No. 18-355

In the

Supreme Court of the United States

PRISON LEGAL NEWS,
Petitioner,
v.
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CIVIL RIGHTS ADVOCACY ORGANIZATION *AMICI CURIAE* IN SUPPORT OF PETITIONER PRISON LEGAL NEWS' PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST

Amici Citizens United for Rehabilitation of Errants ("CURE"); the Civil Rights Clinic, Michigan State University College of Law; the Corrections Accountability Project of the Urban Justice Center; Equal Justice Under Law; the Florida Institutional Legal Services Project of Florida Legal Services; Just Detention International; JustLeadershipUSA; Morningside Heights Legal Services, Inc.; the National Incarceration Association; the National Police Accountability Project; The Prison Law Office; the Prison Policy Initiative; Prisoners' Legal Services of New York; The Sentencing Project; the Southern Center for Human Rights; the Southern Poverty Law Center; the U.C. Davis School of Law Immigration Law Clinic; the Uptown People's Law Center; the Washington Lawyers' Committee for Civil Rights and Urban Affairs; and Working Narratives respectfully submit this brief in support of the petition for writ of certiorari filed by Petitioner Prison Legal News ("PLN").[1] *Amici* do so with the consent of all parties.[2]

In its petition PLN, from a publisher's perspective, discusses application of the four-part

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[1] No party or counsel to a party has authored this brief in whole or in part. Furthermore, other than *Amici* and their counsel, no person or entity has made any monetary contribution toward the preparation or submission of this brief.

[2] PLN filed a blanket consent to the filing of *amicus curiae* briefs on September 27, 2018. Respondent Secretary, Florida Department of Corrections ("FDOC") filed a blanket consent on October 5, 2018.

test established in *Turner v. Safley*, 482 U.S. 78 (1987), to the First Amendment issues raised by FDOC's suppression of *Prison Legal News*. *Amici* — nonprofit organizations who, among other things, advocate in support of civil rights and access to justice for incarcerated persons, including persons convicted of crimes and persons held in detention while awaiting trial or completion of immigration-related processes — submit this brief because incarcerated persons also have First Amendment rights and interests that the Court should consider.[3]

Just as publishers have a First Amendment right to communicate with incarcerated persons by mail, incarcerated persons have a First Amendment right to receive that mail. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989); *see Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (holding that the Constitution "protects the rights to receive information and ideas"). *Amici* believe that courts should be especially protective of First Amendment rights in the case of a publication like *Prison Legal News*, which "teaches inmates their rights and informs them of unconstitutional prison practices." Pet. App. 107.

As civil rights advocates, *Amici* have a significant interest in ensuring, among other things, that incarcerated persons are treated fairly and humanely, that their constitutional rights are protected and enforced, that their right to access the

[3] A description of each of the Amici is set out in the Appendix to this Brief.

courts is not impeded, that they receive appropriate programming and education — including access to appropriate reading materials — and that they are adequately prepared for reintegration into their communities. In carrying out their missions, *Amici* assist incarcerated persons to enforce their constitutional rights or otherwise work to protect or advocate for the constitutional rights of incarcerated persons and/or their loved ones.

Amici recognize *Prison Legal News* as one of the leading publications that provides to incarcerated persons the most informative updates on prison-related litigation and other matters of direct interest to them. They understand the vital role that *Prison Legal News* plays in assisting incarcerated persons to understand their constitutional and other rights, to recognize when those rights have been violated, and to appreciate the administrative and judicial processes through which they can seek relief for those violations. Accordingly, consistent with their central missions and core values, *Amici* have a strong interest in seeing that incarcerated persons throughout the United States who desire to receive *Prison Legal News* and similar publications may do so unimpeded by correctional policies that directly or indirectly preclude their access to the important and relevant information published therein.

SUMMARY OF ARGUMENT

This case presents issues of national and constitutional importance requiring this Court's attention.

1. The Eleventh Circuit's decision highlights a conflict between the judicial approach to censorship in the prison context, as permitted by decisions of this Court dating from the 1980s, and more recent decisions of the Court regarding the pleading of civil claims. Specifically, the highly deferential approach to corrections officials' mail censorship decisions permitted by the Court's existing First Amendment jurisprudence, including *Turner*, allows corrections officials to justify their censorship of mail based on little more than speculation — as happened here — even though speculation would not be sufficient to state a claim for relief under Federal Rule of Civil Procedure 8(a). Prison officials should not be able to defend their decisions to deprive incarcerated persons of their First Amendment rights with the kind of speculation that would not be sufficient to support a claim in a civil complaint. The Court should use this case to clarify and, if necessary, modify the approach to be taken in prison censorship cases and thereby reconcile that approach with the approach required by its more recent pleading jurisprudence.

