner* Court established four factors to determine the reasonableness of prison regulations: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether the publisher has alternative means to exercise its right of access to its inmate subscribers; (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether PLN "can point to . . . alternative[s] that fully accommodate[ ] [its] rights at *de minimis* cost to valid penological interests." *Id.* at 89-91, 107 S. Ct. at 2262 (quotation marks omitted).

PLN contends that the Department's impoundments of *Prison Legal News* under Rules 3(*l*) and 3(m) fail all four factors and therefore amount to unconstitutional censorship. We disagree.

a. The First *Turner* Factor: The Existence of a Rational Connection

The first *Turner* factor requires the Department to show that there is a "rational connection" between its decision to impound *Prison Legal News* and its interests in prison security and public safety. *Id.* at 89, 107 S. Ct. at 2262. The Department's position is that limiting inmates' exposure to the ads in *Prison Legal News* will reduce the risk that inmates will engage in behavior that endangers other inmates, guards, and

the public. PLN's position is that there is no rational connection because there is no evidence that ads in its magazine have ever caused a security breach. PLN's argument demands too much.

The *Turner* standard does not require the Department to present evidence of an actual security breach to satisfy the first factor. Instead, the Supreme Court recognized that prison officials must be able to "*anticipate* security problems and . . . adopt innovative solutions" to those problems to manage a prison effectively. *Id.* (emphasis added). We have rejected the "misconception" that prison officials are "required to adduce specific evidence of a causal link between [a prison policy] and actual incidents of violence (or some other actual threat to security)." *Lawson*, 85 F.3d at 513 n.15. "Requiring proof of such a correlation constitutes insufficient deference to the judgment of the prison authorities with respect to security needs." *Id.* Other circuits agree. *See, e.g.*, *Simpson v. County of Cape Girardeau*, 879 F.3d 273, 280 (8th Cir. 2018) ("Cape Girardeau may seek to prevent harm that has yet to occur and, as a result, is not required to provide evidence of previous incidents of contraband reaching inmates through the mail in order to adopt a postcard-only incoming mail regulation."); *Murchison v. Rogers*, 779 F.3d 882, 890 (8th Cir. 2015) (stating that *Turner* "does not require actual proof that a legitimate interest will be furthered by the challenged policy" and that "evidence short of an actual incident satisfies" the first factor) (quotation marks omitted); *Singer v. Raemisch*, 593 F.3d 529, 536 (7th Cir. 2010) ("The question is not whether [a game banned by the prison] has led to gang behavior in the past; the prison officials concede that it has not. The question is

whether the prison officials are rational in their belief that, if left unchecked, [the game] could lead to gang behavior among inmates and undermine prison security in the future."); *Cal. First Amend. Coal. v. Woodford*, 299 F.3d 868, 882 (9th Cir. 2002) (stating that prison officials "must at a minimum supply some evidence that . . . potential problems are real, not imagined," but affirming that "prison officials may pass regulations in anticipation of security problems").

In *Perry*, a case involving a First Amendment challenge to a Department regulation prohibiting pen pal solicitation, we did not require that prison officials produce evidence of a past incident to satisfy the first *Turner* factor. *See Perry*, 664 F.3d at 1362, 1366. We held that the Department had established a rational connection between that regulation and its security and safety interests through the testimony of James Upchurch, *id.* at 1366, the same prison official the Department relied on in the present case. He testified in *Perry* that "when inmates only receive pen pals through personal associates and not pen pal companies . . . the *possibility* of the inmate defrauding the pen pal is greatly reduced." *Id.* (emphasis added). We did not demand any evidence that inmates' solicitation of pen pals had previously caused a security breach. *Id.*

There is plenty of evidence that preventing inmates from viewing prominent or prevalent ads for prohibited services will reduce the possibility that they will use those services.[12] The ads not only make

[12] PLN asserts that the Department is judicially estopped from arguing that the problematic ads present a security threat because the Department allegedly took the position in the earlier

the prohibited services available to inmates but also appear along with articles about inmate phone scams, the role of Green Dot cards in prison gang extortion schemes, and the nationwide problem with smuggling contraband like drugs and cell phones into prisons. An inmate reading *Prison Legal News* not only reads articles about inmates putting the prohibited services to dangerous use, but also sees ads that enable him to obtain those same prohibited services. As PLN's expert acknowledged, "[j]ust because there [are]

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litigation that the same types of ads do not present such a threat. *See Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010) ("[J]udicial estoppel is designed to prevent a party from asserting a claim in a legal proceeding that is [clearly] inconsistent with a claim taken by the party in a previous preceding.") (quotation marks omitted). Not so. PLN's current position is not clearly inconsistent with its earlier position because the Department never represented that the ads present no security threat. Instead, its position was that the problematic ads were not a security threat as long as they remained incidental in terms of their size and number. *See McDonough*, 200 F. App'x at 878 (stating that we did not expect the Department to "resume the practice of impounding publications based on *incidental advertisements*") (emphasis added). But after 2005 the ads became more prominent (the size and number of the ads increased), ads for prisoner concierge and people locator services appeared, and phone technology changed. In view of those changes, the Department's decision to renew impoundment was not an attempt to "play[ ] fast and loose with [this Court] to suit the exigencies of self interest." *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999) (quotation marks omitted). As a result, the district court did not abuse its discretion in rejecting PLN's judicial estoppel argument. And because judicial estoppel does not apply here, we need not decide the extent to which it can be applied against a state if at all. *See Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60-61, 104 S. Ct. 2218, 2224 (1984) (noting the uncertainty on that point).

rule[s] [prohibiting use of those services] is no guarantee that everybody will abide by the rule[s]." *See Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 3200 (1984) ("Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others."). Given that common-sense proposition, it's no surprise that Upchurch, the Department's expert, agreed with the district court's statement that the ads "create the possibility, [the] real possibility" of inmates doing an end run around prison rules. He explained how that possibility exists for each type of ad at issue in this case: (1) three-way calling ads, (2) pen pal solicitation ads, (3) cash-for-stamps exchange ads, and (4) prisoner concierge and people locator ads.[13]

i. Three-Way Calling Ads

The Department is concerned with ads for three-way calling because that service undermines its ability to determine a call recipient's identity and location. For instance, the December 2009 issue of

[13] Rule (3)(*l*) allows the Department to impound publications that contain prominent or prevalent ads for "[c]onducting a business or profession while incarcerated." Fla. Admin. Code r. 33-501.401(3)(*l*). PLN asserts that the district court failed to analyze the rational connection between an ad for that kind of service and the Department's penological interests, but neither party discusses those particular ads in its briefs. In any event, Upchurch testified that all the ads create the possibility that inmates will circumvent prison rules, which is enough to establish a rational connection. *See Perry*, 664 F.3d at 1366.

Prison Legal News featured an ad from a company that allowed inmates to make a call to a local number, which could then be forwarded to up to three different numbers. Those types of three-way calling services, combined with the growth of internet-based phone technology, make it easier for inmates to call people outside their approved list. Although two phone companies that advertise in *Prison Legal News* provide the Department's telephone vendor with the final call recipient's number and address, other companies that advertise in the magazine have not done so. Given that Department inmates make 700,000 three-way call attempts each year—and some of those attempts succeed—the Department's effort to reduce that number by curtailing inmates' exposure to ads for that service is rational. *See Prison Legal News v. Livingston*, 683 F.3d 201, 218 (5th Cir. 2012) (holding that it was reasonable for prison officials to conclude that removing a book "describing racial tensions in the prison context—as opposed to racial tensions more generally—" would make prison violence less likely).

PLN argues that the Department's fears about three-way calling ads are overblown. It points out that the Department allows inmates to call cell phones, even though cell phones present just as much of a security threat as three-way calling because the Department cannot identify a cell phone call recipient's location. (Identifying a call recipient's location helps the Department detect and stop criminal activity conducted over the phones.). According to PLN, that alleged loophole undermines the rational connection. *See Woodford*, 299 F.3d at 881 (noting that a prison policy involved in that case

contained "loopholes that undermine[d] its rationality"). But the Department explained why it allows inmates to call cell phones despite the security problems they present. Given the decline in landline use, prohibiting inmates from calling cell phones would curtail their ability to keep in touch with family and friends, which can be critical for rehabilitation. The Department also has several rules addressing the unique security problems that cell phones create: the cell phone must be contracted through a company licensed with the Federal Communications Commission; calls to pre-paid or pay-as-you-go phones are prohibited; and the cell phone owner must provide a physical billing address. *See* Fla. Admin. Code r. 33-602.205(2)(a). Because the Department has good reason for not banning all calls to cell phones, while also limiting three-way calls, PLN's argument that the restriction on ads for three-way calls has no rational connection to security and safety interests is unpersuasive.

ii. Pen Pal Solicitation Ads

Upchurch's testimony shows why the Department's concerns with pen pal solicitation ads are rationally connected to its security and safety interests. He described how those services give inmates opportunities to prey on the public by allowing them to write people they have no connection with, which heightens the risk of fraud. In his experience, giving inmates the opportunity to solicit pen pals resulted in the exploitation of kind-hearted but gullible people. Inmates have been known to borrow or buy from each other pen pal letters that have proven effective in scamming victims. Upchurch

explained that such scams are hard to investigate because victims are often embarrassed and prosecutors prefer to focus on criminals on the streets, not those already in prison. And despite the Department's rule prohibiting pen pal solicitation, inmates succeed in posting online profiles with the same companies that advertise in *Prison Legal News*. Given that evidence, the Department's belief that reducing inmates' exposure to the ads will help ensure compliance with the prohibition on pen pal solicitation is rational.

iii. Cash-for-Stamps Ads

Turning to cash-for-stamps ads, Upchurch testified that the large number and size of those ads in *Prison Legal News* makes inmates "aware of the opportunity [to break prison rules] where they otherwise might not be." That is enough to establish a rational connection between the ads and the Department's penological interests. *See McCorkle v. Johnson*, 881 F.2d 993, 995-96 (11th Cir. 1989) (upholding a prison's ban on a satanic bible based on prison officials' testimony that allowing access to it would "only encourage" violent behavior because of the book's teachings about revenge and disobedience). Upchurch also testified that the large number of cash-for-stamps ads in each issue of *Prison Legal News* shows that the companies are making money off their ads, which evidences that the ads are causing inmates to use those services.[14] The record supports his

[14] PLN argues that if the Department is worried about the security problems stamps present, then it should just prohibit inmates from keeping stamps altogether instead of allowing them to keep up to 40 stamps at a time. But the Department

suspicion, because it shows that over a period of several years a cash-for-stamps exchange company deposited more than $50,000 into the accounts of Florida inmates.

iv. Prisoner Concierge and People Locator Ads

Finally, Upchurch testified about why ads for prisoner concierge and people locator services threaten prison security and public safety. The problem with prisoner concierge companies is that their services allow inmates to conceal their true identities from the public. Upchurch recounted how some prisoner concierge companies offer photo editing services, which an inmate could use to transform an official prison photo depicting him in a prison uniform into a fake vacation photo depicting him in a bathing suit at the beach. The inmate could then use that fake photo to misrepresent himself to the public, which facilitates fraud. In that and other ways, those ads undermine the Department's ability to control inmates' contact with the public.

The case against ads for people locator services is even more obvious. As Upchurch put it, inmates could use people locator services to "locate judges, lawyers, prosecutors, former witnesses, families of victims," or

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explained that it allows inmates to keep some stamps so that they can mail letters to family and friends, and switching to a stampless system would be costly and impractical. The Department does inspect all outgoing mail, but stamps are easily hidden and the Department processes 50,000 pieces of mail each day. Allowing inmates to have stamps for the legitimate purpose of sending mail to family and friends, while banning ads that tempt them to use stamps for illegitimate purposes, is rational.

anyone else "they would have an axe to grind with." He cited the example of a Department inmate who threatened a judge, as well as the example of a prison gang member who after he was released murdered the chief of the Colorado Department of Corrections. As the district court aptly noted, "it doesn't require a JD, or a federal judgeship" to see why people locator services pose a threat.

v. The "Focus of" or "Prominent or Prevalent" Requirement

It is true that Rule (3)(*l*) prohibits only those publications where the ruledefying ads are either the "focus of" the publication or are "prominent or prevalent" throughout it. Fla. Admin. Code r. 33-501.401(3)(*l*). PLN asserts that if the ads are as dangerous as the Department makes them out to be, then the Department should impound a publication with even one suspect ad, which it could do. *See Thornburgh*, 490 U.S. at 404-05 & n.5, 418-19, 109 S. Ct. at 1877 & n.5, 1884-85 (upholding the facial validity of a prison regulation that allowed a warden to reject a publication based on a single prohibited feature). Upchurch testified that the Department adopted the "prominent or prevalent" standard to "moderate[ ]" the "focus of" requirement in Rule 3(*l*) and provide "some leeway" to *Prison Legal News* and other publications with questionable ads.[15] It did so even though that more moderate approach amounted to "giv[ing] in on some security concerns." PLN has not convinced us that moderation in pursuit of safety is a

[15] Except, for example, publications containing even a single depiction of, or description about, how to manufacture drugs or construct a weapon. *See* Fla. Admin. Code r. 33- 501.401(3)(a), (c).

constitutional vice. We do not condemn the Department for permitting more expression than it was required to.[16]

vi. Summary of the First *Turner* Factor

The record shows that the Department's decision to limit inmates' exposure to the ads is not "so remote" from the Department's security and safety interests "as to render the . . . [impoundments] arbitrary or irrational." *Pope*, 101 F.3d at 1385. It's not remote at all. There is a rational connection between its impoundments of *Prison Legal News* based on the magazine's ad content and prison security and public safety interests.

b. The Second *Turner* Factor: Alternative Means

The second *Turner* factor is "whether there are alternative means" available to PLN to exercise its right of access to its inmate subscribers. *See Turner*, 482 U.S. at 90, 107 S. Ct. at 2262. PLN contends that this factor weighs in its favor because the district court found that PLN could not afford to publish its magazine without advertising revenue, and publishing a separate Florida-only version without the rule-defying ads would be cost prohibitive. With those options off the table, PLN argues, the impoundments amount to a blanket ban on its magazine because it

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[16] PLN, inconsistently, also argues that the Department cannot prohibit a large amount of protected speech based on a few suspect ads. But the *Thornburgh* Court upheld the facial validity of regulations doing just that. *See* 490 U.S. at 404-05 & n.5, 418-19, 109 S. Ct. at 1877 & n.5, 1884-85.

has no other way to send *Prison Legal News* to inmate subscribers in Florida.

