No. 15-14220

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PRISON LEGAL NEWS, a project of the Human Rights Defense Center,
a not-for-profit Washington charitable corporation,

Plaintiff-Appellee/Cross-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the Northern District of Florida,
No. 4:12-cv-00239-MW-CAS

APPELLEE'S PRINCIPAL AND RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1, Plaintiff-Appellee hereby certifies that Prison Legal News is a project of the Human Rights Defense Center, a not-for-profit Washington charitable corporation. No publicly held corporation owns 10% or more of its stock. Plaintiff-Appellee also certifies that the following is a complete list of the trial judge and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case on appeal.

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17. Stampelos, Hon. Charles, United States Magistrate Judge

18. Stevenson, Benjamin James, Counsel for Prison Legal News

19. Tietig, Lisa, Counsel for Secretary Jones

20. Trevisani, Dante P., Counsel for Prison Legal News

21. Walker, Hon. Mark, United States District Judge

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Dated: December 7, 2015

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34 and 11th Cir. R. 34-4, Prison Legal News respectfully requests that this appeal be placed on the oral argument calendar for submission and decision with oral argument. This appeal turns on complex legal arguments and evidence contained in a detailed record. Oral argument, which would allow for a complete presentation of the facts and legal arguments, would be beneficial to the resolution of this appeal.

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INTRODUCTION

The Florida Department of Corrections (FDOC), alone among the fifty States, the federal Bureau of Prisons (BOP), and every county jail in the country, is violating Prison Legal News' (PLN) First Amendment rights by impounding every issue of its magazine based on the publication's advertisements. This broad restriction on PLN's free speech rights is neither logical nor necessary. In 2006, during previous litigation on this question, the FDOC aligned itself with every penal institution in the nation and informed this Court that the advertisements in PLN's publications do not pose a material security threat and thus that the FDOC had no plans of resuming its past practice of impounding the publications. Two years later, after this Court affirmed dismissal of the prior case, the FDOC abruptly changed course and renewed its censorship with a vengeance. But nothing meaningful had changed. PLN's current publications contain the same types of advertisements in the same proportion to the magazine's overall length. And there is no evidence that those advertisements have suddenly become a security threat.

There is simply no logical fit between the FDOC's renewed censorial zeal and the current evidence that would justify its alone-in-the-nation censorship of a publication uniquely focused on the plights and rights of prisoners. The FDOC's censorship categorically precludes PLN from reaching Florida prisoners; as the District Court found, PLN cannot afford to forego advertising revenue or to publish

a Florida-specific edition. The FDOC, by contrast, can protect its interests without completely censoring PLN, just as 49 other States and the BOP do. Indeed, at the same time the FDOC bans a publication because it advertises conduct that is restricted (*e.g.*, advertisements for purchasing stamps), it allows substantial exceptions to the underlying restrictions (*e.g.*, allowing prisoners to possess up to 40 stamps). The FDOC also ignores alternative means of accommodating PLN's constitutional rights that have been successfully employed by other jurisdictions, such as stapling on a disclaimer stating that some of the advertisements may promote activities prohibited by prison rules. By almost every available measure, the FDOC's response is wildly exaggerated and cannot stand.

Exacerbating its infringement on PLN's free speech rights, the FDOC has also violated PLN's due process rights, as the District Court correctly held. When a publisher's First Amendment rights are restricted by prison officials, due process requires notice and a meaningful opportunity to challenge the prison's censorship decision. But the FDOC has regularly failed to notify PLN of its decisions. Thus, PLN often does not know when its publications are impounded, and it has no chance to make its case for a different result. The District Court agreed and enjoined the FDOC from continuing this textbook due process violation. That injunction should be upheld. If anything it should be modestly expanded to require notice of the name

of each prisoner for whom the FDOC censors PLN—not just one representative notice per issue.

STATEMENT OF JURISDICTION

PLN filed its original complaint in the United States District Court for the Northern District of Florida on November 17, 2011. The District Court had subject matter jurisdiction under 28 U.S.C. §1331 to decide the federal questions in this case, and it entered final judgment on August 27, 2015. Prison Legal News filed a timely notice of appeal from that judgment on September 18, 2015. On October 5, 2015, the District Court entered an amended final judgment, and Prison Legal News filed a timely amended notice of appeal on October 6, 2015. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the Florida Department of Corrections' censorship of Prison Legal News based on its advertising content violates the First Amendment.

2. Whether the District Court correctly determined that the Florida Department of Corrections' failure to notify Prison Legal News of the censorship of its magazine violates the Due Process Clause, and whether the District Court properly entered an injunction requiring the Department of Corrections to provide adequate notice.

STATEMENT OF THE CASE AND FACTS

A. Prison Legal News

PLN exists to advance and protect important constitutional liberties. It is a project of the Human Rights Defense Center, a not-for-profit Florida-based corporation dedicated to the protection and advancement of human rights. *See Prison Legal News v. McDonough*, 200 F. App'x 873, 875 (11th Cir. 2006). PLN is the publisher of *Prison Legal News*, a monthly journal of prison news and analysis, and a distributor of books and other materials. Having published *Prison Legal News* for over 25 years, PLN's core mission includes public education, advocacy, and outreach on behalf of, and for the purpose of assisting, prisoners who seek to enforce their constitutional and basic human rights in our nation's civil justice system. "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." Amended Order 62, Doc. 279 (hereinafter "Order"). And that process "in turn helps prison administrators correct insidious practices, ensuring long-term stability." *Id.*

To further its mission, *Prison Legal News* is composed of writings from legal scholars, attorneys, prisoners, and news wire services, presenting news and analysis primarily of legal developments affecting incarcerated people and their families, as well as political commentary largely critical of the prison system. Jan. 5 Tr. 33:21-

34:13; Pl. Ex. 43. "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." Order 9. It has received a number of awards for its journalism, including the First Amendment Award from the Society of Professional Journalists. Jan. 5 Tr. 50:7-19.