2. Elements of the Eleventh Circuit's decision conflict with, are at odds with, or ignore important considerations discussed in decisions of this Court. First, the Eleventh Circuit did not account for the negative impact that the ban on *Prison Legal News* has on the right and ability of incarcerated persons to access the courts in order to obtain redress for violations by corrections officials of their constitutional and other rights pertaining to conditions of their confinement. Indeed, without

access to *Prison Legal News* or similar publications, persons in prison face significant hurdles even to know what rights they possess and how they may access the courts to protect, vindicate and enforce those rights when they have been violated. Second, the Eleventh Circuit did not consider the positive impact that reading *Prison Legal News* has on the penological goal of rehabilitation and, concomitantly, the negative impact on rehabilitation of cutting off access by incarcerated persons to *Prison Legal News*. The Eleventh Circuit's failure to take these matters into consideration makes suspect that court's evaluation of the reasonableness of the FDOC regulation at issue.

3. Even if the Court does not clarify or modify the *Turner* test, it should conclude under that test that the ban on *Prison Legal News* due to some of its advertising is unconstitutional, and that FDOC is liable to PLN, because there is no reasonable relationship between any legitimate governmental interest and the advertising regulation that resulted in the blanket exclusion of *Prison Legal News* from Florida correctional institutions. FDOC could present no evidence that advertisements in *Prison Legal News* had ever influenced incarcerated persons to use the services or products that are the subject of those advertisements. To the contrary, evidence admitted in the trial court showed that thousands of attempted uses of prohibited services and products have occurred despite the absence of *Prison Legal News* and its advertisements from Florida prisons. Under the circumstances, including the availability of alternatives available to FDOC

that would not impinge on First Amendment and other rights and the fact that no other correctional system in the United States prohibits receipt of *Prison Legal News* based solely on the content of its advertisements, FDOC's advertising-related blanket ban of *Prison Legal News* can only be viewed as an exaggerated response.

4. The Court should further hear this case because of the potential impact on incarcerated persons in jurisdictions outside Florida if the Eleventh Circuit decision is allowed to stand. Jurisdictions across the country may interpret a denial of PLN's petition as a tacit approval of both FDOC's advertising-based restriction on access to publications such as *Prison Legal News* and the extreme deference granted to FDOC officials by the Eleventh Circuit. The result, potentially, is more widespread violations of First Amendment rights that will impede the ability of incarcerated persons to access the judicial system to enforce and vindicate their constitutional and other legal rights.

ARGUMENT

I. The Court Should Grant PLN's Petition to Clarify or, if Necessary, Reconsider the *Turner* Test, to Require Evidence and Not Speculation to Support Prison Censorship Decisions, and to Align *Turner*'s Standards with the Minimal Requirements for Pleading a Claim

As PLN explains, in considering the *Turner* test's first factor — the rational connection component — the Eleventh Circuit placed substantial reliance on speculation by FDOC's inhouse expert regarding the "possibility" of negative impacts on prison security if *Prison Legal News* and the advertisements it contains were allowed into Florida prisons. Pet. 13, 14, 23; *see* Pet. App. 27, 29. In other respects as well, the Eleventh Circuit's decision emphasized conjecture, free of experiential or other evidentiary support, that certain types of advertisements justify FDOC's blanket ban of *Prison Legal News*. *See, e.g.*, Pet. App. 33 (describing FDOC's expert's testimony regarding what prisoners "could" do if allowed to view advertisements for concierge or people-locator services); Pet. App. 38 (referencing "opportunity to use prohibited services"). Indeed, there was nothing other than speculation that FDOC could offer to justify its ban of *Prison Legal News*, given (1) the absence of evidence that, in the years before *Prison Legal News* was banned, similar advertisements had caused the adverse consequences to security about which FDOC officials hypothesize, and (2) evidence

that substantial numbers of attempts to use banned products and services during the years that *Prison Legal News* and its advertisements were not allowed inside Florida prisons. Pet. 21, 30; Pet. App. 8, 26, 30, 32-33.[4]

But FDOC can hardly be blamed for turning to speculation, in an effort to establish a connection between the advertisements in *Prison Legal News* and purported security concerns, in order to justify its decision to ban *Prison Legal News*, given the absence of evidence of an actual tie between those advertisements and instances where the purported security concerns were implicated. Similarly, the Eleventh Circuit and the District Court cannot be blamed for showing deference to the speculation engaged in by FDOC. As Justice Stevens' dissent in *Turner* pointed out, the *Turner* factors lend themselves to this kind of speculative assessment. 482 U.S. at 101 n.1 (Stevens, J., dissenting in part) ("The Court's rather open-ended 'reasonableness' standard makes it much too easy to uphold restrictions on prisoners' First Amendment rights on the basis of administrative concerns and speculation about possible security risks rather than on the