It is a close call, but we reject PLN's argument that no alternative means exist here. The Supreme Court has made clear that prisons do not have to provide exact, one-for-one substitutes to provide alternative means. *See id.* at 92, 107 S. Ct. at 2263 (holding that a prison regulation satisfied this factor because it did not "deprive prisoners of all means of expression," and instead barred "communication only with a limited class of other people with whom prison officials have particular cause to be concerned"). Even if PLN cannot deliver *Prison Legal News* to its inmate subscribers in Florida, this factor is satisfied as long as there is some other way to exercise its right of access to inmates. *See Thornburgh*, 490 U.S. at 417-18, 109 S. Ct. at 1884 (stating that the second factor was satisfied even though inmates could not attend a particular Muslim religious ceremony because they could "participate in other Muslim religious ceremonies") (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S. Ct. 2400 (1987)).

Although PLN cannot publish its magazine without ads and cannot afford to publish a Florida-only version, it can send its other publications to Florida inmates. For example, PLN publishes a handbook called the *Prisoners' Guerrilla Handbook*, which describes various educational programs for prisoners. The Department does not impound that handbook. PLN also distributes to inmates a variety of books about daily life in prison, incarceration in the United States, and related topics. *See Livingston*, 683

F.3d at 209-10. There is no indication that those books are impounded.

PLN's argument focuses solely on its ability to send *Prison Legal News* to Florida inmates, but "adequate alternatives" can exist even "where prisoners [are] cut off from unique and irreplaceable activities." *Id.* at 219; *see also id.* at 209, 218-19 (concluding that the second factor favored the corrections department, which had banned five of PLN's books in Texas prisons, because the "alternatives left open to PLN to communicate its intended message to [the inmates were] extensive," as it could distribute "countless other books" to inmates). Sending alternate publications might not be "ideal" for PLN, but *Turner* does not demand the ideal. *See Yang v. Mo. Dep't of Corr.*, 833 F.3d 890, 894-95 (8th Cir. 2016) (upholding a prison regulation that prohibited a Chinese inmate from corresponding in Chinese with his Chinese-speaking relatives in China, who did not speak English, because the inmate could still correspond in English, receive visitors, and make domestic and international calls). The second factor favors the Department or, perhaps more accurately, does not disfavor the Department.

c. The Third *Turner* Factor: Impact of Accommodating the Asserted Right

The "third consideration is the impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90, 107 S. Ct. at 2262.

As we've explained, the Department impounded every monthly issue of *Prison Legal News* during the five-year period for which there is evidence in the record because the magazine's ads give inmates the opportunity to use prohibited services, which creates security problems. It follows that if the Department admits an issue of the magazine, it would have to allocate more time, money, and personnel in an attempt to detect and prevent security problems engendered by the ads in the magazines. *See Simpson*, 879 F.3d at 281 ("Requiring Cape Girardeau to abandon the postcard-only policy would force the jail to dedicate more time and resources to searching the mail, which would detract from the officers' other duties related to security and inmate welfare."); *Woods*, 652 F.3d at 750 (stating that a ban on pen pal websites passed the third *Turner* factor because pen pal scams "unduly distract[ed] prison officials from the day-to-day affairs they must manage in order to maintain a safe atmosphere for everyone in the prison environment"). PLN's subscribers could share copies of the magazine and its ads with non-subscribing inmates or spread information by word-of-mouth about the companies offering the prohibited services. *See Thornburgh*, 490 U.S. at 412, 109 S. Ct. at 1881 (stating that periodicals "reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct"). As Upchurch testified, that "ripple effect" increases the burden on Department staff. *See Turner*, 482 U.S. at 90, 107 S. Ct. at 2262 ("When accommodation of an asserted right will have a significant ripple effect on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of

corrections officials.") (quotation marks omitted). The third factor favors the Department.

d. The Fourth *Turner* Factor: Exaggerated Response

The final *Turner* factor requires us to consider whether the impoundments of *Prison Legal News* are "an exaggerated response to prison concerns." *Id.* (quotation marks omitted). The "existence of obvious, easy alternatives may be evidence that the regulation . . . is an exaggerated response" to a problem, while the "absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* (quotation marks omitted). PLN argues that the Department's decision to impound the magazine is an exaggerated response to its security concerns because no other corrections department in the nation impounds this particular magazine based on its ad content. And it points to several supposedly simple alternatives to impoundment that would alleviate the Department's security concerns: prohibiting inmates from calling out to cell phones, switching to a stamp-less system, or attaching a flyer to each issue of *Prison Legal News* to remind inmates not to use the prohibited services.

The Department's decision to impound *Prison Legal News* is not an exaggerated response to its security concerns. Although the "policies followed at other well-run institutions [are] relevant to a determination of the need for a particular type of restriction," such policies are not "necessarily controlling." *Procunier v. Martinez*, 416 U.S. 396, 414 n.14, 94 S. Ct. 1800, 1812 n.14 (1974), *overruled on other grounds by Thornburgh*, 490 U.S. at 413-14, 109

S. Ct. at 1881-82. "[T]he Supreme Court has made it patently clear that the Constitution does not mandate a lowest common denominator security standard whereby a practice permitted at one penal institution must be permitted at all institutions."[17] *Pope*, 101 F.3d at 1385; *see also Crime Justice & Am., Inc. v. Honea*, 876 F.3d 966, 971, 978 & n.6 (9th Cir. 2017) (rejecting the plaintiff's argument that a ban on its magazine coming into a county's jail was an exaggerated response to safety concerns, even though the magazine was "widely distributed at other jails," because the county did not have as much control over the inmates

[17] There is no support for PLN's argument that the Department has the burden of showing something unique about its institutions to justify its impoundment decisions. *Cf. Overton*, 539 U.S. at 132, 123 S. Ct. at 2168 ("The burden . . . is not on the State to prove the validity of prison regulations but on [the challenger] to disprove it."). PLN cites *Holt v. Hobbs*, 574 U.S. ___, 135 S. Ct. 853, 859 (2015), where the Supreme Court held that Arkansas' ban on prisoners having 1/2 inch beards substantially burdened a Muslim inmate's religious exercise. The Supreme Court observed that most states and the federal government permitted inmates to grow beards of that length, and stated that "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course . . . ." *Id.* at 866. The Court analyzed that claim under the Religious Land Use and Institutionalized Persons Act, which requires the government to show that its regulation is the least restrictive means of furthering a compelling interest. *Id.* at 863. *Turner*, by contrast, does not require the Department to use the "least restrictive means" to promote prison security. *Turner*, 482 U.S. at 90-91, 107 S. Ct. at 2262. And even under RLUIPA, a state need not permit an accommodation just because others do. *See Knight v. Thompson*, 796 F.3d 1289, 1291, 1293 (11th Cir. 2015) (rejecting the argument that the policies of 39 other prison systems rendered invalid the challenged prison policy).

in its jail compared to other counties). There is no one-size-fits-all approach to prison management. As Upchurch testified, every institution faces different security problems and deals with those problems in different ways. For example, some prisons put microwaves in communal inmate living areas, while others would never allow that arrangement out of fear that an inmate would heat up hot water and use it as a weapon. Upchurch explained that what matters to the Department is not the policies of corrections departments in other states, but maintaining prison security and public safety.[18] In his view, the impoundments of *Prison Legal News* help accomplish those goals.

PLN's proposed alternatives range from bad to worse. Prohibiting inmates from calling cell phones would make it difficult for them to keep in touch with family and friends (because of the decline in landline use), which in turn would undermine efforts to rehabilitate inmates. Switching to a stamp-less system would cost $70,000 (to change the Department's banking system), require changing two state statutes, and force the Department to solve the

[18] One reason that the policies of departments in other states do not matter so much is that circumstances vary from state to state. For example, PLN's evidence shows that the Arizona Department of Corrections does not impound *Prison Legal News*. PLN's expert admitted, however, that Arizona's "physical structures and facilities are more secure than" Florida's, which tends "to use dormitories for certain categories of prisoners that many other states would not put in a dormitory." Because of differences in physical structures and facilities, the Department's security concerns differ from those of Arizona's corrections department.

logistical challenge of how inmates could send letters from prison canteens. *See Thornburgh*, 490 U.S. at 419, 109 S. Ct. at 1885 (stating that courts must consider the administrative inconvenience of proposed alternatives).

Last and most definitely least, PLN proposes that the Department follow New York's lead and simply attach to each issue of *Prison Legal News* a flyer reminding inmates not to use the prohibited services. Really? If all New York has to do to prevent inmate misconduct and crime is gently remind them not to misbehave, one wonders why that state's prisons have fences and walls. Why not simply post signs reminding inmates not to escape? If New York wants to engage in a fantasy about convicted criminals behaving like model citizens while serving out their sentences, it is free to do so, but the Constitution does not require Florida to join New York in la-la-land. Though it was hardly necessary to state the obvious, Upchurch testified that a reminder flyer on the magazine would not alleviate security concerns. *See id.* at 419, 109 S. Ct. at 1884-85 ("In our view, when prison officials are able to demonstrate that they have rejected a less restrictive alternative because of reasonably founded fears that it will lead to greater harm, they succeed in demonstrating that the alternative they in fact selected was not an 'exaggerated response' under *Turner*."). Like the first three factors, this final factor favors the Department.

e. The *Turner* Factors: Conclusion

Upchurch summed up the relationship between the impoundment of *Prison Legal News* and the Department's prison security and public safety

interests by stating that those rules "certainly help[ ]" advance those interests. And that's the point. The impoundment of *Prison Legal News* is not a silver bullet guaranteeing that inmates will not break the rules and commit crimes while incarcerated. But the record shows that a "reasonable relationship" does exist between the Department's decision to impound the magazine and its prison security and public safety interests. *Turner*, 482 U.S. at 91, 107 S. Ct. at 2262. That is all *Turner* requires. *Id.* at 90-91, 107 S. Ct. at 2262. Because all four *Turner* factors favor the Department, we hold that the impoundments of *Prison Legal News* under Rules (3)(*l*) and (3)(m) do not violate the First Amendment.

B. Due Process Claim

That the Department's impoundments of *Prison Legal News* do not violate the First Amendment doesn't let the Department entirely off the constitutional hook. The district court ruled that the Department violated PLN's right to due process by failing to provide it with notice for each impounded issue, and the court entered an injunction requiring the Department to do that. That was not an abuse of discretion.

PLN must receive notice and an opportunity to be heard each time the Department impounds an issue of the magazine. *See Perry*, 664 F.3d at 1367; *Montcalm Publ'g Corp. v. Beck*, 80 F.3d 105, 106 (4th Cir. 1996) ("We hold that publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate subscribers."); *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) (following *Montcalm*); *see also Londoner v. City*

& Cty. of Denver, 210 U.S. 373, 385, 28 S. Ct. 708, 714 (1908) ("[D]ue process of law requires that . . . the [party] shall have an opportunity to be heard, of which he must have notice . . . ."). [19] As the district court ruled, the Admissible Reading Material Rule on its face satisfies those requirements. When the Department impounds an issue of a publication, the rule requires that it send the publisher a notice form listing the "specific reasons" for the impoundment of that issue. Fla. Admin. Code r. 33-501.401(8)(b). [20] The

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[19] We held in the *Perry* decision that there is a lower due process standard for mass mailings (that is, bulk correspondence). 664 F.3d at 1368. We reject the Department's argument that magazines sent to subscribers are mass mailings. *See Montcalm*, 80 F.3d at 109 & n.2 (contrasting magazines sent to individual subscribers with mass mailings, which are sent to "each and every inmate at a given institution"). It is also not enough that publishers may receive notice of an impoundment from inmates. *See Jacklovich*, 392 F.3d at 433-34 ("[The] publisher's rights must not be dependent on notifying the inmate[,] who in all likelihood will never see the publication . . . .").

[20] PLN and the amici argue that the Department must provide PLN with notice for each individual copy of *Prison Legal News* that the Department impounds, even if the Department has already sent notice that it has impounded a copy of that same issue sent to another inmate. In other words, if the Department impounds the January 2018 issue of *Prison Legal News* and withholds 70 copies of that issue from its inmate subscribers, then PLN wants notice forms for all 70 copies, not just one notice for the January issue. Due process does not demand that much. Under the administrative rule, once one facility impounds a monthly issue, every other facility must impound that same issue on the same grounds until the Literature Review Committee can decide whether that issue can be admitted into the prisons. *Id.* rr. 33-501.401(8)(c), (14)(a), (14)(c). Copy-by-copy notice is not necessary for PLN to learn the reason(s) for the impoundment as

Literature Review Committee reviews every impoundment decision, *id.* r. 33-501.401(14)(c), and the publisher can independently appeal an impoundment decision to that committee, *id.* r. 33-501.401(15)(a).[21]

Those procedures, if applied, would have ensured that for each impounded issue PLN received a notice form listing the reasons for the impoundment. As the Department acknowledges, however, that did not happen for 26 out of the 62 monthly issues (42%) impounded between November 2009 and December 2014. That failure rate increases to 87% when we take into account defective notice forms that did not list the reasons for the impoundment. Despite that remarkable failure rate, the Department argues that the Secretary cannot be enjoined because there is no

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long as all copies are impounded for the same reason(s). *See Livingston*, 683 F.3d at 223 (holding that due process does not require copy-by-copy notice because later "denials of identical publications amount to the routine enforcement of a rule with general applicability").

We also reject PLN's and the amici's argument that it is entitled to more due process protections because of the content of its magazine. *See Shaw*, 532 U.S. at 230, 121 S. Ct. at 1480 (rejecting the argument that courts should "enhance constitutional protection [under *Turner*] based on their assessments of the content of the particular communications").

[21] PLN argues that when the committee reviews an impoundment decision it cannot reasonably gauge whether ads are "prominent or prevalent" in the magazine because it receives only a publication's front cover and a copy of the pages with problematic content. Fla. Admin. Code r. 33-501.401(8)(b). That argument fails because publishers must send a copy of the entire impounded issue when the publisher files its own appeal with the committee. *Id.* r. 33- 501.401(15)(a)(2).

evidence that the failure to send the forms was a result of a Department policy or custom to deprive PLN of notice.[22] The Department asserts that PLN should find the mailroom workers who are responsible for the failure to provide notice and sue them. No.