Prison Legal News has a monthly circulation of approximately 7,000 printed copies, and has subscribers in the United States and abroad, including incarcerated subscribers in all 50 state correctional systems, the federal BOP, and numerous county jails throughout the country. Jan. 5 Tr. 48:1-11. Although "[p]risoners are the magazine's primary audience," subscribers to *Prison Legal News* also include attorneys, judges, journalists, academics, and others. Order 8.

Like most periodicals, PLN can survive only by including advertisements in its monthly magazine. As the District Court found, "without advertisements PLN could not print *Prison Legal News*." *Id.* at 9 n.9. The publication would simply cease to exist. And "printing a Florida-only edition of *Prison Legal News*," without the advertisements deemed unproblematic by 49 States, the BOP, and every jail in America, "would be cost-prohibitive." *Id.* Thus, the FDOC's application of its regulations prevents PLN from providing its important service to prisoners in Florida.

B. The FDOC's Admissible Reading Material Rule

The FDOC has adopted a number of regulations governing Florida's prisons. The rule at issue here, the "Admissible Reading Material" Rule, regulates prisoner mail. *See* Fla. Admin. Code R.33-501.401. It allows prison officials to screen incoming mail addressed to prisoners, and it directs the officials to reject any publication that is found to violate one of thirteen distinct criteria.

As relevant here, the current Rule requires that a publication be rejected if:

> 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.
>
> [or]
>
> 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).[1]

In Florida prisons, officials screen incoming prisoner mail according to the FDOC's guidelines. Mailroom staff in the prisons open every piece of mail, including publications like *Prison Legal News*. In doing so, they search for

[1] The Rule was amended in 2010, but "[t]hat amendment did not change subsections (3)(l) and (m)." Order 3 n.3.

contraband and skim the content for prohibited communications. Fla. Admin. Code R.33-210.101 (5), 33-501.401. If a mailroom employee believes that a publication violates the Rule, he impounds the publication by issuing a "Notice of Rejection or Impoundment." *See* Fla. Admin. Code R.33-501.401(8). The rules require the prison to prepare 5 copies of this notice for each impounded publication that has not previously been rejected by the FDOC's Literature Review Committee ("LRC"). Prison staff are to send two copies of the Notice to the intended prisoner-recipient, one copy to the LRC, and one copy to the sender of the publication; one copy is retained by the institution. *Id*.

This Notice is intended to inform the sender that it may appeal the impoundment decision to the LRC by mailing a copy of the Notice, as well as a letter explaining the reasons for the appeal, to the Library Services Administrator, within 15 days. The first impounding facility initiates a process that is intended to result in the automatic impoundment of the publication at every other Florida prison without further notice to the publisher. *See* Fla. Admin. Code R.33-501.401(8)(c).

Three FDOC employees make up the LRC. Fla. Admin. Code R.33-501.401(14). The group meets periodically to decide whether to affirm or overturn every impoundment decision. *Id.* The LRC, like the front-line mailroom officials, must determine whether the relevant advertisements are "prominent or prevalent throughout the publication." Fla. Admin. Code R.33-501.401(3)(l). Remarkably,

however, when making these decisions, "the LRC *never* receives a photocopy of the entire impounded publication." Order 22. Instead, it reviews only the pages with the allegedly offending advertisements on them, without any context to evaluate how "prominent or prevalent" those advertisements are in relation to the magazine as a whole. *Id.*; *see also* Jan. 6 Tr. 115:23-116:1; Jan. 7 Tr. 4:17-20. The LRC maintains a list of rejected and approved publications, and if an incoming publication (*e.g.*, a particular issue of *Prison Legal News*) has previously been rejected, it is not reviewed again. Fla. Admin. Code R.33-501.401(4). Instead, it is automatically rejected based on the earlier rejection, and mailroom staff prepare a separate notice for each individual prisoner. Although it would not "impose a hardship" on prison resources, the FDOC does not require staff to provide a copy of the notice to the publisher in those circumstances. Jan. 7 Tr. 201:1-16; Fla. Admin. Code R.33-501.401(7). Nor does the LRC "notify publishers when it upholds an impoundment decision unless the publisher appealed the initial impoundment decision." Order 23.

"The FDOC has impounded every issue of *Prison Legal News* since September 2009." *Id.* at 24. As a result of the FDOC's aggressive application of its rule, PLN's number of subscribers in Florida prisons dwindled from over 300 prisoners in 2009 to 60 or 70 prisoners at the time of trial. Jan. 5 Tr. 46:12-18. If the FDOC continues censoring PLN, there is little doubt that the number of Florida prisoner-subscribers will soon be zero.