[4] Curiously, while the District Court and Eleventh Circuit accepted FDOC's speculation, the District Court rejected as "conjecture" PLN's theory that the multiple changes to the FDOC censorship rule from 2005 to 2009 were a façade to hide "institutional bias against a publication that informs prisoners of their rights." Pet. App. 65.

basis of evidence that the restrictions are needed to further an important governmental interest.").[5]

More recent decisions of this Court cast doubt on the continued validity of the *Turner* test to the extent it allows corrections officials to rely on speculation to support decisions to censor or ban a publication like *Prison Legal News*. Ironically, the type of speculation in which FDOC officials engaged to justify their blanket prohibition of *Prison Legal News* would not be sufficient to get past a Rule 12(b)(6) motion if FDOC were a plaintiff asserting a claim to enjoin PLN from mailing *Prison Legal News* to persons in Florida detention facilities

When *Turner* was decided in 1987, a complaint would survive a Rule 12(b)(6) motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

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[5] *See also Turner*, 482 U.S. at 100-01 (Stevens, J., dissenting in part) ("But if the [majority's] standard can be satisfied by nothing more than a 'logical connection' between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it." (emphasis omitted) (citations omitted)).

entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). But the Court "retire[d]" this pleading standard more than ten years ago, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007), and in its place held that to survive a motion to dismiss, a complaint must present a claim that is plausible and not merely "conceivable" or "consistent with" wrongful conduct. *Id.* at 557, 570. A complaint's allegations accordingly must raise a right to relief "above the speculative level" and show more than a "possibility" that the plaintiff may later discover facts that will support liability. *Id.* at 555, 557, 561.

If speculation and conjecture are not enough for a claim to survive a Rule 12(b)(6) motion, they should not be enough to uphold a decision by corrections officials to deprive incarcerated persons of their constitutional right under the First Amendment to receive information and ideas from third parties, especially when the information and ideas are vital for incarcerated persons to understand the rights that they possess in the prison context and to seek relief from the courts to enforce and protect those rights. Thus, although this case does not come before the Court in the pleading context, the standard established in *Twombly* is probative as to the reasonableness of FDOC's speculation-laden decision to preclude incarcerated persons from receiving *Prison Legal News*.

Twombly and the decisions that have followed it counsel the Court to modify the *Turner* test — at the least, to require that corrections officials establish with real evidence more than a possibility that

incarcerated persons might engage in prohibited activity if they obtain access to reading material that those officials find objectionable. *See* Alphonse A. Gerhardstein, *False Teeth?* Thornburgh*'s Claim that* Turner*'s Standard for Determining a Prisoner's First Amendment Rights Is Not "Toothless,"* 17 N. Ky. L. Rev. 527, 529 (1990) (arguing "that deference to prison administrators should not cause courts to accept watered-down evidence in support of challenged regulations"); *id.* at 545-46 ("[I]t is evident that the *Turner* factors and the reasonableness test are merely false teeth unless a solid evidentiary record is presented. Trial courts must insist on such a record to ensure that First Amendment challenges to prison regulations receive the greatest scrutiny possible.").

The great deference that *Turner* grants to corrections officials, including the ability to rely on speculation to justify censorship decisions, long has been a source of criticism of the *Turner* test and has led to calls for its modification or even its abandonment. *See generally* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech and Scrutiny*, 84 GEO. WASH. L. REV. 972, 977 (2016) ("What this Article shows, through numerous examples of unjustified prison speech restrictions imposed throughout the country, is that prison and jail officials often act as if unconstrained by judicial review and impose arbitrary (indeed, nonsensical) restrictions on speech."); *id.* at 972 ("Exercising their discretion under *Turner*, correctional officials have saddled prisoners' expressive rights with a host of arbitrary restrictions — including prohibiting

President Obama's book as a national security threat; using hobby knives to excise Bible passages from letters; forbidding all non-religious publications; banning Ulysses, John Updike, Maimonides, case law, and cat pictures."); *id.* at 976 n.20 (cataloging articles in which other legal commentators have critically assessed the *Turner* standard).

The Eleventh Circuit's (and the District Court's) broad deference to the speculative assertions of FDOC's inhouse expert is inconsistent with the requirement of *Twombly* that, even at the pleading stage, a claim must have some basis in non-speculative fact, and demonstrates how easily the reasonableness requirement of *Turner* can be turned on its head. This alone is reason for the Court to grant PLN's petition. Doing so will give the Court the opportunity to clarify that the *Turner* reasonableness test cannot be satisfied by conjecture that is not based on experience or, if necessary, to modify the *Turner* test to ensure that it is consistent with the requirements of *Twombly* and its progeny.