PLN doesn't have to hunt and peck throughout Florida's correctional system for negligent mailroom workers to sue. The buck stops with the Secretary. *See* Fla. Stat. § 20.315(3) ("The head of the Department of Corrections is the Secretary of Corrections. . . . The secretary shall ensure that the programs and services of the department are administered in accordance with state and federal laws, rules, and regulations . . . ."). This is not a case of one or two notice letters lost in the mail or mailroom. PLN did not receive notice forms for 42% of the impounded issues, and many forms it received for other issues were defective. PLN's effort to enjoin the ongoing violation of its right to due process is appropriate, and it seeks only prospective relief against the Department. *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1215 (11th Cir. 2009) (stating that the *Ex Parte Young* doctrine permits "lawsuits against state officials as long as the plaintiffs seek only prospective

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[22] The Department argues that PLN did not receive the required notice because of negligent mailroom staff, and that the negligent deprivation of notice cannot give rise to a procedural due process violation. *Cf. Jones v. Salt Lake County*, 503 F.3d 1147, 1162-63 (10th Cir. 2007) (concluding that PLN's due process claim failed where a prison's mailroom staff negligently failed to deliver the magazine to inmate subscribers). But the Department deliberately impounded *Prison Legal News*, which means that it had to provide notice to PLN for each impounded issue.

injunctive relief to stop ongoing violations of federal law"). And as the district court pointed out, its injunction "essentially requires compliance with the [Department's] own rule." The Secretary should not protest too loudly an order to enforce a rule she is statutorily required to enforce. *See* Fla. Stat. § 20.315(3).

IV. Conclusion

The Department's concerns with the ads in *Prison Legal News* are reasonably related to its legitimate interests in prison security and public safety, so we defer to its decision and hold that the impoundments of *Prison Legal News* under Rules (3)(*l*) and 3(m) do not violate the First Amendment. But with the power to impound *Prison Legal News* comes the duty to inform PLN of the reasons for the impoundments. The Department did not do that, which is why the district court did not abuse its discretion in entering an injunction to require the Department to adhere to its own notice rules.

AFFIRMED.

Appendix B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

No. 4:12cv239-MW/CAS

PRISON LEGAL NEWS,

Plaintiff,

v.

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

Defendant.

Filed: Oct. 5, 2015

AMENDED ORDER[1]

This case involves an as-applied First Amendment challenge to Florida Administrative Code Rule 33-501.401(3)(l) and (m), as well as a procedural due process claim brought under 42 U.S.C. § 1983. Prison Legal News[2] and Julie L. Jones, on behalf of the Florida Department of Corrections, litigated this case to a four-day bench trial beginning on January

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[1] The original order, ECF No. 251, is amended as a result of Plaintiff's motion to alter or amend the judgment, ECF No. 258.

[2] In 2009, PLN, the corporation, changed its name to the Human Rights Defense Center. Tr. of Trial 36:24-:25 (Jan. 5, 2015). This order continues to refer to the entity as PLN.

5th, 2015.[3] This order sets forth the findings of fact, analysis of law, and verdict.

I.

The parties dispute the constitutionality of the FDOC's impoundment and rejection of PLN's magazine, *Prison Legal News*, a monthly publication comprising writings from legal scholars, attorneys, inmates, and news wire services. FDOC regulates inmate mail with Rule 33-501.401 of the Florida Administrative Code, titled "Admissible Reading Material." Rule 33-501.401 authorizes the FDOC to screen all mail entering its facilities and sets forth a detailed process by which it may impound that mail.

Section (3) of Rule 33-501.401 contains thirteen subsections, labeled (a) through (m), providing distinct criteria by which incoming publications "shall be rejected" from the prison population. The First Amendment action specifically challenges subsections (l) and (m), ECF No. 14 ¶ 22, which state:

> [A] [p]ublication[] shall be rejected when . . .
>
> (l) It contains an advertisement promoting any of the following where the advertisement

[3] The sole remaining defendant in this action, Julie L. Jones, is the current Secretary of the FDOC. Two other secretaries have cycled through the FDOC during this litigation, Kenneth S. Tucker and Michael D. Crews. Some early documents are directed at these individuals. The Secretary of the FDOC is responsible for the overall management of the Florida prison system and has ultimate responsibility for the promulgation and enforcement of all FDOC rules, policies and procedures, and administrative code provisions. *See* ECF No. 14 ¶ 15; ECF No. 68 ¶ 15. For simplicity, this order refers to Defendant Jones as the FDOC.

> is the focus of, rather than being incidental to, the publication or the advertising is prominent or prevalent throughout the publication.
>
> 1. Three-way calling services;
> 2. Pen pal services;
> 3. The purchase of products or services with postage stamps; or
> 4. Conducting a business or profession while incarcerated.
>
> [or]
>
> (m) It otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person.

Fla. Admin. Code R. 33-501.401(3)(l), (m) (2009) (amended 2010).[4]

As relief, PLN requests a declaratory judgment that Rule 33-501.401(3) is unconstitutional as applied to *Prison Legal News*. ECF No. 14, at 13. PLN also

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[4] That is the 2009 version. The Rule was amended in 2010. That amendment did not change subsections (3)(l) and (m). In the version before 2009, the prohibition against advertisements for three-way calling services, pen pal services, the purchase of products or services with postage stamps, and conducting a business while incarcerated appeared in section (4), not subsection (3)(l). *See* Fla. Admin. Code R. 33-501.401(4) (2006) (amended 2009). For clarity, this Court refers to these prohibitions as (3)(l). The other subsection at issue in this case is (3)(m), the Rule's residual clause. Prior to 2009, the residual clause appeared under subsection (3)(l). *See* Fla. Admin. Code R. 33-501.401(3)(l) (2006) (amended 2009). This Court refers to the residual clause as (3)(m).

seeks an injunction that prohibits the impoundment and rejection of *Prison Legal News*, orders the delivery of all previously censored and withheld issues, and requires individualized notice and an opportunity to be heard whenever a copy of an issue is rejected.[5] Finally, PLN seeks the same due process remedies for the books and information packets it has mailed to FDOC inmates, which it maintains the FDOC impounded without notice. Tr. of Trial 4-5 (Jan. 8, 2015).

II.

This part of the order sets forth background facts that help situate the lawsuit in the broader contest between the parties.

A.

This is not the parties' first rodeo—that would have been in February 2003, when the FDOC began censoring *Prison Legal News* due to its advertisement of services accepting postage stamps as payment, three-way calling services, pen pal services, and offers to purchase inmate artwork. *See Prison Legal News v. Crosby*, No. 3:04-cv-14-JHM-TEM, slip op. at 5-8, ¶¶ 4, 7, 14-16 (M.D. Fla. July 28, 2005), Pl.'s Trial Ex. 23 (the "Moore Order"). PLN sued the FDOC in January

[5] PLN attempted to add a void-for-vagueness claim. It sought leave to file a second amended complaint on February 19, 2013. ECF No. 119. That motion was denied for failure to show good cause. ECF No. 127, at 3. At the time, the trial was set for May 13, 2013. ECF No. 106. The trial would eventually be delayed by more than a year. Had this Court known, perhaps it would have ruled differently on the motion to amend. Either way, PLN did not again move to amend the complaint until *trial*. By then it was far too late, and the motion was denied.

2004 challenging that censorship under the First Amendment.[6] *Id.* at 2.

While the suit was pending in March 2005, the FDOC amended Rule 33-501.401 to clarify that publications would not be rejected for the advertising content in that case, so long as those ads are "merely incidental to, rather than being the focus of, the publication."[7] Moore Order 15. Following this

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[6] The First Amendment challenge to the censorship was not the sole claim. PLN also argued that Rule 33-602.207 of the Florida Administrative Code, which prohibits prisoners from engaging in outside businesses or professions and which the FDOC interpreted as proscribing compensation for writing for *Prison Legal News*, infringes on PLN's First Amendment rights as a publisher. Moore Order 17. The Eleventh Circuit would eventually disagree. *See Prison Legal News v. McDonough*, 200 F. App'x 873, 875 (11th Cir. 2006). Lastly, PLN had originally asserted a due process claim under the Fifth and Fourteenth Amendments, but abandoned that claim at the start of the bench trial. Moore Order 2 n.1.

[7] Rule 33-501.401 has been amended several times. The FDOC's interpretation of the Rule has also fluctuated. In the first lawsuit, "the FDOC changed its position several times as to whether PLN's magazine contained prohibited material. In early 2003, the FDOC began impounding issues of PLN's magazine because they contained ads for three-way calling services, which are prohibited for Florida inmates because they pose a threat to prison security. In November 2003, the FDOC reversed its decision and allowed for delivery of eight issues that it had previously impounded. However, a month later, in December 2003, the FDOC again decided to impound the magazine for including three-way calling service ads due to ongoing security concerns. By March 2004, the FDOC was satisfied that its telephone provider could properly monitor prisoners' calls and that the three-way calling service ads were no longer a security concern. Therefore, the FDOC again approved delivery of the magazine." *McDonough*, 200 F. App'x at 875.

amendment, the FDOC promised to no longer impound *Prison Legal News* for its advertising content. *Id.* at 13-15. The FDOC ceased impounding and rejecting *Prison Legal News* for the duration of the litigation and argued that PLN's First Amendment challenge to the Rule was moot.

This convinced the district court. Four months after the amendment was implemented, it found that the FDOC had "shown that the [newly adopted] procedures . . . allow for distribution of [*Prison Legal News*] in its current format" and that the magazine would not be rejected solely on the basis of the advertising content at issue. *Id.* at 15-16. The Eleventh Circuit reiterated these sentiments on appeal. In rejecting PLN's argument that an injunction was necessary to prevent further censorship, the Eleventh Circuit stated:

> We agree with the district court's finding that, although the FDOC previously wavered on its decision to impound the magazine, it presented sufficient evidence to show that it has "no intent to ban PLN based solely on the advertising content at issue in this case" in the future. The FDOC demonstrated that its current impoundment rule does allow for distribution of PLN in its current format and that the magazine will not be rejected based on its advertising content. The FDOC officially revised its impoundment rule and has not refused to deliver issues of the magazine since this amendment. . . . We have no expectation that FDOC will resume the

> practice of impounding publications based on incidental advertisements.

McDonough, 200 F. App'x at 878. Since the Eleventh Circuit disposed of the claim as moot, it further declared that, "[a]s to the current rule, we offer no opinion on its constitutionality." *Id.*

B.

Less than three years after the Eleventh Circuit's ruling in *McDonough*, the FDOC amended the Rule to provide an additional ground for rejection under (3)(l). Under the revised Rule, publications with "*prominent* or *prevalent*" advertisements for services prohibited by (3)(l) would also be rejected. Fla. Admin. Code R. 33-501.401(3)(l) (emphasis added).

The 2009 amendments became effective on June 16, 2009. Def. Crews' Obj. to Pl.'s First Set of Interrogs. to Def. Crews 2-3 (Jan. 18, 2013), Pl.'s Trial Ex. 30. The FDOC has impounded every issue of *Prison Legal News* since September 2009. Tr. of Trial 105:24-106:2 (Jan. 6, 2015).

PLN initiated this suit on November 17, 2011. ECF No. 1. On December 16, 2011, PLN filed its First Amended Complaint. ECF No. 14. Only two counts remain, both against the FDOC. *See* ECF No. 117 (confirming the dismissal of the other two original defendants under a settlement agreement). Count III is a First Amendment as-applied challenge to subsections (3)(l) and (m) of the Rule. ECF No. 14, at 11, ¶¶ 40-43. PLN alleges that the FDOC's actions "in refusing to deliver or allow delivery of Plaintiff's publications to Florida inmates in its custody, solely because of the presence of certain advertisements within these publications, violate Plaintiff's rights to

free speech, press and association as protected by the First and Fourteenth Amendment to the U.S. Constitution and 42 U.S.C. § 1983." *Id.* ¶ 43. And, in Count VI, PLN contends that the FDOC's "failure and refusal to provide Plaintiff with constitutionally required notice and an opportunity to be heard and/or protest the decision each time Plaintiff's publications are censored . . . violates Plaintiff's rights to due process of law protected by the Fifth and Fourteenth Amendments . . . and by 42 U.S.C. § 1983." *Id.* at 14, ¶¶ 52-55.

On January 5, 2015, the parties began a four-day bench trial on these two counts. ECF No. 235. At its conclusion, the Court extended the parties an opportunity to brief certain key issues. *See* ECF Nos. 241-44, 246.

III.

In this part are the facts of the case, as found by this Court after careful consideration of all the evidence presented at trial. Most facts are undisputed. For those in dispute, the order lays out the competing views before resolving them.

A.

Established in 1990 by Paul Wright and Ed Meade, *Prison Legal News* is a monthly magazine that reports on news and legal developments related to the criminal justice system. Tr. of Trial 32:8-:22 (Jan. 5, 2015).[8] PLN, a nonprofit with its principal place of

[8] The magazine was initially titled *Prisoner's Legal News*. Tr. of Trial 122:22-123:5 (Jan. 5, 2015). In 1992, the editors changed the name to *Prison Legal News* because they "thought that [the]

business in Lake Worth, Florida, publishes *Prison Legal News*. Tr. of Trial 36:18-37:2 (Jan. 5, 2015). Its mission is to inform the public about events in prisons and jails and the need for progressive criminal justice reform, to inform prisoners and their advocates about these events and how to advocate for their rights, and to enhance rehabilitation for prisoners, ensure transparency and increase accountability of prison officials. Tr. of Trial 32:23-33:9 (Jan. 5, 2015).

Over the past 25 years, *Prison Legal News* has published over 700 articles on the FDOC and Florida prisons and jails, with coverage ranging from misconduct by FDOC contractors to individual cases involving a host of legal issues. Tr. of Trial 51:15-:22 (Jan. 5, 2015). Prisoners are the magazine's primary audience. Tr. of Trial 123:6-:10 (Jan. 5, 2015).

Prison Legal News started carrying advertisements in 1996.[9] Tr. of Trial 41:16-:22 (Jan. 5, 2015). But it was not until February 2003 that the FDOC censored *Prison Legal News* for its advertising content. Tr. of Trial 41:23-42:8, 184:9-:10 (Jan. 5, 2015). The FDOC specifically took issue with the publication's advertisement of services accepting postage stamps as payment, three-way calling services, pen pal services, and offers to purchase

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news and information was too important to . . . restrict it to prisoners." *Id.*

[9] The FDOC says that advertisements are unnecessary. The evidence overwhelmingly refutes that argument. This Court finds that without advertisements PLN could not print *Prison Legal News*. This Court further finds that printing a Florida-only edition of *Prison Legal News* would be cost-prohibitive. Tr. of Trial 60:23-71:14 (Jan. 5, 2015).

inmate artwork; proscribed mostly by subsection (3)(l). Moore Order 5-8. The justification was that those advertisements presented a security risk because they promoted prohibited services. *Id.* at 3.

PLN sued and the FDOC subsequently amended the Rule several times during the 2005 litigation, vacillating between admitting publications containing (3)(l) advertisements and rejecting them. Moore Order 7. Eventually the FDOC settled on a rule that would not reject publications such as *Prison Legal News* for advertising services prohibited by subsection (3)(l), so long as the advertisements were "merely incidental to, rather than being the focus of, the publication." *Id.* at 8.