In the vast majority of instances, the FDOC failed to adequately inform PLN that its publications had been censored. The District Court found that "for 26 issues between November 2009 and December 2014," or "roughly 42% of all issues during that period," "PLN did not receive any notice from the FDOC that *Prison Legal News* had been impounded." Order 26. Even the notices that PLN did receive were often insufficient to explain the basis for impoundment: "many did not list the page numbers containing advertisements allegedly in violation of the Rule"; "[s]ome did not even state the subsection allegedly breached"; "[a]nd at least three times PLN received a notice of *rejection* [from the LRC] without having first received a notice of impoundment, meaning that the LRC had made its decision before PLN had an opportunity to appeal." *Id.* In addition, "the FDOC failed to provide notice every time it impounded the *Prisoners' Guerilla Handbook* [*to Correspondence Programs in the United States and Canada*] and the information packets sent to its inmates by PLN." Order 26. In all, the FDOC failed to provide adequate notice a shocking 87% of the time it censored PLN's publications. *See* Pl's Post-Trial Br. 9, Doc. 246; Order 26 n.18 (adopting PLN's summary of defective notices); Pl's Ex. 46 (providing every notice PLN received from FDOC).

The FDOC's censorship of PLN is a national outlier. "Florida is the *only* state that censors *Prison Legal News* because of its advertising content." Order 20. No other state corrections agency, nor the BOP, nor any county jail (including every

county jail in Florida) considers it necessary to censor PLN's publications based on their advertisements.[2] And "[s]ome 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." *Id.*

There is also considerable "tension" between the FDOC's strict censorship of PLN for including advertisements concerning certain conduct and other prison rules that permit substantial leeway for similar conduct. Order 20. For example, while the FDOC says it is concerned with three-way calling services because they can mask the true identity and location of a call recipient, it allows prisoners to call cell phone numbers, "for which it has no way of knowing the location and identity of the person on the other end." *Id.* And while the FDOC says it is concerned with stamp-based payment methods, "it allows inmates to possess up to 40 stamps at any given time." *Id.* These FDOC policies thus allow primary conduct that directly threatens the FDOC's asserted security concerns, while prohibiting PLN's constitutionally

[2] Two private prison companies, GEO Group and Corrections Corporation of America, previously followed the FDOC's practice and censored PLN in their Florida facilities but not in other States. *See* Jan. 5 Tr. 74:17-76:25. A GEO Group prison in Indiana also briefly rejected PLN publications based on pen-pal advertisements, but ceased doing so after PLN sued. *See id.* 144:8-11, 145:10-13. Both private prison companies were original defendants in this suit but settled with PLN before trial. *See* Joint Stipulation of Dismissal of Defendants the GEO Group, Inc. and Corrections Corporation of America, Doc. 116.

protected speech based on advertisements that could only indirectly and hypothetically affect those security concerns.

C. Previous Litigation

This is not the first time the FDOC has censored PLN, nor the first time that its censorship has prompted litigation. From 1990, when PLN was founded, until 2003, the FDOC uneventfully delivered *Prison Legal News* to Florida prisoners. In February 2003, the FDOC began censoring *Prison Legal News* based on its advertisements, and often without notifying PLN that its publications were impounded. When PLN first raised the issue with the FDOC, it agreed to stop censoring *Prison Legal News* for its advertising content. But the very next month it again began censoring the magazine. PLN then sued, raising free speech and due process claims under the First and Fourteenth Amendments.

"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 [found in *Prison Legal News*], so long as those ads are merely incidental to, rather than being the focus of, the publication." Order 5 (quotations omitted). Based on this change, the FDOC insisted that it would no longer censor *Prison Legal News*. Specifically, an FDOC official explained that "if [a] publication's focus is publishing articles, news, short stories, and similar material and the advertisements are merely incidental to the primary focus of the publication, the publication will not be rejected

because it contains such ads." Hayes Affidavit 1, Doc. 230 Ex. 4. After the amendment, and throughout the course of the previous litigation, the FDOC refrained from censoring *Prison Legal News* and delivered it to Florida prisoners.

The FDOC urged the courts to dismiss PLN's First Amendment claim as moot based on the policy change. It emphatically told the District Court that "the Department's new policy ensures that Plaintiff's magazine will not be rejected merely because it contains a three-way calling, pen pal, or postage advertisement." Def. Trial Br. 10-11, No. 3:04-cv-14-JHM-TEM (M.D. Fla.), Doc. 58; Pl's Ex. 17. And the FDOC's institutional representatives informed the court that the Department no longer had security concerns with PLN's advertisements. *See, e.g.*, Upchurch Affidavit, Pl's Ex. 6 ("Because this process prevents use of the longdistance three-way calling services advertised by local companies, it adequately addresses the department's security concerns. For this reason, it is now unnecessary to reject flyers and publications carrying such advertisements."). The trial court agreed that the claim had become moot, finding that "the FDOC ha[s] plenty of ways at its disposal to prevent the inmates from taking advantage of any illicit services offered in the advertisements, [and] its procedures and policies already ensure that publications such as PLN, which are not focused on such content, can be distributed to inmates without any substantial security concerns." Order 13-14, No. 3:04-cv-14-JHM-TEM (M.D. Fla.), Doc. 87; Pl's Ex. 23.

This Court affirmed based on the same representations from the FDOC. Specifically, the Court held 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 th[e] case' in the future." *McDonough*, 200 Fed. App'x at 878. Relying on the FDOC's assurances about how it would apply its new policy, this Court had "no expectation that FDOC w[ould] resume the practice of impounding publications based on incidental advertisements." *Id.* The FDOC has never alleged that its delivery of *Prison Legal News* during the interregnum period led to any security threats. *See* Order 12.