II. The Eleventh Circuit's Decision Is Inconsistent with This Court's Decisions Recognizing the Constitutional Right of Incarcerated Persons to Meaningful Court Access

Prison Legal News contains "core protected speech, not commercial speech or speech whose content is objectionable on security or other grounds." *Prison Legal News v. Cook*, 238 F.3d 1145,

1149 (9th Cir. 2001). Indeed, even as it objects to some of its advertising content, FDOC purports not to object to the substantive content of *Prison Legal News*. And because *Prison Legal News* facilitates incarcerated persons' access to the courts, any decision to censor or ban the receipt of *Prison Legal News* should receive more than the highly deferential and perfunctory review that the Eleventh Circuit employed when it found prison officials' speculation sufficient to uphold censorship decisions.

As this Court stated in *Bounds v. Smith*, it is "established beyond doubt that prisoners have a constitutional right of access to the courts." 430 U.S. 817, 821 (1977); *accord Bradley v. Hall*, 64 F.3d 1276, 1280 (9th Cir. 1995) ("The reality and substance of any of a prisoner's protected rights are only as strong as his ability to seek relief from the courts or otherwise to petition the government for redress of the deprivation of his rights."), *overruled on other grounds by Shaw v. Murphy*, 532 U.S. 223, 230 n.2 (2001). That access must be "adequate, effective, and meaningful." *Bounds*, 430 U.S. at 822. Access is meaningful only if a potential plaintiff knows the basis for potential claims:

> Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.
>
> If a lawyer must perform such

> preliminary research, it is no less vital for a pro se prisoner.

Id. at 825-26.

Particularly important to incarcerated persons is "[a] source of current information . . . so that prisoners could learn whether they have claims at all . . . ." *Id.* at 826 n.14.[6] As the District Court in this case found, *Prison Legal News* fills this critical role:

> 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. Cue PLN. Through its publications PLN

[6] Although the Court later "disclaim[ed]" some of this language from *Bounds*, it did so only with respect to information that supported claims unrelated to an incarcerated person's conviction or constitutional issues pertaining to conditions of confinement. *See Lewis v. Casey*, 518 U.S. 343, 354-55 (1996). As discussed below, articles in *Prison Legal News* focus on issues that are directly relevant to an incarcerated person's circumstances, including articles concerning convictions and conditions of confinement, and not on matters that might lead to the filing of "shareholder derivative actions" or "slip-and-fall claims." *See Lewis*, 518 U.S. at 355. It is, in the words of *Lewis*, a tool that incarcerated persons "need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Id.*

> 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.

Pet. App. 106-07 (footnote omitted). Other courts likewise recognize *Prison Legal News*' vital role in delivering news about current matters of interest to incarcerated persons. *E.g.*, *Human Rights Def. Ctr. v. Bd. of Cty. Comm'rs*, No. 18 CV 00355 JAP/SCY, 2018 WL 3972922, at *2 (D.N.M. Aug. 20, 2018) (*Prison Legal News* "contains news and analysis about prisons, jails and other detention facilities, prisoners' rights, court opinions, management of prison facilities, prison conditions, and other matters pertaining to the rights and/or interests of incarcerated individuals"); *Prison Legal News v. Stolle*, Civ. No. 2:13cv424, 2014 WL 6982470, at *1 (E.D. Va. Dec. 8, 2014) (*Prison Legal News* "includes articles and news about various legal issues, access to courts, prison conditions, mail censorship, prisoner litigation, visitation rights, religious freedom, and prison rape, among other things"); *Prison Legal News v. Lindsey*, No. 3:07-CV-0367-P, 2007 WL 9717318, at *1 (N.D. Tex. June 18, 2007)

("The magazine contains information of interest to prison inmates concerning access to courts, prison conditions, mail censorship, jail litigation, prisoners' rights, and related subjects."); *see also* Giovanna Shay, Response, *One Market We Do Not Need*, 160 U. PA. L. REV. PENNUMBRA 319, 326 (2012), http://www.pennumbra.com/responses/3-2012/Shay.pdf. (describing *Prison Legal News* as the "leading publication for prisoner rights").

The Eleventh Circuit's omission to take into account this Court's rulings regarding incarcerated persons' right of access to the courts, and the impact of the blanket ban of *Prison Legal News* on that right, provides substantial reason to grant review.

III. The Eleventh Circuit's Decision Conflicts with This Court's Recognition of the Substantial Penological and Societal Interest in Rehabilitation of Incarcerated Persons

The Court long has recognized that rehabilitation of incarcerated persons is a "substantial governmental interest[ ]." *Procunier v. Martinez*, 416 U.S. 396, 413 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989); *accord Graham v. Florida*, 560 U.S. 48, 71 (2010) (recognizing rehabilitation as one of the "goals of penal sanctions that have been recognized as legitimate"); *Pell v. Procunier*, 417 U.S. 817, 823 (1974) (identifying "rehabilitation of those committed to its custody" as a "paramount objective of the corrections system").