This Court finds that there were several reasons for this change. First, the FDOC believed that it had in place security measures to alleviate some of the concerns associated with the prohibited services advertized in *Prison Legal News*. Significantly, the FDOC trusted that its telephone vendor, at the time MCI, could detect and block three-way calls and call-forwarding. *See, e.g.*, *id.* at 7; Tr. of Trial 78:11-:22 (Jan. 6, 2015). Second, the FDOC recognized that "incidental" advertisement did not pose a significant security threat to the prisons. Moore Order 15. Following this recognition, the FDOC promised that it would no longer impound and reject *Prison Legal News* "in its current format." *Id.* at 16. The Rule was not, as PLN claims, amended to "moot" the 2005 case. Tr. of Trial 78:11-:22 (Jan. 6, 2015).

Finally, this Court finds that the 2005 litigation did not concern services prohibited by subsection (3)(m). *See* Tr. of Trial 69:9-70:8 (Jan. 6, 2015)

(discussing the major concerns in the prior litigation); Tr. of Trial 214 (Jan. 7, 2015) (testifying that prior litigation was not about subsection (3)(m)). This litigation does.

B.

From 2005 to 2009 the FDOC, proceeding under the revised Rule, did not reject *Prison Legal News*. Then, in June 2009, the FDOC once again amended subsection (3)(l) of the Rule. Along with this revision came the decision to resume rejection of publications such as *Prison Legal News* for advertising services

prohibited by subsection (3)(l).[10] [11] At trial, the parties vigorously disputed what prompted these changes.

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[10] At times during this litigation the FDOC has taken the position that the 2009 revisions were not substantive—that is, that the sole purpose was to clarify "incidental" to assist mailroom staff. The witnesses at trial could not agree on whether the change was substantive, and the parties never directly addressed the issue.

If truly not substantive, adding "prominent or prevalent" should not have resulted in heightened censorship, generally. Yet that is precisely what happened. Within a few months the FDOC resumed rejection of *Prison Legal News*, even though there was no noticeable change in the magazine between June 2009, when the rule was implemented, and September 2009, the first issue impounded since 2005. *See* Def.'s Trial Ex. 1; Pl.'s Trial Ex. 79.

What explains this inconsistency? First, it may not be an inconsistency at all. It could be the case that *Prison Legal News*' advertising content had ballooned well beyond "incidental" back in October 2008, when it made the permanent jump from 48 pages per issue to 56. *See* Pl.'s Trial Ex. 79, at 38. This would mean that FDOC mailroom staff mistakenly admitted *Prison Legal News* for nearly a year. Under this view, the 2009 amendment worked. The staff has gotten it right ever since, impounding and rejecting *every* issue of the magazine from September 2009 to the present.

This Court finds, however, that the *true* and more obvious answer is that the 2009 amendment was *not* a simple "restyling"—to borrow from the judicial Committee on Rules of Practice and Procedure—of the Rule. The evidence at trial bears this out. For instance, Susan Hughes, chairwoman of the Literature Review Committee from 2012 to October 2013, testified that she understood the 2009 revision to be a change in the rule. Tr. of Trial 2:13-:17, 6:9-7:8 (Jan. 7, 2015). And, as this Court will discuss, the FDOC provided additional justifications for the *substantive* decision to again reject *Prison Legal News*, such as renewed security concerns.

[11] The FDOC also began censoring *Prison Legal News* for advertisements prohibited by subsection (3)(m).

Everyone agrees it was not any major incident or tragedy related to (3)(l) services, since none occurred between 2005 and 2009.[12] Tr. of Trial 5:9-:12 (Jan. 6, 2015).

FDOC administrators gave three primary reasons for amending subsection (3)(l) in 2009, each of which this Court deems credible. *See* Tr. of Trial 58:20-:21 (Jan. 6, 2015). The first was a disagreement among the administrators "over whether the prior policy met the needs of the department." Tr. of Trial 59:8-:10 (Jan. 6, 2015). According to James Upchurch, new technology, such as the advent of Voice over Internet Protocol ("VoIP") technology, forced the FDOC to reconsider previous security decisions. Tr. of Trial 19:12-:22 (Jan. 6, 2015). Securus is the FDOC's current telephone vendor. Like MCI, it works by detecting noises and clicks made on a phone line that signal the initiation of three-way calls and call-forwarding. Tr. of Trial 15-16 (Jan. 6, 2015). Circumventing the system generally requires obfuscating those specific noises or transferring calls without any noise at all. VoIP employs the latter. Tr. of Trial 19:12-:22 (Jan. 6, 2015). The changes in technology proved wrong the FDOC's belief that it had adequate security measures to curb three-way calling and call-forwarding.

The second reason given was dissatisfaction with the vagueness of subsection (3)(l). FDOC administrators sought to clarify the circumstances

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[12] While no single, major incident prompted the amendment, this Court finds that there *is* evidence that companies and prisoners disregarded prison rules against exchanging stamps for money and services. *See, e.g.*, Tr. of Trial 36:18-40:13 (Jan. 6, 2015).

under which publications should be censored for their advertising content. *See* Tr. of Trial 59:11-:14 (Jan. 6, 2015); *see also* Pl.'s Trial Ex. 30 (identifying clarity as the goal of the 2009 revisions). They did so with the antonyms "prominent or prevalent," which the FDOC believed would assist mailroom staff in their decision-making. Lastly, the FDOC had noticed an increase in the volume of advertisements related to postage stamps. Tr. of Trial 59:16-:18 (Jan. 6, 2015).

A major theme in PLN's First Amendment challenge is that the FDOC had no legitimate reasons for amending subsection (3)(l). So, PLN endeavored to undermine these reasons all through trial.

PLN asserts that the first reason—the purported circumvention of Securus—is false. Securus, like MCI, is contractually obligated to block the call services at issue. This contract was recently renewed by the FDOC. That means the system works, says PLN. Otherwise, the FDOC would not have renewed the contract.

FDOC offers evidence to refute PLN's argument. First, Securus itself admits it is not 100% effective. Second, FDOC personnel monitoring phone calls have heard inmates successfully transfer calls. Third, hundreds of thousands of attempted calls have been detected by Securus. According to the FDOC, this means that some prisoners successfully transfer calls, or else there would not be so many attempts.

FDOC officials also said that increasing Securus' effectiveness would be too costly. They explained that Securus could be made more effective by increasing its sensitivity to noise. The heightened sensitivity would capture more attempts, but also result in more false

positives. It would shutdown inmates placing rule-abiding phone calls. This would lower prisoner morale and increase tension to untenable levels. Tr. of Trial 15-16:25 (Jan. 6, 2015). So it goes.

With respect to the first reason, this Court makes the following determinations. At the time of the 2005 litigation, the FDOC believed that its telephone vendor could detect all attempts at three-way calling and call-forwarding. After all, Securus, its current vendor, is contractually obligated to block three-way calls and call-forwarding attempts. Yet it is unable to do so. Some calls, including those transferred using VoIP technology, elude the system. There is no evidence to suggest that any other provider could do a better job than Securus. And while it is theoretically possible to increase Securus' efficacy, any benefit from doing so would be offset by attendant prison instability.

As to the third reason, PLN points out that the FDOC never ran a study to determine whether advertisements accepting stamps as payment increased between 2005 and 2009. Tr. of Trial 59:19-60:7 (Jan. 6, 2015). The FDOC instead relied on plain observations and noticed that the number of such advertisements had grown "substantially." Tr. of Trial 59:19-60:18 (Jan. 6, 2015); *accord* Tr. of Trial 8:22-9:1 (Jan. 6, 2015).

That is beside the point. In fact the magazine did increase in size. Tr. of Trial 109:18-110:6 (Jan. 5, 2015). In four years the magazine went from 48 pages to 56 pages per issue, containing both more substantive, non-offending content and prohibited advertisements. *See* Pl.'s Trial Ex. 79 (providing total

number of pages for every issue of *Prison Legal News* dating back to January 2002); Def.'s Trial Ex. 7. Qualitatively, the advertisements have changed as well. The number of "half page or greater" (3)(l) ads have increased. Def.'s Trial Ex. 7. And since 2010, PLN has run an offending advertisement on the back cover of the magazine. *Id.* Today, *Prison Legal News* is 64-pages long. *See* Pl.'s Trial Ex. 79. No formal study is necessary to see that.

PLN additionally argues that the FDOC is wrong to look to the total number of advertisements. Tr. of Trial 49:9-:12 (Jan. 7, 2015). Instead, as PLN would have it, the proper measure is the percentage of the magazine that is prohibited advertisement. Tr. of Trial 49:14-50:2 (Jan. 7, 2015). The merits of this argument are explored later. For now, suffice to say that the percentage of advertisements for three-way calling services, stamps as payment, pen pal services, and conducting a business services—that is, those prohibited by subsection (3)(l) of the Rule—increased only slightly from 9.21% in 2005 to 9.8% in 2009. *See* Pl.'s Trial Ex. 79, at 85. In 2014, (3)(l)-prohibited advertisements averaged 15.07% of the publication. *Id.*[13]

Notably, neither this "study" nor anything else introduced by the parties examines the percentage for advertisement prohibited by (3)(m). *See* Tr. of Trial 242, 250:9-:15 (Jan. 5, 2015) (explaining methods,

[13] Evidence before this Court shows that advertising content in *Prison Legal News* has been on the rise since 2005. Paul Wright testified that PLN does not intend to further increase the number and size of offending advertisements. Tr. of Trial 59:8-:10 (Jan. 5, 2015). This Court has no reason to disbelieve Mr. Wright.

which excluded (3)(m) ads); *see also* Def.'s Trial Ex. 7 (providing number of advertisements forbidden by other rules, including (3)(m), and showing that, by 2009, *Prison Legal News*' advertising content had widened to include more types of prohibited advertisements; but still not revealing the percentage of (3)(m) advertisements).

Another contention made by PLN, which it hopes this Court will adopt as fact, is that FDOC officials amended the Rule in 2009 specifically to exclude *Prison Legal News*. PLN cites email exchanges among FDOC administrators where they discuss the 2009 amendment and how the new rule might "run afoul" of the promises made in the 2005 litigation. *See, e.g.*, Tr. of Trial 61-66 (Jan. 6, 2015); Pl.'s Trial Ex. 57a-57i. To PLN, these emails are a smoking gun of the ulterior motive animating the 2009 revisions. *See* Tr. of Trial 135-136 (Jan. 5, 2015) (accusing the FDOC of censoring *Prison Legal News* for its editorial content).

At minimum, the emails reveal that FDOC officials were aware that the 2009 changes would lead to rejection of *Prison Legal News*. This supports the finding that the FDOC intended the 2009 amendments to be substantive. And perhaps when placed, as PLN does, in the broader context of FDOC prevarication and inconsistent application of the Rule, they hint at chicanery (more on this later). But it is still a stretch to say that the emails demonstrate that FDOC officials amended the Rule in 2009 specifically to exclude *Prison Legal News*.

These emails are the closest thing PLN presented to direct evidence that the FDOC targets *Prison Legal News*. Other circumstantial evidence relies heavily on

inference to support this theory. PLN reasons, for example, that security concerns could not possibly underlie the amendment because no major incident or tragedy related to the services advertised occurred between 2005 and 2009. The Rule must then be a façade, masking institutional bias against a publication that informs prisoners of their rights.

Such a finding would be nothing less than conjecture. There are many reasons, not the least of which is that there *is* some evidence of stamp-related problems. Animus is not the only inference that can be drawn from the fact that the FDOC amended subsection (3)(l) before a calamity transpired. Plus, the FDOC unequivocally denies any malice, its officials going as far as saying that they view *Prison Legal News* favorably. *See, e.g.*, Tr. of Trial 212:9-:13 (Jan. 7, 2015). More importantly, PLN failed to offer *any* evidence showing that the FDOC does *not* censor other publications containing similar advertising content, or that the only other publications that the FDOC censors contain editorial content similar to *Prison Legal News*. To the contrary, the FDOC produced evidence, though limited, that it has repeatedly rejected other publications on (3)(l) grounds, some of which on their face do not resemble *Prison Legal News*. *See, e.g.*, Def.'s Trial Ex. 12, at 37-39 (censoring *American Arab Message* for advertising services for stamps), 63-65 (censoring *Cellmates* for pen pal advertisement), 69-71 (censoring *Butterwater* catalog for advertising services for stamps), 72-74 (censoring *Picture Entertainment* for advertising services for stamps); Def.'s Trial Ex. 15.

Here, the more limited conclusion is the soundest. And that conclusion is that FDOC officials did not amend subsection (3)(l) in 2009 because they disliked *Prison Legal News*' "editorial" content.[14] And there is no evidence, this Court finds, that the FDOC censors *Prison Legal News* but not other publications with similar advertising content. Lastly, with respect to subsection (3)(l), this Court finds, consistent with the expert testimony presented at trial, that advertisements for such services implicate legitimate security concerns. Tr. of Trial 69-147 (Jan. 7, 2015).

Turning to subsection (3)(m), this Court makes the following findings. Subsection (3)(m) contains a residual clause requiring the FDOC to reject publications that otherwise present a threat to security, order, rehabilitative objectives, and safety. From 2009 onward, the FDOC became increasingly concerned with services falling outside the ambit of (3)(l) and within the purview of (3)(m). *See, e.g.*, Tr. of Trial 15:14-:20 (Jan. 7, 2015). Chiefly troubling among these services—at least to the FDOC—are prisoner concierge services, which enable inmates to establish outside bank accounts, run background checks, and locate people, among other things. *See* Tr. of Trial 69:9-70:8 (Jan. 6, 2015); *see also* Tr. of Trial 73:13-:21 (Jan. 7, 2015) (listing services falling under umbrella term "prisoner concierge services"). This Court finds,

[14] It is not entirely clear how much "motive" matters, if at all, in the First Amendment analysis. The order later explores the divergent case law on this issue. Ultimately, this Court does not decide whether motive matters because, even if it does, PLN failed to present sufficient evidence that FDOC officials acted with ill will in 2009 when they amended the Rule and resumed impounding *Prison Legal News*.

consistent with the expert testimony produced by the FDOC, that advertisements for these services constitute legitimate security risks. *See* Tr. of Trial 69-147 (Jan. 7, 2015).

Prison Legal News contained these sorts of advertisements in 2009. *See* Def.'s Trial Ex. 7. It did not back in 2005. *See id.* Indeed, the largest increase in advertisements in *Prison Legal News* has been for prisoner concierge services. Tr. of Trial 73:13-:21 (Jan. 7, 2015). Unremarkably, then, the FDOC began invoking subsection (3)(m) to censor the publication.