D. Proceedings Below

But the FDOC's promises to this Court were short-lived. Only two years later, the FDOC resumed its practice of censoring *Prison Legal News* based on its advertisements. In another amendment to the Admissible Reading Material Rule, the FDOC instructed prison officials to reject a publication if prohibited advertisements are "prominent or prevalent throughout the publication," Fla. Admin. Code R.33-501.401(3)(l) (2009). As explained above, since adopting this change, the FDOC has applied the Rule to impound every issue of *Prison Legal News* and certain other, but not all, materials and correspondences from PLN.

After unsuccessfully attempting to resolve the dispute without litigation, PLN was again forced to sue the FDOC. In November 2011, PLN filed suit, and on December 16, 2011, PLN filed the operative Complaint in this case. As relevant here, two constitutional claims against the Secretary of the FDOC, under 42 U.S.C. §1983, remain—an as-applied claim against the FDOC's censorship of PLN under the First and Fourteenth Amendments, and a procedural due process claim based on the FDOC's failure to provide adequate notice under the Due Process Clause of the Fourteenth Amendment. *See* First Amended Complaint, Doc. 14 (Count III and Count VI). PLN sought a declaratory judgment and a permanent injunction on both counts. After denying cross-motions for summary judgment, the District Court held a four-day bench trial.

The District Court concluded that the FDOC violated PLN's due process rights and granted an injunction on that claim, but it upheld the FDOC's censorship of PLN. Despite the lack of any evidence that Florida's prisons had experienced any new security problems traceable to its decision to stop censoring PLN's publications, the District Court broadly deferred to the FDOC's claimed need to resume censorship. The court found that the Florida prisons had experienced some unrelated security issues, and it credited the FDOC's newfound concern with its three-way calling security protections. But there was no evidence tying either of these issues to the advertisements in PLN's publications.

Nonetheless, the District Court held that the FDOC's expansive censorship of PLN was logically connected to its security concerns. It did not reach this conclusion with respect to each category of prohibited advertisements, but instead lumped the four categories together. Nor did it provide any analysis whatsoever for censorship based on advertisements for pen pal services or inmate business services. While it acknowledged that some of the FDOC's other policies directly undermined the interests supposedly underlying its censorship of PLN, it concluded that it was required to defer to the Department's decision to tolerate those direct threats while prohibiting PLN based on advertising. *See* Order 44-46. And while it found that PLN could not afford to publish its magazines without the relevant advertisements or publish a Florida-only version of *Prison Legal News*, the District Court nonetheless concluded that PLN had alternative means of expressing itself in Florida's prisons. *See id.* at 47.

The court also relied on the FDOC's objections to conclude that the FDOC could not accommodate PLN's rights without burdening prison resources or security concerns. *See id.* at 47-48. It pointed to no specific evidence for this conclusion, but instead held that Supreme Court precedent required it to "defe[r] 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.'" Order 48 (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 418, 109 S. Ct. 1874, 1884 (1989)).

The District Court found it "troubling" that no other prison system in the United States impounds PLN for its advertising content. Order 48. Yet, it declined to conclude that the FDOC's *de facto* ban on PLN was an exaggerated response to its security concerns. It considered New York's practice of attaching short notices to PLN's publications, warning prisoners that some of the advertised services are prohibited by prison rules. But it dismissed this alternative because "the FDOC may be constrained in ways that New York's department of corrections is not." Order 49.

The court also noted the "*many* other worrisome facts uncovered at trial," including the inherent vagueness of the Rule's "prominent or prevalent" standard. Order 50. Different officials employed different concepts of the terms, and no official who testified at trial could articulate a lower limit for the "prevalence" standard. *Id.* In addition, because the LRC never reviews the entire publication being impounded, the District Court worried that it was incapable of actually assessing prevalence. *Id.* Yet, in the end, the District Court concluded that the FDOC's uniform rejection of *Prison Legal News* suggested that the Rule could be applied intelligibly, and it considered itself constrained to uphold the FDOC's practice of censoring PLN. *See id.* at 52.

On the Due Process claim, the District Court found evidence of an ongoing constitutional violation. "The 'decision to censor or withhold delivery of a particular [publication],' such as *Prison Legal News*," the court explained, "'must be

accompanied by minimum procedural safeguards.'" Order 52-53 (quoting *Procunier v. Martinez*, 416 U.S. 396, 417, 94 S. Ct. 1800, 1814 (1974)). These minimal requirements include "(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." Order 53. The District Court held that the FDOC regularly failed to notify PLN of impoundment and often failed to adequately explain the basis for impoundment. *Id*. at 25-26, 58. Because of these failures, PLN frequently learned of a rejection, and the LRC's decision affirming impoundment, without ever having had a chance to challenge the action. *Id.* at 26.

The District Court rejected the FDOC's argument that these deficiencies were based on the mere negligence of mailroom staff. Because the failures were so widespread and consistent, the Court found "that the FDOC's failure to provide notice exceeded negligence." Order 58. The exceptional rate at which the FDOC failed to provide adequate notice or an opportunity to contest its decision "indicates a substantial risk … disregarded by FDOC administrators" that "[a]t the very least … amounts to recklessness or gross negligence, which everyone agrees suffices for a due process violation." *Id.* at 58-59.

The court also rejected the FDOC's argument that PLN waived its due process claim when it did not appeal every impoundment decision. In the many instances where it was not notified of impoundment "[o]f course PLN did not appeal. It did not know that an issue had been censored, by which institution, and on what grounds." Order 60. Even as to the impoundments for which it was given notice, those notices were often deficient. Because "the reasons for impounding *Prison Legal News* var[ied]," the District Court held that the FDOC had a continuing duty to inform PLN each time it refused to deliver a new issue of *Prison Legal News*. *Id.* Thus, the District Court concluded, PLN had not waived its due process rights and those rights were violated.