The relationship of reading to rehabilitation is also well established. Thus, in *Morrison v. Hall*, 261 F.3d 896, 904 (9th Cir. 2001), the Ninth Circuit rejected the argument of corrections officials that allowing incarcerated persons to watch television or listen to the radio was an adequate substitute for reading newspapers and magazines. Recognizing that neither television nor radio will improve literacy within prisons, the court cited studies showing the beneficial effect of reading on rehabilitation:

> According to *The Los Angeles Times*, the 1992 National Adult Literacy Survey "found that two-thirds of adult prisoners were not able to write a letter explaining a billing error or extract information from the average sports-page story." Richard Lee Colvin, *Reading by 9 Young Offenders Learn ABCs the Hard Way: Caged*, L.A. Times, Nov. 8, 1998, at A1. *The Los Angeles Times* also noted the link between higher rates of literacy and lower rates of recidivism. *See id.* (discussing the fact that "literacy programs reduce recidivism"); *see also* Willoughby Mariano, *Reading Books Behind Bars Reading Programs for State Prison Inmates and Juvenile Hall*

> *Wards are Critical to Helping Offenders Develop Literacy and Avoid Return to Crime, Experts Say*, L.A. Times, Jan. 30, 2000, at B2 (discussing illiteracy rates among inmates and citing "correlation between reading, writing and inmate rehabilitation").

Id. at 904 n.7; *see also Abdul Wali v. Coughlin*, 754 F.2d 1015, 1034 (2d Cir. 1985) ("The rehabilitative goals for which we strive are furthered by efforts to inform and educate inmates, and foster their involvement in the world outside the prison gates. Although committing an illegal act may require the physical segregation of an individual from the society at large, it does not dictate that the prisoner's mind be similarly locked away to atrophy during the period of his incarceration."), *abrogated on other grounds by O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987).

Commentators likewise have noted the connection between reading and rehabilitation. For example, in extolling the benefits of education on incarcerated persons, Professor James Vacca stated:

> Inmates who are released from prison are frequently unable to find jobs because they either lack experience and/or literacy skills. With the high cost of incarceration and the large increase in the prison

> population, it seems that mastery of literacy skills may be a proactive way to address the problem of reincarceration. Literacy skills are important to prisoners in many ways. Inmates need these skills to fill out forms, to make requests and to write letters to others in the outside world. In addition, some prison jobs require literacy skills and inmates can use reading as a way to pass their time while they are behind bars (Paul, 1991). Thus, education programs initially should stress practical applications of literacy so that prisoners can use newly gained skills and insights.

James S. Vacca, *Educated Prisoners Are Less Likely to Return to Prison*, 55 J. CORRECTIONAL EDUC. 297, 301-02 (2004).[7] Professor Vacca noted the importance of providing incarcerated persons with reading materials that are of interest to them, including materials written by persons in a similar situation:

> III. Prison literacy programs must emphasize

[7] At the time of the article, the author was the Chair of Special Education and Literacy at C.W. Post College in New York. *See* James S. Vacca, *supra*, 55 J. CORRECTIONAL EDUC. at 305.

> instruction that includes engaging topics that motivate and sustain the inmates' interest.
>
> - The programs should use literature that deals with subject matter that is relevant to the academic needs of the inmates.
> - The programs should be taught, when possible, with literature that is written by inmates to serve as effective models for reading and writing skills development.

Id. at 303, fig. 1; *see also* Alicia Bianco, *Prisoners' Fundamental Right to Read: Courts Should Ensure that Rational Basis Is Truly Rational*, 21 ROGER WILLIAMS U. L. REV. 1, 34 (2016) ("Reading habits correlate with being an active participant in one's community and foster the free flow of ideas. These benefits are key to democratic functioning and can aid in the penological objective of rehabilitation by keeping a prisoner's mind engaged." (footnote omitted)); John M. Sands, Book Review, FED. LAW., Oct. 2011, at 70 (reviewing AVI STEINBERG, RUNNING THE BOOKS: THE ADVENTURES OF AN ACCIDENTAL PRISON LIBRARIAN (2010)) ("Th[e] tradition of inmate rehabilitation and transformation through libraries and of turning a new page in one's life by reading worn copies of books is a venerable one. Malcolm X

is the most famous prisoner who did so; Wilbert Rideau is a more recent example of an inmate who was changed by books.").