Not all of PLN's evidentiary arguments are duds. The following is largely undisputed. Florida is the *only* state that censors *Prison Legal News* because of its advertising content. Tr. of Trial 71:15-:20, 198-200 (Jan. 5, 2015). The private prison corporations censor *Prison Legal News* only in Florida as well. Tr. of Trial 75:14-:20 (Jan. 5, 2015). Some states that previously censored the publication because of its advertising content have found less restrictive ways of furthering their legitimate penological goals without banning it. *See, e.g.*, Tr. of Trial 81:19-82:14 (Jan. 5, 2015) (explaining that New York staples a notice to the magazine before delivering it to inmates warning them that certain services are prohibited).

Other prison rules seem in tension with the penological grounds upon which the FDOC censors *Prison Legal News*. Inmates may call up to 10 numbers preapproved by the FDOC. Tr. of Trial 13:1-:7 (Jan. 6, 2015). The FDOC claims that three-way calling and call-forwarding present a security risk because these services mask the identity and location of the true recipient of a call. Tr. of Trial 197-200 (Jan.

5, 2015). Yet the FDOC allows inmates to list cell phone numbers, for which it has no way of knowing the location and identity of the person on the other end. *Id.*; *see also* Tr. of Trial 22:5-:10 (Jan. 6, 2015). The assignment of a cell phone number likewise does not depend on geography. Tr. of Trial 49-50 (Jan. 6, 2015) (explaining how someone in Miami can obtain a cell phone number with a Tallahassee area code). Similarly, even though the FDOC has stamp-related security concerns, it allows inmates to possess up to 40 stamps at any given time. Tr. of Trial 188:3-:4 (Jan. 5, 2015). And, as PLN stresses, there are many ways for inmates to obtain the information advertized in *Prison Legal News* despite its censorship.

These inconsistencies aside, this Court determines that the FDOC's stated penological objectives for censoring *Prison Legal New* have been steadfast: security, rehabilitation, and protecting the public, FDOC staff and inmates.

C.

The FDOC's literature review process can be broken down into two groups. The first group consists of incoming publications that have not previously been rejected by the Literature Review Committee ("LRC"), the body that reviews impoundment decisions made by FDOC institutions. As to that group, the process works as follows.

An issue of *Prison Legal News* enters an FDOC facility or institution. Mailroom personnel initially flag potential advertising violations. If they think the advertising content violates the Rule, the publication is sent to the warden or the warden's designee ("[f]or the purposes of approving the impoundment of

publications," the designee is limited to the assistant warden), who makes the impoundment decision for the FDOC institution. Fla. Admin. Code R. 33-501.401(8)(a). If that official believes the publication violates the Rule, he or she completes "Form DC5-101, Notice of Rejection or Impoundment of Publications." *Id.* The form is supposed to indicate the "specific reasons" for impoundment. *Id.*

Several copies of this form are made. Not everyone is entitled to a copy. Under the Rule, the inmate is always entitled to notice whenever a copy of any publication addressed to him or her is impounded. But the Rule only requires that the institution that "originated the impoundment . . . also provide a copy of the completed form to the publisher, mail order distributor, bookstore or sender, and to the literature review committee." Fla. Admin. Code R. 33-501.401(8)(b). "[A] copy of the publication's front cover or title page and a copy of all pages *cited* on [the form]," are attached to the copy sent to the LRC.[15] *Id.* (emphasis added).

FDOC personnel do not mark down every offending advertisement. So the LRC *never* receives a photocopy of the entire impounded publication.[16] The LRC reviews the institution's decision—in (3)(l) cases,

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[15] Briefly, the parties dispute the burden of making a copy for the publisher every time an FDOC facility impounds a copy of an issue. The dispute centered on whether doing so would impose a *de minimus* burden on the FDOC. This Court has considered the evidence and now finds that making a copy for the publisher every time would be minimally burdensome.

[16] The FDOC does not copy the entire publication for fear that doing so infringes copyright protections.

reviewing to see whether offending advertisement is "prominent or prevalent throughout the publication"—without ever knowing the number and size of all offending advertisements in any given issue of *Prison Legal News*, nor the issue's total page count. It may affirm or overturn the institution's decision on different or additional grounds. Tr. of Trial 113:20-:25, 120:20-:23 (Jan. 6, 2015). The LRC does not use Form DC5-101 to make its decision. Tr. of Trial 120 (Jan. 6, 2015). Instead, the LRC uses a different form that it keeps internally. *Id.* These internal forms have not been provided to this Court by either party.

Once an initial impoundment decision is made, the Rule requires all other institutions to impound the same publication pending review by the LRC. Fla. Admin. Code R. 33-501.401(8)(c). The initial impounding institution is supposed to notify other institutions of the impoundment through a centralized database that explains why a specific publication was impounded. This reduces duplicative efforts. Institutions that subsequently receive the same publication should automatically reject it on the same grounds as the initial institution.

Group two concerns publications that have previously been rejected by the LRC. Once the LRC affirms an initial impoundment, it rejects the specific issue of a publication and informs all institutions of its decision. Future recipient institutions are then required to reject other copies of that issue. The LRC does not notify publishers when it upholds an impoundment decision unless the publisher appealed the initial impoundment decision. Tr. of Trial 86:3-:8 (Jan. 6, 2015).

D.

The FDOC has impounded every issue of *Prison Legal News* since September 2009. Pursuant to its policy, it admits not providing PLN a notice of impoundment for every *copy* of each issue it has impounded.[17]

The FDOC says that it has provided PLN at least one impoundment notice per *issue* since 2009. As evidence, the FDOC called two witnesses who worked in the mailroom at Florida State Prison. Tr. of Trial 154, 180 (Jan. 7, 2015). One of them, Ms. Patricia Goodman, has been working there since at least 2009. Tr. of Trial 154:22-155:7 (Jan. 7, 2015). The two witnesses are responsible for mailing out the impoundment notices originating at Florida State Prison. Both testified about the impoundment protocol at their institution and how closely these procedures are followed by mailroom staff. *See, e.g.*, Tr. of Trial 158:5-:7 (Jan. 7, 2015). Neither could independently recall actually sending PLN an impoundment notice every single time. As further support, the FDOC provided documentation of notices of impoundment from 2009 to the present. *See* Def.'s Trial Ex. 5.

None of this, says PLN, demonstrates that the FDOC provided PLN with an impoundment notice for every issue since 2009. PLN is absolutely correct. First, the testimonial evidence submitted by the FDOC is limited to one of its institutions, Florida State Prison. No one argues that Florida State Prison was always the original impounding institution. There

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[17] Whether due process requires individualized notice per copy will be discussed later.

is no evidence that the other institutions regularly followed protocol like Ms. Goodman. Second, even for the Florida State Prison, the witnesses admitted that they could not recall whether they notified PLN every time. Third, the notices of impoundment submitted are reproductions of notices received by PLN from *prisoners*, not the FDOC. *See* ECF No. 241, at 9-10 (explaining that the notices reproduced in Defendant's Trial Exhibit 5 contained PLN Bates numbers; PLN originally disclosed these notices to the FDOC during discovery).

This Court finds in favor of PLN on these facts. PLN proved that it did not receive an impoundment notice for every issue impounded since November 2009. ECF No. 241, at 9. Two of its witnesses explained PLN's mail protocol, credibly establishing PLN's meticulous recordkeeping. Tr. of Trial 252, 268 (Jan. 5, 2015). From November 2009 to June 2013, Mr. Zachary Phillips was responsible for filing mail concerning censorship or possible censorship of *Prison Legal News*. Tr. of Trial 253:8-254:6 (Jan. 5, 2015). He reviewed notices of rejection or impoundment from November 2009 to May 2013. Tr. of Trial 257-263 (Jan. 5, 2015). PLN did not receive a notice of impoundment from the FDOC for many of those months. *See, e.g.*, Tr. of Trial 257:13-:14 (Jan. 5, 2015) (stating that in 2010 PLN did not receive notices in May, June, July, August, September, and October).

In summary, for 26 issues between November 2009 and December 2014, PLN did not receive any notice from the FDOC that *Prison Legal News* had

been impounded.[18] That is roughly 42% of all issues during that period where the FDOC withheld *Prison Legal News* without notifying PLN. ECF No. 241, at 9. Of the notices PLN did receive, many did not list the page numbers containing advertisements allegedly in violation of the Rule. *Id.* Some did not even state the subsection allegedly breached. *Id.* And at least three times PLN received a notice of *rejection* without having first received a notice of impoundment, meaning that the LRC had made its decision before PLN had an opportunity to appeal. *Id.*

Lastly, this Court finds that the FDOC failed to provide notice every time it impounded the *Prisoners' Guerilla Handbook* and the information packets sent to its inmates by PLN. *See* Tr. of Trial 261-262 (Jan. 5, 2015); Tr. of Trial 4-5 (Jan. 8, 2015); Pl.'s Trial Ex. 46; Pl.'s Trial Ex. 86.

IV.

There are three principal issues to be resolved. The first is preliminary and does not address the merits of PLN's lawsuit. That issue is whether the FDOC should be judicially estopped from censoring *Prison Legal News* under Rule 33-501.401(3)(l). Resolving that issue does not completely dispose of the case because PLN also brought an as-applied First Amendment challenge to subsection (3)(m) of the Rule. The two remaining issues are: first, whether the FDOC's censorship of *Prison Legal News* under Rule 33-501.401(3)(l) and (m) unconstitutionally abridges

[18] This is the summary provided by PLN in its post-trial brief. *See* ECF No. 241, at 9. This Court has independently reviewed the evidence submitted at trial and agrees with the summary.

PLN's First Amendment rights;[19] and second, whether the FDOC violated PLN's procedural due process rights.

A.

The preliminary question is whether judicial estoppel bars the FDOC from censoring *Prison Legal News* on the basis that its advertising content violates Rule 33-501.401(3)(l).

The doctrine of judicial estoppel generally "prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting 18 *Moore's Federal Practice* § 134.30, p. 134-62 (3d ed. 2000)). It is designed "to protect the integrity of the judicial process." *Id.* To that end, the doctrine, in its "simplest manifestation[]," estops a party from asserting "a present position because [that] party had earlier persuaded a tribunal to find the opposite." 18B Charles Alan Wright et al., *Federal Practice & Procedure* § 4477 (2d ed. 2015).

The Supreme Court in *New Hampshire* explained that while "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," "several factors typically inform the decision whether to apply the doctrine in a particular case." 532 U.S. at 750 (alteration in original) (quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982)).

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[19] Applied to the State of Florida by the Fourteenth Amendment.

> First, a party's later position must be "clearly inconsistent" with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was misled." Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. at 750-51 (citations omitted).

In this Circuit, courts consider two additional factors. "First, it must be shown that the allegedly inconsistent positions were made under oath in a prior proceeding. Second, such inconsistencies must be shown to have been calculated to make a mockery of the judicial system." *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (quoting *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1308 (11th Cir. 2001), *cert. granted, judgment vacated on other grounds*, 537 U.S. 1085 (2002)). "[T]hese . . . enumerated factors are not inflexible or exhaustive." *Id.* at 1286. And, courts have discretion in invoking the doctrine. *New Hampshir*e, 532 U.S. at 750. But they "must always give due consideration to *all of the circumstances* of a particular case when considering

[its] applicability." *Burnes*, 291 F.3d at 1286 (emphasis added).

The FDOC currently maintains that the advertisements for (3)(l) services in *Prison Legal News* present a security threat, justifying the publication's censorship under that subsection. PLN insists that this position is clearly inconsistent with the 2005 representation that "such 'incidental' ads do not pose a significant security threat to the prisons." Moore Order 15. It would be different if the underlying facts changed, but according to PLN, the only thing that has changed is the FDOC's "interpretation of the evidence or its decisions on how to enforce the rules at issue." ECF No. 241, at 20. It points out that the percentage of (3)(l) advertising content in *Prison Legal News* did not increase significantly from 2005 to 2009, and that no major incident or tragedy linked to (3)(l) services occurred during that time period. The FDOC's "flip-flopping" "over the same rule and same security concerns," PLN claims, is precisely the sort of inveiglement of the judiciary that judicial estoppel is supposed to ward against.

But because circumstances *have* changed, the two FDOC positions are not clearly inconsistent. First, technology changed. In 2005, the FDOC decided not to censor publications containing advertisements for three-way calling and call-forwarding services because it believed that its telephone vendor could detect and block all such attempts. *See* Moore Order 14. Yet inmates have continued to bypass the FDOC's security measures using technology such as VoIP that previously was not so widely available. The FDOC was clearly mistaken about the efficacy of its security

measures. Judicial estoppel simply does not apply "when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996).

Second, the extent to which *Prison Legal News* advertizes services prohibited by (3)(l) has also changed. PLN stresses that the proportion of the magazine that is (3)(l) advertisement barely increased from 9.21% in 2005 to 9.8% in 2009. To PLN, these percentages demonstrate that in 2009 such advertisements were no less "incidental" than they had been in 2005. PLN thus equates "incidental" to proportional.

A strictly proportion-based metric, however, overlooks significant differences. For starters, *Prison Legal News* ran larger ads in 2009. A chart submitted by the FDOC tallies the number of "half page or greater" (3)(l) ads. Def.'s Trial Ex. 7. From April 2005, the last issue censored in the previous litigation, to September 2009, the number of such ads increased by 100%, from 2 to 4. *Id.* at 1. That number rose even more, now hovering around 6 per issue. *Id.* at 3. So while the overall proportion of (3)(l) advertisement had not increased significantly in 2009, the number of larger, more conspicuous ads did.

The magazine also shifted away from advertising three-way calling services to advertisements enabling inmates to purchase products or services with postage stamps. By PLN's own account, the number of these so-called "stamp" advertisements went from 2 in April 2005 to 7 in September 2009. *Compare* Pl.'s Trial Ex. 79, at 17-18, *with id.* at 43-44. That number has

steadily ticked upward: 8 by November 2009; 9 in February 2010; 10 in March 2010; a slight decrease before rebounding to 11 in July 2010; 13 by August 2010; peaking at 17 in March 2013; and steadying at the lower end of the teens ever since. *Id.* at 44-84. Advertisements for three-way calls have not seen this growth, but they have not decreased either. *Id.* Although PLN argues that the overall percentage of (3)(l) advertisements has not changed much,[20] the magazine clearly emphasizes a different *type* of (3)(l) ad today than it did in 2005.

The most obvious shortcoming with equating "incidental" to proportional is that it misses the absolute increase of advertisements for services prohibited by (3)(l). *See id.*; Def.'s Trial Ex. 7. Perhaps a 10-page publication with one page of advertisement is functionally equivalent to a 100-page publication with ten pages of advertisement. This Court, however, refuses to supplant FDOC officials' judgment on whether one of these equally proportionate, but qualitatively different publications presents any more of a security risk than the other. *See Jones v. N. Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (admonishing the lower court for "not giving appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement").