Because the FDOC would likely continue to deprive PLN of its due process rights, the District Court entered an injunction requiring the FDOC to modify its practices 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.

Order 64-65.

After the District Court entered judgment for the FDOC on the First Amendment issue and for PLN on the Due Process issue, both parties appealed and the FDOC moved for a stay, which the District Court denied. In addition, PLN moved to partially alter or amend the judgment to clarify that the Prison Litigation Reform Act (PLRA) does not apply to the District Court's injunction or, in the alternative, that the injunction satisfies the PLRA. The District Court granted that motion, over the FDOC's objection, and entered an amended final judgment. The parties filed amended notices of appeal, but the FDOC has not challenged the District Court's PLRA ruling.

SUMMARY OF ARGUMENT

Since 2009, the FDOC has consistently violated PLN's free speech and due process rights by censoring its publications without providing adequate notice or an opportunity to be heard. There is no doubt that PLN has a First Amendment interest in sending its publications to prisoner-subscribers, or that the FDOC has abridged that fundamental right. *Turner v. Safley* and *Thornburgh v. Abbott* set forth a four-

part test for evaluating a prison system's infringement of a publisher's First Amendment rights, and each of those factors favors PLN.

The FDOC's censorship of PLN is illogical and unnecessary. In previous litigation, the FDOC represented to this Court that the advertisements in PLN's publications do not present a significant security threat and pledged not to censor PLN. Shortly after that litigation was dismissed, however, the FDOC reversed course without adequately explaining what justified its renewed appetite for censorship. Indeed, while prison officials often have to rely on predictive judgments, the 55-month censorship-free interregnum (not to mention the experience of 49 other States, the BOP, and every jail in the country) gave the FDOC the unique opportunity to verify its representation to this Court that PLN's advertisements did not create material security risks. Yet, the FDOC has pointed to no material change in circumstances. It is thus barred from now arguing that PLN must be censored for security reasons.

The exaggerated nature of the FDOC's renewed censorship is further underscored by its decision to permit some of the same primary conduct that, if advertised, gives rise to censorship. The FDOC permits calls to cell phones that raise the same problems supposedly targeted by prohibitions on three-way calling. And while the FDOC bans publications that have too many advertisements for companies that accept stamps as payment, the FDOC allows prisoners to possess up

to 40 stamps, rather than banning stamps altogether or more strictly limiting the amount prisoners may possess. Even in the prison context, censorship cannot be a first resort for tackling problems better dealt with by regulating the primary conduct that concerns prison officials. The District Court said nothing to justify censorship based on advertisements involving pen pal services or inmate business services.

Even if the FDOC's censorship of PLN were logically related to its penological interests, it still would fail because it bans too much speech with too little justification. Under the FDOC's aggressive application of its regulations, PLN is left with no alternative means of exercising its free speech rights. As the District Court found, it cannot operate without advertisements and the cost of producing Florida-specific publications would be prohibitive. If this Court does not reverse, Florida's large prison population will be deprived of PLN's valuable publications. The burden of accommodating PLN's constitutional rights, by contrast, is minimal. There is no evidence that the relevant advertisements ever have or ever will lead to new security threats. And ceasing its censorship of PLN will significantly *reduce* Florida prisons' administrative burden.

Indeed, Florida's approach to PLN is an extreme outlier. No other State, nor the federal government, nor any county jail considers it necessary to censor PLN based on its advertising content. That is strong evidence that the FDOC's draconian approach is an exaggerated response to its purported security concerns. Indeed, the

FDOC has a number of available alternatives, including New York's practice of attaching a short notice to PLN's publications warning prisoners that some advertisements relate to prohibited conduct, that would accommodate PLN's constitutional rights with minimal cost to Florida's prisons.

The FDOC's due process violations are plain, and the District Court was right to enjoin them going forward. Under *Procunier v. Martinez*, prisons must satisfy minimal due process requirements when impounding incoming mail. They must provide notice, a meaningful opportunity to challenge the decision, and review of the decision by prison officials not involved in the initial impoundment. The record evidence clearly established that the FDOC failed to provide PLN *any* notice nearly half of the time it impounded PLN's publications, and in many more instances it failed to provide adequate notice identifying the basis for its decision. This fundamental failure thus prevented PLN from challenging many of those actions and failed to create an accurate factual record for effective judicial review.

The Secretary's many arguments to justify the FDOC's misconduct are unpersuasive. Her first question presented is premised on the mistaken view that the District Court rested its injunction on a finding of negligence by prison mailroom officials. But the District Court squarely held that the FDOC's atrocious record of providing notice was the product of *more* than negligence, and it expressly laid the blame for those failures on the FDOC's administrators, not low-level mailroom

staffers. Even if that were not true, even a negligent failure to provide notice violates due process.

The Secretary waived any arguments about supervisory liability by not raising them below, and her reliance on *Rizzo v. Goode* is wholly off-point. That case rejected a class of plaintiffs' attempt to group together unrelated instances of police misconduct to avoid standing problems and attribute isolated substantive abuses by individual police officers to city officials. Here, there is no standing problem, each due process violation directly injured PLN, and the District Court found that the FDOC administrators recklessly disregarded the substantial risk associated with the prisons' persistent failure to provide adequate notice.