Prison Legal News meets many of the requirements identified by Professor Vacca for effective rehabilitation. It is written in large part by persons who themselves are incarcerated. *See Prison Legal News v. McDonough*, 200 F. App'x 873, 875 (11th Cir. 2006) ("PLN is a not-for-profit charitable corporation that publishes a monthly magazine containing articles about prison legal issues written mostly by prison inmates."). More important, it discusses topics that are of special interest to persons in prison. *E.g.*, *Human Rights Def. Ctr. v. Bd. of Cty. Comm'rs*, 2018 WL 3972922, at *2; *Prison Legal News v. Stolle*, 2014 WL 6982470, at *1; *see* Alicia Bianco, *supra*, 21 ROGER WILLIAMS U. L. REV. at 13 ("The goal of PLN is to increase political awareness and inform prisoners of their rights."). When corrections officials bar incarcerated persons from access to *Prison Legal News*, they effectively work against "one of the paramount objective[s] of the corrections system," *Pell v. Procunier*, 417 U.S. at 823. As Ms. Bianco states:

> Informing prisoners of their rights and transforming them into more engaged citizens is a step toward their rehabilitation. . . . Banning informative publications such as PLN can actually threaten the same goal that institutions are seeking to

accomplish.

21 ROGER WILLIAMS U. L. REV. at 13-14.

The Eleventh Circuit did not consider the negative impact on rehabilitation caused by FDOC's blanket ban of *Prison Legal News*, nor did it balance that impact against the "possible" security concerns that it stressed. This raises additional concerns about the *Turner* test and its application, further warranting review by the Court.

IV. The Eleventh Circuit's Decision Is Inconsistent with This Court's Precedents Which Require that FDOC Demonstrate a "Reasonable" Relation Between Purported Security Concerns and the Regulations that Resulted in a Blanket Ban of *Prison Legal News*

In *Beard v. Banks*, the plurality opinion emphasized that a penal institution's regulations that impinge on constitutional rights must bear more than a "logical" relation to the justifications asserted for the regulation. 548 U.S. 521, 533 (2006). Rather, the regulation must bear a "reasonable" relation to the purported justifications. *Id.* This requirement is stated in *Turner* itself. 482 U.S. at 89-91.

Despite the Eleventh Circuit's lip service to following the reasonable-relationship standard, Pet. App. 43, the evidence it considered shows that FDOC's blanket ban on *Prison Legal News* does not bear a reasonable relation, and is an exaggerated

response to, its expressed concerns about prison security. That ban began in September 2009. Pet. App. 16. Thus, for the past nine years not a single advertisement for three-way calling, pen-pal solicitation, cash-for-stamps exchange, or concierge or people-locator services has entered a Florida correctional facility through *Prison Legal News*. Yet despite the ban on *Prison Legal News* and its advertisements, incarcerated persons in Florida attempt 700,000 three-way calls each year, "succeed in posting online profiles with the same [pen-pal] companies that advertise in *Prison Legal News*," received over $50,000 in deposits to their accounts from just one cash-for-stamps exchange company over a several-year period, and, in one instance, sent threatening letters to a judge. Pet. App. 6, 8, 30, 32, 33, 34.[8] These facts demonstrate the absence of any reasonable relation between advertisements in *Prison Legal News* and the likelihood that incarcerated persons will engage in the prohibited practices that FDOC cites to support its ban. It is pure speculation that reintroducing *Prison Legal News* would exacerbate this problem beyond, at most, a *de minimis* amount. That no other state or local corrections department in this country has seen fit to institute a ban on *Prison Legal News* due

[8] The Eleventh Circuit does not say that the threatened judge was located through a concierge or people-locator service, suggesting they were not at issue in that case. Pet. App. 34. The only other indication presented regarding potential ill effects of access to a concierge or people-locator service, besides speculation, concerned a person in *Colorado* who committed a murder *following* his release. *Id.*

to the content of its advertising, and that other corrections departments have found reasonable alternatives that do not adversely impact First Amendment rights and do not cut off incarcerated persons from a unique source of information that is of particular relevance to them, shows that FDOC's blanket ban of *Prison Legal News* is not reasonable, but rather an exaggerated response to a situation that *Prison Legal News* did not create and does not contribute to. Pet. App. 39.

When you add this evidence, including the absence of any evidence of actual — as opposed to hypothetical — wrongdoing tied to the advertising in *Prison Legal News* at issue here, and the Eleventh Circuit's need to rely on speculation to justify FDOC's ban of *Prison Legal News*, it is evident that FDOC has failed the reasonable-relationship test. Even if the Court determines that there is no need to clarify or modify the four-part *Turner* test, this factor should be dispositive. *See Turner*, 482 U.S. at 89-90 ("a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational"); *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) (because the first *Turner* factor is *sine qua non*, "if a regulation is not rationally related to a legitimate and neutral governmental objective, a court need not reach the remaining three factors"). Consequently, FDOC's inability to satisfy this factor should have required both the District Court and the Eleventh Circuit to conclude that FDOC is liable for violating PLN's First Amendment rights (not to mention, the

First Amendment rights of those Florida subscribers who for nine years have been denied access to *Prison Legal News*).