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[20] This is not actually true. The overall percentage in 2005 was 9.21%. Pl.'s Trial Ex. 79, at 85. By 2011 that number had gone up to 10.19%. *Id.* It hit 12.66% in 2012, and now hovers above 15%. *Id.*

All of these changes to the content and format of *Prison Legal News* matter for judicial estoppel. PLN paints the FDOC's representations in 2005 as a blanket promise that *Prison Legal News* would never again be censored for advertising services prohibited by (3)(l). But that is not what the Moore Order articulates. The FDOC represented that "*such* 'incidental' ads" did not pose a security threat. Moore Order 15 (emphasis added). This is a direct reference to the advertising content at issue in that case. *See* Black's Law Dictionary 1661 (10th ed. 2014) (defining "such" as "That or those; having just been mentioned"). By limiting its representation, the FDOC's promise cannot fairly be read as extending to all future iterations of such advertisements, particularly those different in kind.

Furthermore, the Moore Order itself reflects the limited finding that the FDOC had promised not to impound *Prison Legal News* "in its *current format*." Moore Order 21 (emphasis added). The Eleventh Circuit reiterated this understanding on appeal. *McDonough*, 200 F. App'x at 878 ("The FDOC demonstrated that its current impoundment rule does allow for distribution of PLN in its *current format*.") (emphasis added). The format changed in four years. It has changed even more since then. Consequently, the FDOC's current position is not clearly inconsistent with the position it took before Judge Moore, and this Court's acceptance of that position would not "create the perception that . . . the first . . . court was misled." *New Hampshire*, 532 U.S. at 750-51.

Accordingly, the FDOC is not judicially estopped from adopting the current position that *Prison Legal*

News must be censored because its (3)(l) advertising content presents a security risk.[21]

B.

This Court must also decide whether the FDOC's censorship of *Prison Legal News* pursuant to Rule 33-501.401(3)(l) and (m) violates PLN's rights under the First Amendment.

PLN has a legitimate First Amendment interest in accessing prisoners "who, through subscription, willingly seek [the] point of view" expressed in *Prison Legal News*. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). Prison regulations limiting that access must be analyzed under the reasonableness standard developed by the Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987). *Thornburgh*, 490 U.S. at 413-14 (holding that regulations affecting the sending of a "publication" to a prisoner must be analyzed under *Turner*; refusing to distinguish between incoming correspondence from prisoners and incoming correspondence from nonprisoners); *accord Washington v. Harper*, 494 U.S. 210, 224 (1990) ("[T]he standard of review we adopted in *Turner* applies to all circumstances in which the needs of

[21] The FDOC additionally contends that judicial estoppel does not apply against states when doing so would "compromise a governmental interest in enforcing the law" and "where broad interests of public policy [are] at issue." ECF No. 242, at 4-5 (quoting *New Hampshire*, 532 U.S. at 755-56). It argues this case implicates both concerns. First, estoppel would compromise the FDOC's interest in enforcing prison safety rules. Second, broad interests of public safety and prison security are at issue. PLN responds that neither interest is at play in this litigation. This Court need not decide this issue because it finds that the totality of the circumstances counsel against judicial estoppel.

prison administration implicate constitutional rights."); *Perry v. Sec'y, Florida Dep't of Corr.*, 664 F.3d 1359, 1365 (11th Cir. 2011). Under *Turner*, such regulations are "valid if [they are] reasonably related to legitimate penological interests." *Thornburgh*, 490 U.S. at 413 (alteration in original) (quoting *Turner*, 482 U.S. at 89).

Several factors are relevant to the reasonableness inquiry. The first factor is multifold, requiring courts to "determine whether the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Id.* at 414. This "'factor' is more properly labeled an 'element' because it is not simply a consideration to be weighed but rather an essential requirement." *Salahuddin v. Goord*, 467 F.3d 263, 274 (2d Cir. 2006); *accord Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001) ("[After stating the first *Turner* factor:] 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.").

A second factor "is whether there are alternative means of exercising the right that remain open to [the plaintiff]." *Turner*, 482 U.S. at 90. "A third consideration is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Finally, *Turner* instructs lower courts to inquire whether there are "easy alternatives" indicating that the regulation is not reasonable, but rather an "exaggerated response" to prison concerns. *Id.*

After the impinged constitutional right has been identified, as is the case here, the state must "put forward" the legitimate governmental interests underlying its regulation. *Id.* at 89. Once this is done, the plaintiff bears the ultimate burden of showing that the regulation in question, as applied, is not reasonably related to legitimate penological objectives. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) ("The burden, moreover, is not on the State to prove the validity of prison regulations but on the [plaintiff] to disprove it.").

The FDOC identified public safety and prison security as the underlying legitimate governmental interests.[22] No one questions whether those are legitimate governmental interests. Any suggestion to the contrary would be fruitless. *See Thornburgh*, 490 U.S. at 415 (holding that regulation promulgated with the purpose of "protecting prison security" is legitimate, since that "purpose . . . is central to all other corrections goals"); *Perry*, 664 F.3d at 1366 (acknowledging that "protecting the public and ensuring internal prison security" are legitimate penological interests).

PLN instead contends that the FDOC's application of Rule 33-501.401(3)(l) and (m) is not content-neutral, and that censoring *Prison Legal News* for its advertising content is not rationally related to public safety and prison security. And so, with respect to the first factor, the question becomes (1) whether the Rule "operate[s] in a neutral fashion,

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[22] It identified other reasons too, but only the security objectives are necessary for this analysis.

without regard to the content of the expression" at issue; and (2) whether censoring *Prison Legal News* due to its advertising content rationally relates to public safety and prison security. *Turner*, 482 U.S. at 90.

As to neutrality, the Supreme Court has explained that *Turner* requires nothing more than that "the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression." *Thornburgh*, 490 U.S. at 415 (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)). "Where . . . prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are 'neutral' . . . ." *Id.* at 415-16.

The limited evidence at trial reveals that the FDOC censors an assorted mix of publications under subsections (3)(l) and (m). Nothing in the record implies that such censorship turns on the content of the publication. PLN did not show, for instance, that the FDOC disparately censors publications critical of its institutions.

Lacking this evidence, PLN argues that FDOC administrators did not amend the Rule in 2009 on legitimate penological grounds. PLN alleges, citing a series of emails, that the true motivation behind the amendment was a dislike of *Prison Legal News*. *See* Pl.'s Trial Ex. 57a-57i.

"It is unclear what role, if any, motive plays in the *Turner* inquiry." *Hatim v. Obama*, 760 F.3d 54, 61 (D.C. Cir. 2014). *Compare Hammer v. Ashcroft*, 570 F.3d 798, 803 (7th Cir. 2009) ("It is not clear why one

bad motive would spoil a rule that is adequately supported by good reasons. The Supreme Court did not search for 'pretext' in *Turner*; it asked instead whether a rule is rationally related to a legitimate goal.") (citation omitted), *with Salahuddin*, 467 F.3d at 276-77, *and Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) ("Prison officials are not entitled to the deference described in *Turner* and *Procunier* if their actions are not actually motivated by legitimate penological interests at the time they act."). In this case, the contours of that role need not be delineated because "[e]ven if some quantum of evidence of an unlawful motive can invalidate a policy that would otherwise survive the *Turner* test," the evidence introduced by PLN is "too insubstantial to do so." *Hatim*, 760 F.3d at 61; *see also Prison Legal News v. Stolle*, No. 2:13CV424, 2014 WL 6982470, at *6 n.2 (E.D. Va. Dec. 8, 2014) (rejecting applicability of motive and holding, in the alternative, that PLN failed to present sufficient evidence of "unlawful motive" that could "invalidate a policy that would otherwise survive the *Turner* test"). As previously explained, the emails simply do not evidence unlawful animus on the part of FDOC administrators. Neither does the other circumstantial evidence. PLN thus failed to show that the FDOC applies Rule 33-501.401(3)(l) and (m) in a biased fashion.

Setting neutrality aside, this Court now turns to the gravamen of PLN's First Amendment challenge. PLN advances three principal reasons for why there is no rational connection between the censorship at issue and the stated penological objectives.

The first argument boils down to a dispute about the evidentiary burden necessary to establish a "rational" connection. Everyone, even PLN's expert, agrees that the underlying services addressed in Rule 33-501.401(3)(l) and (m) unquestionably compromise public safety and prison security. *See, e.g.*, Tr. of Trial 68-69 (Jan. 8, 2015) (summarizing how even PLN's expert agrees that the underlying services compromise security); Tr. of Trial 203:9-:15 (Jan. 5, 2015) (admitting that "[those services raise] very legitimate concerns"). This is why the FDOC forbids prisoners from using them.

But PLN says that evidence that prohibiting the use of these services furthers security is not enough. This case, PLN insists, is not about those services. This case is about censoring a publication because it *advertizes* those services. That is correct. Even so, the FDOC *also* articulated a logical connection between censorship and the penological objectives at stake, *and* presented sufficient evidence in support.

The logic is straightforward. Without question, the proper, initial response to the dangerous services is forbidding prisoners from using them. Though not surprisingly, they do so anyway. Tr. of Trial 241-243 (Jan. 7, 2015). *See generally Washington*, 494 U.S. at 225 ("[A] prison environment, . . . 'by definition,' is made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.'" (quoting *Hudson v. Palmer*, 468 U.S. 517, 526 (1984))). So the FDOC has adopted prophylactic safeguards in addition to bare proscription.

Rule 33-501.401 is such a safeguard. Advertisements compromise security because they

convert a publication into a "one-stop shop"—to borrow from the FDOC's expert—for dangerous services. Tr. of Trial 71-72:15 (Jan. 8, 2015). By limiting inmates' exposure, the Rule seeks to reduce the likelihood that inmates will use those services.

PLN responds that such "general or conclusory" articulation of rationality is insufficient to withstand constitutional muster. Tr. of Trial 64:17 (Jan. 8, 2015). This Court agrees, "*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 (2006). The FDOC met that burden by providing the testimony of several administrators who, "relying on their professional judgment, reached an *experience-based* conclusion that [censorship] . . . further[s] [the] legitimate prison objectives." *Id.* at 533 (emphasis added); *see also Prison Legal News v. Livingston*, 683 F.3d 201, 216 (5th Cir. 2012) ("[P]rison policies may be legitimately based on prison administrators' *reasonable assessment* . . . .") (emphasis added). And, as additional support, the FDOC provided "expert testimony to establish that [censorship] will help curb" prisoners' use of the services. *Perry*, 664 F.3d at 1366 (holding that expert testimony is sufficient to establish rational connection; deferring to the opinion of FDOC administrator James Upchurch, who is also a witness in this case).

None of this suffices for PLN. It wants specific past incidents. And not merely some past example of an inmate using a prohibited service to do something bad; PLN demands a concrete, unfortunate incident caused by an inmate using a banned service, which the

inmate learned about in *Prison Legal News*. *See, e.g.*, Tr. of Trial 66:2-:8 (Jan. 8, 2015).

No controlling precedent in this Circuit requires the FDOC to provide evidence of an actual, past incident. *See, e.g.*, *Perry*, 664 F.3d at 1363 (affirming summary judgment in favor of the FDOC on First Amendment challenge to prison regulation despite fact that the FDOC failed to cite specific instances of the alleged problem in Florida). Several other circuits likewise do not require it. *See, e.g.*, *Murchison v. Rogers*, 779 F.3d 882, 890 (8th Cir. 2015) ("[P]rison officials need not wait until particular prohibited material causes harm before censoring it . . . ."); *Livingston*, 683 F.3d at 216 ("[P]rison policies may be legitimately based on prison administrators' reasonable assessment of *potential* dangers."). But even if such evidence were required, FDOC administrators provided examples, both in Florida and throughout the country, of problems associated with specific services that advertize, or have advertized, in *Prison Legal News*. *See, e.g.*, Tr. of Trial 5-6, 39-41 (Jan. 6, 2015) (explaining that FDOC officials learned of a company that had been sending prisoners money for stamps, and how such companies could distribute money for prisoners to people in the outside world in exchange for stamps; this company had previously advertized on *Prison Legal News*).

PLN's second reason is that the FDOC applies the Rule arbitrarily. PLN introduced evidence of identical issues of *Prison Legal News* censored at separate FDOC facilities on different grounds, as reflected on the impoundment notice accompanying the censorship. There is also some testimony about issues

that were initially admitted at some facilities while denied at others. Lastly, PLN stresses that advertisements for other prohibited services and products are not censored by the FDOC. PLN maintains that these inconsistencies amount to an irrational application of the Rule.

Case law supports the proposition that the consistency with which a regulation is applied matters for determining whether it is rationally connected to a legitimate penological objective. "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." *Murchison*, 779 F.3d at 890 (emphasis added). In addition to inconsistent censorship of "similar" material, general "inconsistencies could [also] become so significant that they amount to a practical randomness that destroys the relationship between a regulation and its legitimate penological objectives." *Id.* (quoting *Livingston*, 683 F.3d at 221); *see also Thornburgh*, 490 U.S. at 417 n.15.

Although PLN has presented evidence of inconsistent censorship decisions made by FDOC mailroom staff, this Court does not believe PLN demonstrated inconsistencies that rise to a level of randomness or that undermine the rationale for censoring *Prison Legal News*. The fact that mailroom personnel do not uniformly censor *Prison Legal News* on the same grounds is not dispositive. "With the volume of material that must be screened, we cannot expect prison officials to perfectly screen all material that violates prison regulations." *Murchison*, 779 F.3d

at 890. Inconsistent application by mailroom staff goes more to the vagueness of the Rule.

In any event, mailroom staff decisions are not final and do not permanently compel censorship of the magazine throughout Florida. Initial impoundment decisions are subject to review by the LRC. The LRC rejects the publication on the grounds it thinks adequate. That decision is then uniformly applied throughout Florida because once the LRC makes a decision, there is no further individualized review by mailroom staff.

This pares down the risk of randomness and distinguishes this case from *Thornburgh*,[23] where each prison warden independently decided censorship, such that "certain federal prisons had excluded the *very same book* that others had allowed." *Livingston*, 683 F.3d at 221. Here, the very same issue of *Prison Legal News* is eventually censored throughout the FDOC. Like in *Livingston*, the LRC's "system-wide" "exclusion decisions" make the inconsistencies "only arguable," because the only apparent inconsistencies left to sort out are the decisions to admit, for example, an advertisement about guns versus one about three-way calling. *Id.* This Court refuses to engage in such "one-to-one comparisons" of specific ads. *Id.* Not because these inconsistencies are irrelevant. But rather, due to the substantial deference owed prison

[23] Yet, even the inconsistencies in that case did not defeat an otherwise rational connection. *Thornburgh*, 490 U.S. at 417 n.15 (addressing the "seeming inconsistencies" in that case and holding that the regulation at issue struck "an acceptable balance" between uniformity and individualized review).

administrators regarding which type of advertisement is more problematic.