Finally, the Secretary is simply wrong to claim that PLN waived its due process rights by not appealing every impoundment decision. Of course, PLN could not appeal when it had no notice of a violation, and the courts have not required plaintiffs to exhaust administrative remedies before raising procedural due process claims. Thus, the District Court's injunction should be upheld, and if anything modestly expanded to require the FDOC to provide notice of every decision to impound a PLN publication, not just a single, representative notice for each issue of the magazine.

STANDARDS OF REVIEW

"After a bench trial," this Court reviews "the district court's conclusions of law *de novo* and the district court's factual findings for clear error." *Proudfoot Consulting Co. v. Gordon*, 576 F.3d 1223, 1230 (11th Cir. 2009). The Court will "reverse the district court's findings of fact if, after viewing all the evidence," the Court is "left with the definite and firm conviction that a mistake has been committed," *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 873 (11th Cir. 2005) (internal quotation marks and citation omitted), or that the findings are not "supported by substantial evidence," *United States v. Robertson*, 493 F.3d 1322, 1330 (11th Cir. 2007). "The grant of an injunction is reviewed for abuse of discretion." *Wesch v. Folsom*, 6 F.3d 1465, 1469 (11th Cir. 1993).

ARGUMENT

I. The Department's Censorship of *Prison Legal News* Violates PLN's First Amendment Rights.

The First Amendment question in this case is not whether the FDOC's regulations are legitimate in the abstract; instead, the Court must decide whether the FDOC's specific application of those rules violates PLN's specific constitutional rights. The answer to that question is simple and straight-forward. There is no logical fit between the FDOC's censorship of PLN's publications and its claimed penological interests. The FDOC definitively told this Court that the relevant advertisements do not pose a material security risk. And both its experience during

the censorship-free interregnum and its permissive attitude toward more serious conduct confirms its prior statements. The FDOC's aggressive application of its rule against PLN leaves the publisher with no alternative means of exercising its constitutional rights in Florida's prisons, while the FDOC could accommodate PLN's free speech rights without a significant effect on prison security or resources. Indeed, no other prison system or jail in the entire country considers it necessary to censor *Prison Legal News* on the basis of its advertisements. The FDOC's application of its rule is an illogical and exaggerated response to its claimed objectives that cannot stand under the First Amendment.

A. The First Amendment Applies Within Prison Walls.

The FDOC indisputably impinges on PLN's core First Amendment rights, as incorporated against the States by the Fourteenth Amendment, every time it censors *Prison Legal News* and other PLN publications. As the Supreme Court explained in *Thornburgh v. Abbott*, "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." 490 U.S. at 408, 109 S. Ct. at 1879; *see also Perry v. Secretary, Fla. Dep't of Corr.*, 664 F.3d 1359, 1363-64 (11th Cir. 2011). So too do prisoners have a constitutional right to receive *Prison Legal News* and similar publications. *See id.* Indeed, the Court has long cautioned that "'[p]rison walls do not form a barrier separating prison inmates

from the protections of the Constitution,' nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'" *Thornburgh*, 490 U.S. at 407, 109 S. Ct. at 1878 (quoting *Turner v. Safley*, 482 U.S. 78, 84, 94-99, 107 S. Ct. 2254, 2259, 2265 (1987)) (citations omitted).

These rights are even more important, and their abridgement even more harmful, when a prison impounds publications like PLN's that inform prisoners of their legal rights and chronicle prison abuses. A publication like *Prison Legal News* is both uniquely useful to prisoners, and based on its content, a uniquely attractive target for censorship by prison officials. Especially when a vague standard that does not categorically prohibit all advertisements for activity forbidden within prison walls (a policy that impermissibly would censor nearly all periodicals) is used to target a publication like *Prison Legal News*, First Amendment concerns are at their zenith.

While these constitutional rights must be balanced against a prison's legitimate penological interests, the federal courts must nonetheless "discharge their duty to protect constitutional rights." *Procunier v. Martinez*, 416 U.S. at 405-06, 94 S. Ct. at 1807-08. In *Turner v. Safley*, the Supreme Court developed the following four-part analysis to balance the need to protect vital constitutional rights against prisons' legitimate safety or security concerns, and in *Thornburgh v. Abbott*, the

Court held that the same analysis applies to policies that infringe on publishers' First Amendment rights. *See* 490 U.S. at 405-14, 109 S. Ct. at 1877-82.

The first *Turner* factor requires "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (quotation marks omitted). This element of the analysis breaks down into two sub-steps: (1) whether the asserted penological interest "is legitimate and neutral" and (2) whether the challenged regulation is "rationally related to that objective." *Thornburgh*, 490 U.S. at 414, 109 S. Ct. at 1882. If a prison's policy fails under either of those subparts, it cannot be upheld "irrespective of whether the other factors tilt in its favor." *Shaw v. Murphy*, 532 U.S. 223, 229-30, 121 S. Ct. 1475, 1479 (2001); *Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001) ("The rational relationship factor of the *Turner* standard is a sine qua non.").