V. A Decision Not to Review this Case Could Signal that Extreme Deference to Corrections Officials Is Appropriate and that Bans on a Publication Solely Because of Its Advertisements Is Defensible

The First Amendment concerns raised by this case are not limited to Florida. There is risk that once restrictions on access by incarcerated persons to certain types of mail are upheld in one jurisdiction, other jurisdictions interested in restricting access to the same types of mail — in this instance, publications like *Prison Legal News* — will jump on the bandwagon, follow the newly established precedent, and implement similar restrictions. *See* Pet. 32-33. To leave the Eleventh Circuit's decision unreviewed and undisturbed may also inadvertently signal to prison officials and courts throughout the United States that the Eleventh Circuit's broadly deferential approach to FDOC's advertising-related ban of *Prison Legal News*, and its willingness to accept FDOC's speculative reasons in defense of the advertising restriction, are both reasonable and a correct application of *Turner*. As such, unless reviewed and reversed, the Eleventh Circuit's decision could be the launching pad of an ill-advised direction for First Amendment law in the prison context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

DESCRIPTION OF *AMICI CURIAE*

The following private, nonprofit civil rights advocacy organizations join in the filing of this *amicus curiae* brief:

Citizens United for Rehabilitation of Errants ("CURE") has made access to the courts a top priority throughout its almost 50-year history. From working during its early years with jailhouse lawyers in Texas to obtain basic reforms to the criminal justice system, to working now with persons throughout the country who are serving life sentences or convicted of sex offenses, CURE has turned to the courts for initial reform, as the first step toward broader reform by the legislature and the executive. Today, CURE's operations are international in scope, and it has received consultative status by the United Nations.

The **Civil Rights Clinic, Michigan State University College of Law** (the "Clinic"), was created at the request of the United States District Court for the Western District of Michigan, which had not been able to find lawyers willing to handle the large volume of pro se cases that survived dispositive motions and were ready to be tried. The Clinic accepts appointment to some of these cases and provides representation through settlement or trial. The Director of the Clinic, Daniel E. Manville, is an ex-offender who has dedicated his life to litigating and lobbying on behalf of those who are incarcerated.

The **Corrections Accountability Project of the Urban Justice Center** is dedicated to eliminating the influence of commercial interests on our criminal legal system and ending the exploitation of those that system touches. It does so by exposing the harms caused by the commercialization of justice and empowering and equipping change agents with the tools to challenge the system's exploitation of vulnerable communities.

Equal Justice Under Law ("EJUL") works to eliminate wealth-based discrimination in the criminal justice system through litigation and advocacy. EJUL recognizes that most incarcerated persons cannot afford ongoing legal representation, and that cutting them off from access to the best source of free and up-to-date information on how they may know and vindicate their rights will disadvantage them vis-à-vis wealthier prisoners, epitomizing how access to the justice system is restricted for those lacking financial resources.

The **Florida Institutional Legal Services Project of Florida Legal Services** ("FLS") uses impact litigation, community lawyering, and policy advocacy to defend and advance the civil rights of adults and children who are incarcerated in prisons, jails, juvenile justice facilities, civil commitment, and immigration detention throughout Florida. FLS also provides self-help materials to incarcerated persons so they may better understand and advocate for their rights.

Just Detention International ("JDI") is the world's only organization dedicated exclusively to

ending sexual abuse behind bars. JDI works to hold government officials accountable for prisoner rape, to promote public attitudes that value the dignity and safety of people in detention, and to ensure that survivors of this violence receive the crisis services and other help they need and deserve to heal. JDI's activities in support of these objectives include educating incarcerated persons about their rights and formulating policies to increase safety for LGBT and other especially vulnerable persons.

JustLeadershipUSA ("JLUSA") seeks to cut in half the number of people under correctional control in the United States by 2030 by empowering and elevating the voices of leaders who have been directly impacted by the criminal justice system — people who best understand how the system works and what must be done to transform it — so that they can drive criminal justice reform at all levels of government. JLUSA recognizes that few things are as vital to empowering reform and the preservation of humanity as providing accurate and accessible information, something that *Prison Legal News* does for thousands of incarcerated people.

Morningside Heights Legal Services, Inc. ("MHLS") is the legal body under which clinics at the Columbia University School of Law operate. Lawyers and law-student interns at MHLS perform legal services in the public interest, provide legal assistance, and assist legal services programs in representation of their clients. MHLS has regularly provided legal representation to persons incarcerated at state and federal prisons and jails for

more than 25 years. MHLS lawyers accept appointment by federal courts in civil cases challenging conditions of confinement.

The **National Incarceration Association** ("NIA") focuses on the impact of incarceration on the families of persons in prison and works to support them in their difficult journey. Through the lens and perspective of these families, NIA fervently supports freedom of speech and press and is devoted to allowing incarcerated persons access to the valuable news and analysis of legal developments that directly affect them and their families, about which *Prison Legal News* reports.