Absent a showing that the FDOC is admitting other magazines containing advertisements closely resembling those found in *Prison Legal News*, which there is none, this Court holds that the "limited amount of inconsistency at the margins of [the FDOC's] exclusion decisions is not enough to defeat the reasonableness of [the FDOC's] practices." *Id.*

The last argument PLN advances is that other FDOC regulations undermine the Rule to such a great extent that they render the Rule's connection to security irrational. To illustrate, among the many such rules explored at trial is a regulation permitting inmates to list cell phone numbers on their preapproved contact list and another allowing inmates up to 40 stamps at any given time. *See* Tr. of Trial 22:5-:10 (Jan. 6, 2015); Tr. of Trial 188:3-:4 (Jan. 5, 2015). PLN asserts that these rules undermine the logic behind censoring some of the services singled out in (3)(l). Cell phones have three-way calling and call-forwarding capabilities identical to, or better than, the services advertized on *Prison Legal News*. The FDOC has no way of knowing a cell phone user's location, just like it does not know the location of the person on the other end of a forwarded call. Tr. of Trial 197 (Jan. 5, 2015); Tr. of Trial 22:5-:10 (Jan. 6, 2015). Also, the FDOC allows inmates to have stamps and allows families to send inmates stamps despite their contention that they are a serious hazard in prisons. *See* Tr. of Trial 188:3-:4 (Jan. 5, 2015).

An FDOC administrator explained each conflicting rule. Cell phones are ubiquitous in modern

society. Prohibiting inmates from calling cell phones would effectively preclude them from speaking with many of their loved ones who no longer carry land lines. The FDOC could theoretically impose such a draconian rule, but it would surely lead to increased tension within prisons. *See* Tr. of Trial 102-103 (Jan. 7, 2015) (summarizing practical impossibility).

Likewise, the FDOC once proposed a rule that would have embargoed stamps sent by family members to an inmate by mail. Tr. of Trial 23 (Jan. 6, 2015). Under the proposed rule, families would have been limited to depositing money into inmates' prison accounts which the inmate could then use to purchase stamps. Families and friends of prisoners vehemently opposed the proposal, expressing concern that the rule would increase the likelihood that their imprisoned loved ones would either be victimized or simply not purchase any stamps at all. Tr. of Trial 23-24 (Jan. 6, 2015). Moreover, FDOC officials testified that implementing the accounting measures proposed by PLN to counteract the problems with stamps would be too costly and require amending state statutes. Tr. of Trial 25 (Jan. 6, 2015). Nearly every other seemingly paradoxical regulation in place also had some corresponding explanation.

Running a prison system is not easy. Prison administrators, charged with the unenviable task of "deal[ing] with the difficult and delicate problems of prison management," must make considered decisions that balance order, security and resources. *Thornburgh*, 490 U.S. at 407-08. The first *Turner* factor requires this Court to determine whether the censorship at issue is rationally related to legitimate

penological objectives. Finding that it is both rational and supported by evidence, this Court declines PLN's invitation to disrupt the balance struck by the FDOC.

The remaining factors tilt in the FDOC's favor as well. When considering whether alternative means of exercising the abridged right remain open to the plaintiff, the Supreme Court instructs courts to view "'the right' in question . . . sensibly and expansively." *Id.* at 417. This means that the alternatives need not be perfect substitutes. *Livingston*, 683 F.3d at 218.

The Rule leaves open sufficient alternatives for PLN to express their point of view to inmates. First, as in *Perry*, the Rule does not completely prevent PLN from corresponding with inmates. 664 F.3d at 1366. There are countless other written materials that PLN may send prisoners. As the Fifth Circuit in *Livingston* explained, if alternative means existed in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), "where prisoners were cut off from [a] unique and irreplaceable [activity]"—"a unique religious ceremony"—surely there are alternatives to a magazine. 683 F.3d at 219.

Second, even *Prison Legal News* is not invariably censored. The Rule applies only when a particular issue's advertising content crosses a certain threshold.[24] And while this Court accepts that advertisements are necessary, the unfeasibility of printing *Prison Legal News* without advertising content is not dispositive. PLN has not proven that it

[24] This threshold, however, is almost impossible to identify. As this Court will explain shortly, vagueness is principally responsible for the Rule's disparate application.

is unable to adopt advertising rubrics that would help bring its magazine in line with prison regulations.

The third factor is the impact the accommodation of the asserted constitutional right will have on guards, inmates and prison resources. In this case, "the class of publications" excluded by the Rule "is limited to those found potentially detrimental to order and security." *Thornburgh*, 490 U.S. at 418. The evidence demonstrates that accommodating the specific way in which PLN seeks to exercise its right—through a publication containing dangerous amounts of advertising content—would "significantly less[en] liberty and safety for everyone else, guards and other prisoners alike." *Id.* The Supreme Court has held that this fact alone pushes the third factor in FDOC's favor. *Id.* (deferring to the "informed discretion of corrections officials" who had said that accommodating the right would lessen liberty and safety for "everyone else, guards and other prisoners").

The final *Turner* factor is whether there are "easy alternatives" indicating that the regulation is not reasonable, but rather an "exaggerated response" to prison concerns. 482 U.S. at 90. This is not an inquiry into whether prison officials adopted the "least restrictive alternative." *Id.* at 90-91. "But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

As this Court explained during its discussion of rationality, there are no "easy alternatives" available to the FDOC. The prohibition against using the

services themselves is not enough. Similarly, the alternatives suggested by PLN to eliminate the security concerns either have equally unattractive side effects or are costly to implement.

Additionally, with respect to subsection (3)(l), "[a]lthough the FDOC did not need to narrowly tailor its Rule to only prohibit" publications containing "prominent or prevalent" offending advertisements, it adopted a less exaggerated response than censorship for *any* amount of offending advertising content. *Perry*, 664 F.3d at 1367. And as to subsection (3)(m), this Court is "comforted by the individualized nature of the determinations required by the regulation," under which a publication is censored only if the LRC determines that it "presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person." *Thornburgh*, 490 U.S. at 416.

Admittedly, the fact that Florida is the only state that currently censors *Prison Legal News* for its advertising content is troubling—at least for purposes of determining whether the Rule is indeed an exaggerated response. Some states *have* censored the publication for its advertising content. New York once censored it for carrying advertisements about services accepting stamps as payment. Tr. of Trial 81-82 (Jan. 5, 2015). New York eventually settled on a less restrictive way of furthering its security interest without censoring the entire magazine: attaching a notice warning prisoners that the services advertized are prohibited. *Id.* Even if this is the sounder policy, the FDOC is not required to implement the least restrictive regulation. Moreover, the FDOC may be

constrained in ways that New York's department of corrections is not. Significant variances would make comparison futile. Comparing different states' department of corrections is difficult, and in this case the parties did not submit sufficient evidence to do so.

This Court is also not blind to the *many* other worrisome facts uncovered at trial. The most disconcerting is the Rule's vagueness. None of the witnesses at trial were able to articulate any reasonably specific guidelines to determining when advertisements were "prominent or prevalent." Some considered whether font was large and bolded to determine prominence. Others looked to the size of the advertisements. For prevalence, no one could identify a cutoff. With no framework handy, this Court would probably be unable to apply the Rule to those publications at the margins. Yet FDOC officials felt very strongly about their ability to determine prominence and prevalence correctly. It seems that they, unlike this Court, "know it when [they] see it." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

To make matters worse, the LRC, the final decision-maker, *never* reviews an entire publication or book when it makes its decision. As this Court mentioned earlier, this means that final determinations about *prevalence* are made without knowing whether, for instance, the four or five pages copied and attached to the impoundment notice are four or five out of one hundred, one thousand.

That being said, there is no void-for-vagueness claim pending. This lawsuit instead focuses on whether the FDOC has applied subsections (3)(l) and

(m) to *Prison Legal News* in a manner reasonably related to legitimate penological interests. Courts have wrestled with the role played by *general* vagueness in the *Turner* analysis. *See Martinez v. Fischer*, No. CIV S-10-0366 GGH P, 2011 WL 4543191, at *8 n.4 (E.D. Cal. Sept. 28, 2011) ("[T]he undersigned has trouble fitting the *Turner* test, an analysis focused on the legitimacy of prison regulations, with an analysis focused on whether regulations are understandable."); *Miller v. Wilkinson*, No. 2:98-CV-275, 2010 WL 3909119, at *5 (S.D. Ohio Sept. 30, 2010) (noting that "[p]rison regulations are not often challenged on vagueness grounds" and that some courts have held that "the First Amendment overbreadth doctrine, do not 'apply with independent force in the prison-litigation context' " (quoting *Waterman v. Farmer*, 183 F.3d 208, 213 (3d Cir. 1999))); *Bahrampour v. Lampert*, 356 F.3d 969, 975-76 (9th Cir. 2004) (applying *Turner* test despite inmate's assertion that vagueness and overbreadth claims must be considered separate and apart from application of *Turner* test.); *cf. Sweet v. McNeil*, No. 4:08CV17-RH/WCS, 2009 WL 903291, at *7 (N.D. Fla. Mar. 31, 2009) (Hinkle, J.) (importing deferential principles to void-for-vagueness suit, in light of *Turner*).[25]

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[25] PLN does not argue that the *Turner* analysis entirely subsumes the void-for-vagueness inquiry. Moreover, PLN moved to amend their complaint to add a void-for-vagueness claim. This implies that PLN also thinks that the two claims are separate and distinct. In addition, there has not been *any* argument on the issue of whether void-for-vagueness and overbreadth claims apply with independent force in the prison context. This Court accordingly treats them as separate claims.

In this case, all *Turner* factors support the FDOC. This includes the last one, where, instead of banning any amount of offensive advertisement, the FDOC elected the less restrictive option of allowing publications with some advertising content. The difficulty of applying the more reasonable option should not, and does not, overcome the other *Turner* factors. The uniformity with which the publication has been rejected by the LRC, both at the time and after re-reviewing the censored issues in preparation for trial, further alleviates the concern that the Rule cannot be applied intelligibly. Finally, the Rule here seems equally as difficult to apply as the one in *Thornburgh*, but that did not preclude a finding in the government's favor. *See* 490 U.S. at 428 (Stevens, J., concurring in part and dissenting in part) (addressing the regulation's vagueness).

This Court therefore holds that PLN has failed to show that the FDOC's censorship of *Prison Legal News* is not "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

C.

The final issue is whether the FDOC violated PLN's due process rights in its impoundment of *Prison Legal News*, the *Prisoners' Guerilla Handbook* and the information packets sent to FDOC inmates.

The "decision to censor or withhold delivery of a particular [publication]," such as *Prison Legal News*, "must be accompanied by minimum procedural safeguards."[26] *Procunier*, 416 U.S. at 417. Under

[26] *Procunier* addressed the due process afforded prisoners and their correspondents when exchanging letters. Circuit courts

Procunier, those safeguards are: (1) notifying the intended recipient-inmate; (2) giving the author of the publication a reasonable opportunity to protest the decision; and (3) referring complaints about the decision to a prison official other than the person who originally disapproved the correspondence.[27] *Id.* at 418-19.

PLN claims that the current review process violates *Procunier* because only the institution that initially impounds an issue of *Prison Legal News* is required to provide the publisher notice. Publishers, PLN argues, are entitled to notice every time a *copy* of an issue is impounded. This is so even if later

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have extended the due process safeguards to magazine publishers. *See Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004); *Montcalm Pub. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996). They have held that a publisher's right to due process does not depend on notifying the inmate. *Jacklovich*, 392 F.3d at 433-34.

[27] The FDOC seems to have abandoned its argument that *Mathews v. Eldridge* applies. 424 U.S. 319 (1976). Even if *Eldridge* did apply, *see Perry*, 664 F.3d at 1368, it would similarly require of the FDOC the same procedural safeguards this Court sets forth in this order. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Eldridge*, 424 U.S. at 333. A "meaningful manner" presupposes that the deprived party be provided with the information necessary to mount a meaningful challenge to the deprivation. In this case, that means informing PLN of the distinct, independent bases upon which its magazine has been impounded. Sharing this information is critical to reducing the risk of erroneous deprivation. Testimony about the ease of making additional copies suggests that the costs of implementation are minimal. The upshot of doing so benefits the government's interest in due process of law and ensures that PLN has a meaningful opportunity to contest the deprivation.

impoundment decisions duplicate earlier determinations. The FDOC responds that since all issues of *Prison Legal News* are alike, PLN is only entitled to one notice per issue.

Neither party properly demarks the requirements of due process. *Procunier* demands that the publisher "be given a *reasonable* opportunity to protest" the censorship. *Id.* at 18 (emphasis added). For an opportunity to be reasonable, the publisher must know of the grounds upon which the publication has been censored. *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. Pa. L. Rev. 1267, 1280 (1975) (explaining that it is "fundamental" to due process that "notice be given . . . that . . . clearly inform[s] the individual of the proposed action and the grounds for it"). This knowledge component of due process does not turn on whether the publication is the first copy or a subsequent copy. What matters is the basis for censorship. If a subsequent impoundment decision is based on a *different* reason not previously shared with PLN, due process requires that PLN be told of this new reason.

The FDOC's current policy of providing notice once per issue should theoretically satisfy this formulation. Under the Rule, once one institution impounds an issue of *Prison Legal News*, a later institution must *automatically* impound that same issue pending a final rejection determination by the LRC. Fla. Admin. Code R. 33-501.401(8)(c). The subsequent institution learns of the first institution's reasons for impoundment through a centralized database. It must then inform its inmate of "the specific reasons why the publication *was* impounded."

Id. (emphasis added). That is, the later institution must inform the prisoner of the initial institution's reasons for impoundment.

The succeeding, perfunctory impoundment amounts to "routine enforcement of a rule with general applicability" because it does not raise new grounds for censorship. *Livingston*, 683 F.3d at 223. The initial reasons for impoundment having been communicated to PLN, this ordinarily would not require additional notice.

Despite this mechanism, PLN has at times received multiple notices impounding a specific issue of *Prison Legal News* on different grounds. PLN expresses uncertainty as to how this happens, since the Rule requires future institutions to replicate the first institution's reasoning. ECF No. 241, at 12 n.10.

One explanation is that sometimes multiple institutions receive the same issue of *Prison Legal News* simultaneously. When that happens, each institution thinks of itself as an initial impounding institution. In that scenario PLN should receive a notice *per* initial impounding institution. But the moment these simultaneous, initial impoundment decisions are disseminated throughout the FDOC, later institutions should cease providing independent grounds for exclusion.