If a prison's actions survive the first factor, the analysis next looks to how each party's position would affect the other side. The second *Turner* factor considers "whether there are alternative means of exercising the right that remain open to [the plaintiff]." 482 U.S. at 90, 107 S. Ct. at 2262. If a plaintiff is able to pursue "other avenues" to exercise its constitutional rights, then courts are encouraged to defer to prison officials. *Id.* But when a plaintiff has no such alternatives, the courts must be more circumspect. The third factor then considers "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the

allocation of prison resources generally." *Id.* This consideration, while important, is not a trump card for prison officials. Prisons cannot deny constitutional protections merely based on inconvenience or minimal additional costs. Instead, the factor is concerned with whether accommodating a plaintiff's rights will cause "a significant 'ripple effect' on fellow inmates or on prison staff." *Id.*

The fourth *Turner* factor asks whether the prison's actions are an "exaggerated response" to its concerns. *Id.* The availability of "obvious, easy alternatives" for the prison to protect its legitimate interests while respecting constitutional rights suggests that "the [prison's] regulation is not reasonable." *Id.* "While not necessarily controlling, the policies followed at other well-run institutions [are] relevant to a determination of the need for a particular type of restriction." *Martinez*, 416 U.S. at 414, n.14, 94 S. Ct. at 1812, n.14. If no other prisons consider it necessary to infringe constitutional rights to protect the same penological interests, that is especially strong evidence that a regulation is unlawful. *See id.*; *cf. Holt v. Hobbs*, 135 S. Ct. 853, 866 (2015) ("That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks."). And if "the rule sweeps much more broadly than can be explained by [the prison's] penological objectives," then courts are

required to protect the plaintiff's constitutional rights over the prison's preferred policy. *Turner*, 482 U.S. at 98, 107 S. Ct. 2266; *Cook*, 238 F.3d at 1150-51.

While the *Turner* analysis affords deference to prison officials' judgment, it is not a "blank check to prison officials." *Johnson v. California*, 543 U.S. 499, 547, 125 S. Ct. 1141, 1170 (2005); *Thornburgh*, 490 U.S. at 414, 109 S. Ct. at 1882 ("[A] reasonableness standard is not toothless."). The Supreme Court has always taken care to emphasize that "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535, 126 S. Ct. 2572, 2581 (2006). The government may not pile "conjecture upon conjecture" to justify infringement of constitutional rights. *Reed v. Faulkner*, 842 F. 2d 960, 963-64 (7th Cir. 1998). Thus, it is not enough for prison officials merely to assert that "in our professional judgment the restriction is warranted." *Beard*, 548 U.S. at 556, 126 S. Ct. at 2593 (Ginsburg, J., dissenting); *id.* at 535, 2581 (majority opinion) (agreeing that the standard is much higher). Rather, "[i]n order to warrant deference, prison officials *must present credible evidence* to support their stated penological goals." *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) (emphasis by court); *see also, e.g.*, *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990); *Ramirez v. Pugh*, 379 F.3d 122, 128-29 (3d Cir. 2004); *Whitney v. Brown*, 882 F.2d 1068, 1074 (6th Cir. 1989). And the "deference owed prison authorities" thus does *not* make "it impossible for prisoners

or others attacking a prison policy … ever to succeed." *Beard*, 548 U.S. at 535, 126 S. Ct. at 2581.

In particular, courts should decline to defer to prisons where a "'severe'" restriction amounts to "'a *de facto* permanent ban'" on a plaintiff's exercise of constitutional rights. *Id.* (quoting *Overton v. Bazzetta*, 539 U.S. 126, 134, 123 S. Ct. 2162, 2169 (2003)). And even where a prison rule is facially legitimate, it "may be invalid if it is applied to the particular items in such a way that negates the legitimate concerns." *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 986 (8th Cir. 2004); *see also Thornburgh*, 490 U.S. at 403, 109 S. Ct. at 1876 (remanding for as-applied analysis after rejecting a facial challenge).

B. There is no Logical Fit Between the FDOC's Censorship of PLN and Its Asserted Rationale.

The FDOC's application of the Reading Material Rule to censor PLN is not logically related to its concerns with the relevant advertisements. The FDOC itself has previously told this Court that the exact same type of advertising content in *Prison Legal News* does not pose a material security threat, and there is no evidence to suggest that any new threat has arisen—nor that any threat existed in the 13 years before the FDOC began censoring PLN. The FDOC is thus barred from arguing otherwise now. Indeed, the FDOC's operations and the distribution of PLN publications to prisoners co-existed for the 55 months that the FDOC honored its representations to this Court and the sky did not fall. To the contrary, during those

months, the FDOC, like every other penal agency in the nation, demonstrated that prisons can enforce prison rules even in the face of publications that contain advertisements for services that would violate those rules. Indeed, the FDOC continues to allow prisoners to engage in primary conduct that poses a much greater threat to the prison's claimed security interests.

By lumping together the four categories of forbidden advertisements, the District Court obscured the lack of fit between the FDOC's censorship and its stated objectives. As to one of the services (three-way calling), PLN does not contain such advertisements and never has. As to two others (pen-pals and conducting a business) the District Court said nothing. With the sole remaining category (advertisement for the purchase of stamps), the FDOC has the greatest fit problem since it, in fact, allows prisoners to possess up to 40 stamps at any given time, and it could easily stop prisoners from selling stamps or using them as payment by inspecting outgoing mail for enclosed stamps. That fit problem is exacerbated by the FDOC's failure to ban all advertisements of forbidden services, but rather to ban them only at the point at which they become prevalent or prominent in the underlying publication (without ever defining what that standard means).

1. There is no rational basis for the FDOC's renewed censorship of PLN.

The FDOC itself has recognized the shaky grounds on which its censorship rests. In 2006, to further its argument that a previous lawsuit challenging its

censorship of PLN had been rendered moot, the FDOC told this Court that PLN's advertisements do not pose a material security risk and that the FDOC had "'no intent to ban PLN based solely on the advertising content at issue in this case' in the future." *McDonough*, 200 Fed. App'x at 878. "[A]lthough the FDOC previously wavered on its decision to impound the magazine," the Court agreed that the previous suit became moot because "[t]he FDOC demonstrated that its [2005] 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." *Id.* Shortly after this Court decided *McDonough* and dismissed the case, however, the FDOC again amended its rule and again began impounding PLN's publications. But there was no neutral, legitimate justification for that about-face, and there is no new evidence suggesting that *Prison Legal News* had suddenly become so dangerous that it could *never* be distributed to the prisoners who had purchased subscriptions.