The **National Police Accountability Project** ("NPAP"), founded by members of the National Lawyers Guild, coordinates with and assists civil-rights lawyers to represent victims of misconduct by law-enforcement and detention-facility officials. NPAP also supports legislative efforts to increase accountability of law-enforcement and detention-facility officials and appears regularly as an *amicus curiae* to present issues important to its member lawyers and their clients, who include persons whose constitutional rights have been infringed by detention-facility officials.

The Prison Law Office ("PLO") engages in class action impact litigation to improve conditions in prisons, jails, and juvenile halls for adults and children, represents individual prisoners, educates the public about prison conditions, and provides technical assistance to advocates across the country. PLO has litigated numerous large-scale prisoner

and parolee class actions in the last 40 years, including *Brown v. Plata*, 563 U.S. 493 (2011) (holding that court-mandated population limits for California prisons were necessary to ensure incarcerated persons' constitutional right to adequate medical and mental health care), and *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206 (1998) (unanimously holding that the Americans with Disabilities Act applies to state prisoners).

The **Prison Policy Initiative** ("PPI") challenges over-criminalization and mass incarceration through research, advocacy, and organizing. PPI shows how the United States' excessive and unequal use of punishment and institutional control harms individuals and undermines our communities and national well-being. PPI's research includes the impact of communications restrictions on individuals and communities, recognizing that contact with the outside world, including access to publications, is an important component of reducing mass incarceration.

Prisoners' Legal Services of New York ("PLS") has provided civil legal services for over 40 years to indigent persons incarcerated in New York on claims concerning conditions of confinement, including First Amendment claims. PLS also publishes over 75 educational form memos and a bi-monthly newsletter ("*Pro Se*") which it sends to all New York State prisons for placement in their law libraries and to over 7,500 individual prisoners who asked to be placed on its mailing list. Like *Prison*

Legal News, *Pro Se* educates incarcerated persons about changes in the law, statutory and regulatory requirements, and legal-practice issues relating to incarceration so that they may understand and navigate the legal system.

The Sentencing Project conducts research and advocacy on criminal justice and juvenile justice reform. The organization is recognized for its policy research documenting trends and racial disparities within the justice system and for developing recommendations for policy and practice to ameliorate those problems. The Sentencing Project has produced policy analyses documenting the increasing use of sentences of life without parole for both juveniles and adults and has assessed the impact of such policies on public safety, fiscal priorities, and prospects for rehabilitation. Organization staff frequently testify in Congress and before various policymaking bodies and practitioner audiences.

The **Southern Center for Human Rights** ("SCHR") is committed to upholding the constitutional rights of incarcerated people and works for equality, justice, and dignity in the criminal justice system. Its mission is to end capital punishment, mass incarceration, and other criminal justice practices used to control the lives of poor people, people of color, and other marginalized groups in the southern United States. SCHR does this through death penalty representation, impact litigation, policy advocacy, and public education.

The **Southern Poverty Law Center** ("SPLC") is one of the nation's leading civil rights organizations and is dedicated to fighting hate and bigotry and to seeking justice for vulnerable members of our society. In addition, SPLC has a 40-year history of protecting the rights of prisoners, with SPLC attorneys serving as lead or co-counsel in dozens of major prison cases, including significant First Amendment cases.

The **U.C. Davis School of Law Immigration Law Clinic** ("The Clinic") is an academic institution dedicated to defending the rights of detained noncitizens in the United States. The Clinic provides direct representation to detained immigrants who are placed in removal proceedings. In addition, the Clinic screens unrepresented individuals to facilitate placement with pro bono attorneys and presents legal orientation programs for detained individuals in removal proceedings who are unable to obtain direct representation.

The Uptown People's Law Center ("UPLC") provides legal representation, advocacy, and education for poor and working people in Chicago, and legal assistance to people housed in Illinois prisons in cases related to their confinement. UPLC has provided direct representation to over 100 persons confined in Illinois prisons pertaining to their civil rights, including in seven class-action or putative class-action cases that are currently pending. UPLC has litigated several cases involving the First Amendment, censorship of publications,

and similar issues, including one pending case regarding censorship of *Prison Legal News*.

The **Washington Lawyers' Committee for Civil Rights and Urban Affairs** ("WLC") was founded 50 years ago to provide pro bono legal services to address issues of discrimination and entrenched poverty, and has successfully handled thousands of civil rights cases on behalf of individuals and groups, including incarcerated persons. WLC engages in extensive individual advocacy and class-action litigation on behalf of individuals held in custody in local jails and state and federal prisons. WLC has litigated at least one case involving First Amendment censorship of publications by the federal Bureau of Prisons and similar issues in federal and state prisons.

Working Narratives is an arts and social justice organization that works with prisoners, formerly incarcerated persons, their families, and policy makers to advance positive criminal justice reform. Each year arts and education programming reaches thousands of prisoners working with them through the humanities. Working Narrative's work focuses on building connections with those inside prisons and working to create community driven solutions.