Another explanation is that the Rule is not always followed. And as a result a subsequent impoundment is not perfunctory, but rather the product of an independent determination. *See, e.g.*, ECF No. 241, at 11-12 (summarizing evidence). Worse, FDOC has at times completely failed to inform PLN of an impoundment decision, only notifying PLN of a

rejection. This means that by the time PLN received notice, the LRC had already reviewed the initial impounding institution's decision.

The FDOC claims that even if its employees failed to send PLN impoundment notices, it cannot be held liable because the failure is merely negligent. It cites *Daniels v. Williams*, 474 U.S. 327 (1986), and *Davidson v. Cannon*, 474 U.S. 344 (1986), in support of the argument that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Daniels*, 474 U.S. at 328. PLN, in response, contends that *Daniels* only holds that the *substantive* deprivation must be caused by conduct beyond mere negligence. According to PLN, the failure to provide notice—that is, the process itself—gives rise to liability, even if the employee only negligently failed to do so.

There seems to be a circuit split on the issue of whether *Daniels* is limited to the substantive deprivation or whether it extends to the process itself. In *Dale E. Frankfurth, D.D.S., v. City of Detroit*, the plaintiff brought an action under § 1983 for damages resulting from the demolition of a building he owned. Nos. 86-1476, 86-1825, 1987 WL 44769, at *1(6th Cir. Sept. 17, 1987). The Sixth Circuit, citing *Daniels*, held that the plaintiff's "failure to receive notice was due to the negligent act of a clerk. Because the act was negligent, no fourteenth amendment deprivation is involved and there is no constitutional need to provide a remedy." *Id.* at *3; *accord Brunken v. Lance*, 807 F.2d 1325, 1331 (7th Cir. 1986) ("[*Daniels*] teaches that an official does not 'deprive' a person of life,

liberty, or property, within the meaning of the Fourteenth Amendment, when an official's negligent act causes the unintended loss of or injury to life, liberty, or property. . . . Given this evidence, [the defendant's] failure to notify [the plaintiff] was at most negligent.").

In contrast, the Third Circuit in *Sourbeer v. Robinson* limited *Daniels* to the substantive deprivation. 791 F.2d 1094, 1104-05 (3d Cir. 1986). In so doing, it summarized the distinction well:

> Cases such as *Davidson*, dealing with a state of mind requirement for § 1983/due process actions, relate only to the highly unusual circumstance where the *deprivation* of life, liberty, or property the case is predicated upon was not intentional, as opposed to where the failure to provide adequate process was not intentional. For example, in *Davidson* prison guards negligently failed to take action to protect one prisoner who was threatened by another, allegedly "depriving" him of a liberty interest in being free of assaults. . . . In [*Daniels*] it was alleged that a correctional deputy had negligently left a pillow on a stairway, causing the plaintiff to slip and thereby "depriving" him of a liberty interest. These cases, it is readily apparent, are of a highly unusual nature—the defendants had probably not even been aware until after the fact of the "deprivations" that would trigger due process concerns. "To hold that injury caused by such conduct is a *deprivation* within the meaning of the

> Fourteenth Amendment would trivialize the centuries-old principle of due process of law."
>
> Here, in contrast, the keeping of Sourbeer in administrative custody—depriving him of liberty—was itself an intentional act. That being the case, it was not necessary for the district court to make any other state of mind finding. We know of no authority for the proposition that an intentional deprivation of life, liberty or property does not give rise to a due process violation because the failure to provide due process was without fault.

Id. (citations omitted). As far as this Court or the parties can tell, the Eleventh Circuit has not spoken on the issue.

This Court believes that the Third Circuit has the better-reasoned opinion. This is particularly true here, where the relief sought is declaratory and injunctive. Even supposing that the "fault" associated with past failures matters for recovering damages against the government, an injunction pivots on the "independent legal right . . . being infringed." *Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1127 (11th Cir. 2005). The right in this case implicates "the most rudimentary demands of due process of law"—notice. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965). Just because past failures were the product of negligent conduct does not absolve the FDOC of its constitutional obligation to provide notice going forward.

In any event, PLN has shown that the FDOC's failure to provide notice exceeded negligence. The systemic failure of FDOC personnel to provide notice

42% of the time reveals that the failures were not coincidental. The high failure rate indicates a substantial risk, one disregarded by FDOC administrators. At the very least this amounts to recklessness or gross negligence, which everyone agrees suffices for a due process violation. *See Fagan v. City of Vineland*, 22 F.3d 1296, 1305 (3d Cir. 1994) (collecting cases); *Burch v. Apalachee Cmty. Mental Health Servs., Inc.*, 840 F.2d 797, 802 (11th Cir. 1988), *affirmed sub. nom. Zinermon v. Burch,* 494 U.S. 113 (1990) (holding allegations of actions taken willfully, wantonly, and with reckless disregard sufficient to state a due process claim). *See generally Farmer v. Brennan*, 511 U.S. 825, 839 (1994) (deliberate indifference is conscious disregard of a substantial risk).

This same reasoning applies to impoundment of the *Prisoners' Guerilla Handbook* and the information packets. The record unquestionably establishes that FDOC personnel failed to notify PLN on a couple of occasions that it had impounded the *Prisoners' Guerilla Handbook* and the information packets. The injunction is appropriate because those failures are part of the greater, widespread practice of not providing notice.

Before concluding, this Court addresses two remaining arguments. First, the FDOC contends that PLN waived due process. Mr. Wright admitted that at some point PLN stopped appealing impoundment decisions. Tr. of Trial 159:20-160:2 (Jan. 5, 2015). Apparently PLN thought appealing was futile. From this the FDOC concludes that it no longer had to

apprise PLN of impoundment decisions since, in all likelihood, PLN would not have appealed.

The problem with that logic is that the reasons for impounding *Prison Legal News* vary. Indeed, the Rule proscribes "total[] rejection" of a periodical and mandates that "each issue of the subscription . . . be reviewed separately." Fla. Admin. Code R. 33-501.401(5). That PLN did not appeal past impoundments does not necessarily mean that it will not appeal future impoundments based on different reasons. The old adage that past behavior does not predict future performance rings truer here, where the underlying circumstances change over time.

More importantly, the FDOC failed to notify PLN of many impoundment decisions. Of course PLN did not appeal. It did not know that an issue had been censored, by which institution, and on what grounds. The fact that PLN may have *later* received a copy of an impoundment notice from an *inmate* is of no consequence. Notice must be timely and must set forth the basis for censorship, which many impoundment notices introduced at trial clearly did not. *Armstrong*, 380 U.S. at 552 ("[The opportunity to be heard] must be granted at a meaningful time and in a meaningful manner."). Given these deficiencies, PLN did not waive its right to due process by failing to appeal.

Finally, PLN asserts that the LRC's practice of affirming an impoundment decision on different or additional grounds than that found by the initial impounding institution violates *Procunier*. Recall that *Procunier* instructs that certain "minimum procedural safeguards" must accompany the decision to censor a periodical. 416 U.S. at 417. PLN says that the LRC's

practice violates the third safeguard requiring that complaints about a censorship decision be referred to someone other than the prison official who "originally disapproved the [publication]." *Id.* at 418-19. PLN says that by censoring a publication on a different or additional basis, the LRC effectively becomes the "original" decision-maker. And because no other prison official reviews the LRC's decisions, PLN is left to ask the LRC to review its own decision, in violation of *Procunier*.

Under PLN's view, the *reason* for censorship determines who "originally disapprove[s]" the publication. There would be a different "original" decision-maker for each new reason. But *Procunier* is not so specific. It only requires that a different prison official review the original censorship. It says nothing about whether that review must be limited to the reasons originally given.

This is consistent with *Baker on Behalf of Baker v. Sullivan*, 880 F.2d 319, 320 (11th Cir. 1989), which PLN relies on to argue that expanding the scope of review without notice violates due process. In this case the issue never expands. The initial impounding institution is tasked with determining whether a particular publication violates the Rule. The same issue that the LRC must decide.

V.

The Supreme Court has made it clear that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. Yet these protections mean

little if inmates do not understand them.[28] Cue PLN. Through its publications PLN teaches inmates their rights and informs them of unconstitutional prison practices. With this knowledge inmates become another check to government encroachment on constitutional rights. This in turn helps prison administrators correct insidious practices, ensuring long-term stability. Everyone ultimately benefits when knowledge grows from more to more.

But the Constitution does not guarantee PLN unfettered communication with inmates. That right must be balanced against the legitimate penological concerns inherent in running a prison system. In this case, the FDOC requires PLN to conform its written communications to Rule 33-501.401(3), which censors publications containing certain types of advertisements. After carefully considering the evidence presented at trial and the arguments made by the parties, this Court concludes that the FDOC's censorship of *Prison Legal News* under subsections (3)(l) and (m) of the Rule does not violate PLN's First Amendment rights because the censorship reasonably relates to public safety and prison security.

That the censorship in this case complies with the First Amendment, however, does not give the FDOC license to censor without regard to its due process obligations under the Fourteenth Amendment. But that is precisely what the FDOC has done, repeatedly. It has impounded multiple issues of *Prison Legal News* and other PLN mail without notifying PLN. Adhering

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[28] This is even more pernicious considering how prisoners are not afforded counsel and how prisons limit inmates' access to the prison library, books, and legal materials.

to its regulations, it then fails to notify PLN when the mail is finally rejected. The FDOC will continue to do this going forward absent interjection by this Court.

For these reasons,

IT IS ORDERED:

1. Judicial estoppel does not preclude the Florida Department of Corrections from adopting its current litigation position.
2. The Florida Department of Corrections' censorship of *Prison Legal News* under Rule 33-501.401(3) of the Florida Administrative Code does not violate Prison Legal News' First Amendment rights.
3. The Florida Department of Corrections' censorship procedures violate Prison Legal News' right to due process under the Fourteenth Amendment.
4. The Clerk shall enter an amended judgment stating:

> Prison Legal News' First Amendment claim against the Florida Department of Corrections is dismissed with prejudice.
>
> Prison Legal News successfully proved that the Florida Department of Corrections has violated its right to due process under the Fourteenth Amendment. Prison Legal News has also shown that the Florida Department of Corrections' current censorship practices will continue to deprive Prison Legal News of due process of law.

Accordingly, the Florida Department of Corrections is permanently enjoined from censoring Prison Legal News' written communications without due process of law. To comply with due process of law, this permanent injunction modifies the Florida Department of Corrections' current notification procedures as follows:

(1) The Florida Department of Corrections must notify Prison Legal News when it first impounds a particular written communication by Prison Legal News.

(2) The notification must specify the prison rule, including the subsection, purportedly violated and must indicate the portion of the communication that allegedly violates the cited regulation.

(3) The Florida Department of Corrections does not have to notify Prison Legal News when copies of that same written communication are subsequently impounded, unless the subsequent impoundment decision is based on a different or additional reason not already shared with Prison Legal News.

(4) If the Literature Review Committee rejects a written communication based on a different or additional reason not already shared with Prison Legal News, the Florida Department of Corrections must notify Prison Legal News of the basis for that decision, including the specific prison rule violated and the portion of the communication that violates the cited regulation.

(5) This injunction is not governed by the Prison Litigation Reform Act (PLRA) because this is not a civil proceeding "with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2). But even if the PLRA did apply, the Court finds that the injunction complies with the PLRA's "needs-narrowness-intrusiveness" standard. *See* 18 U.S.C. § 3626(a)(1)(A). The relief is narrowly drawn, as it only requires notice to Prison Legal News and no other party, and only requires notice on a per-issue (rather than a per-copy) basis. It requires compliance with the minimum requirements of due process. Similarly, the relief extends no further than necessary to correct the violation of PLN's due process rights. It only requires notice to Prison Legal News and no other party, and only requires notice on a per-issue (rather than a per-copy) basis. For the same reasons, the injunction is the least intrusive means necessary to correct the violation of PLN's due process rights. Even though it would be minimally burdensome to provide notice to the publisher every time a copy of the magazine is censored, the injunction only requires notice on a per-issue basis. Finally, the Court has given substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the injunction, and finds that the injunction will have no impact on public

safety and almost no impact on the Florida Department of Corrections, as the injunction essentially requires compliance with the FDOC's own rule.

5. Although all claims have been adjudicated, the Clerk must not close the file. This Court retains jurisdiction over the open file to decide costs and attorney's fees, if any.

SO ORDERED on October 5, 2015.

s/Mark E. Walker
United States District Judge

Appendix C

RELEVANT STATUTORY PROVISION

Fla. Admin. Code R. 33-501.401(3)

(3) Inmates shall be permitted to receive and possess publications per terms and conditions established in this rule unless the publication is found to be detrimental to the security, order or disciplinary or rehabilitative interests of any institution of the department, or any privately operated institution housing inmates committed to the custody of the department, or when it is determined that the publication might facilitate criminal activity. Publications shall be rejected when one of the following criteria is met:

(a) It depicts or describes procedures for the construction of or use of weapons, ammunition, bombs, chemical agents, or incendiary devices;

(b) It depicts, encourages, or describes methods of escape from correctional facilities or contains blueprints, drawings or similar descriptions of Department of Corrections facilities or institutions, or includes road maps that can facilitate escape from correctional facilities;

(c) It depicts or describes procedures for the brewing of alcoholic beverages, or the manufacture of drugs or other intoxicants;

(d) It is written in code or is otherwise written in a manner that is not reasonbly subject to interpretation by staff as to meaning or intent;

(e) It depicts, describes or encourages activities which may lead to the use of physical violence or group disruption;

(f) It encourages or instructs in the commission of criminal activity;

(g) It is dangerously inflammatory in that it advocates or encourages riot, insurrection, disruption of the institution, violation of department or institution rules;

(h) It threatens physical harm, blackmail or extortion;

(i) It depicts sexual conduct as follows:

1. Actual or simulated sexual intercourse;

2. Sexual bestiality;

3. Masturbation;

4. Sadomasochistic abuse;

5. Actual lewd exhibition of the genitals;

6. Actual physical contact with a person's unclothed genitals, pubic area, buttocks, or, if such person is a female, breast with the intent to arouse or gratify the sexual desire of either party;

7. Any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

(j) It depicts nudity in such a way as to create the appearance that sexual conduct is imminent, i.e., display of contact or intended contact with a person's unclothed genitals, pubic area, buttocks or female breasts orally, digitally or by foreign object, or display of sexual organs in an aroused state.

(k) It contains criminal history, offender registration, or other personal information about another inmate or offender, which, in the hands of an inmate, presents a threat to the security, order or rehabilitative objectives of the correctional system or to the safety of any person;

(l) It contains an advertisement promoting any of the following where the advertisement is the focus of, rather than being incidental to, the publication or the advertising is prominent or prevalent throughout the publication.

1. Three-way calling services;

2. Pen pal services;

3. The purchase of products or services with postage stamps; or

4. Conducting a business or profession while incarcerated.

(m) It otherwise presents a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person.