Indeed, because the FDOC's position in this litigation is antithetical to its earlier representations to this Court it is barred by judicial estoppel. In its efforts to have PLN's first lawsuit dismissed as moot, the FDOC assured this Court that there were no security concerns with the types of advertisements contained in PLN's publications. Now, the FDOC claims that those same forms of advertisements pose such a grave security threat that they require complete censorship of every issue of *Prison Legal News*. Plainly, the FDOC's current position, which it advanced to

secure victory in the District Court, "is inconsistent with [its] claim … in [the] previous proceeding," which it advanced to secure victory the last time this dispute was before this Court. *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002) (quotations and citations omitted). That sort of gamesmanship is precisely what judicial estoppel exists to prevent. And this is not the first time the FDOC has flip-flopped in litigation with PLN; during the previous litigation, "the FDOC changed its position several times" before finally convincing this Court that it would no longer censor PLN. *McDonough*, 200 Fed. App'x at 875. Especially given the important First Amendment interests at stake, this Court should preclude the FDOC from "deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 1814 (2001).

The FDOC's reversal poses more than credibility concerns. Prison officials receive deference in part because they must rely on predictive judgments that cannot be empirically tested. For instance, no court would force prison officials to house all prisoners together before deferring to a prison official's judgment that the most dangerous prisoners should be housed separately. But, here, based on the FDOC's own judgment that PLN and its advertisements did *not* pose a material security risk, there is ample empirical evidence that shows that the FDOC's censorship does not fit its stated security concerns. And the FDOC has failed to provide any counter-evidence showing that the connection between its objectives and its censorship of

PLN "is not so remote as to render the policy arbitrary or irrational." *Prison Legal News v. Cook*, 238 F.3d 1145, 1150 (9th Cir. 2001). Instead, the FDOC's own experience during the 55 months that it foreswore censorship and the 13 years before it began censoring PLN, not to mention the experience of 49 States and the BOP, demonstrates that the FDOC can maintain a secure prison system and enforce rules against restricted conduct while allowing PLN to exercise its undoubted First Amendment freedoms.

The FDOC's efforts to point to materially factual differences between then and now that could justify renewed censorship are unavailing. For example, the FDOC claimed that it changed its rule because PLN began including more offending advertisements in its magazine. *See* Jan. 6 Tr. 62:19-21. In fact, when directly asked, that is the *only* reason the FDOC provided. Pl's Ex. 30, #2. It said nothing of differences in calling technology and an increase in cash-for-stamps transactions. As an initial matter, this claimed reason strongly suggests that the change was aimed directly at bringing PLN back within the Rule's prohibition, and thus it is not a legitimate, neutral justification under *Turner*.

More importantly, it is simply not true. Although *Prison Legal News* has grown in size, the *proportion* of the magazine containing relevant advertisements has not materially changed. From January 2005 to August 2009 (the period when *Prison Legal News* was allowed in Florida prisons), the relevant advertisements

"increased only slightly from 9.21% in 2005 to 9.8% in 2009." Order 16. Given that the FDOC's rule prohibits only "prominent or prevalent" advertisements—standards that call for a *relative* assessment of a magazine's advertising content—the FDOC's treatment of *Prison Legal News* should not change so long as the proportion of offending advertisements does not materially change. And in all events it is utterly implausible that a .59 percentage-point increase in advertisements poses a sufficiently serious security risk to justify the FDOC's complete about-face. This rationale simply does not add up.

2. The District Court failed to adequately analyze each element of the Rule.

The District Court's analysis of the FDOC's application of its Rule was insufficient at a number of levels. As a threshold matter, it analyzed only censorship based on three-way-calling and stamp-for-payment advertisements. It did not consider rejections based on pen pal and outside business service advertisements. And the analysis it did conduct missed the utter mismatch between the FDOC's censorship of PLN and its stated security objectives.

With respect to three-way-calling advertisements, but none of the other categories, the FDOC argues that new security concerns came to light after *McDonough*. Specifically, the FDOC told the District Court that it became concerned that its telephone service provider, Securus, was not able to block three-way calls as effectively as the FDOC previously thought. According to the FDOC,

this weakness is problematic because three-way calls prevent prison officials from knowing the precise identity and location of call recipients. Thus, the FDOC argues, its censorship of PLN is essential to protect its ability to know who and where its prisoners are calling.

But this rationale encounters two insurmountable obstacles. First, PLN's publications do not contain advertisements for three-way calling services. *See* Jan. 5 Tr. 60:15-24. In fact, PLN has "*never* run an ad in [its] history for so-called three-way calling services." *Id.* 61:11-12. The closest type of advertisements found in *Prison Legal News* are for discount telephone services that provide a local phone number (to a person on the outside) that can ring on that person's existing phone. *Id.* 61:1-19. The prisoner still uses the same telephone system; he or she just calls the local number to receive a local rate rather than a long-distance rate. The FDOC does not prohibit calls to these local numbers, and the numbers must be approved by the FDOC. The system does not bypass Securus, and the identity and location of recipients are not obscured. At trial, a representative from Millicorp, a company that advertises in PLN, explained how this system differs from three-way calling services because the ultimate recipient of the call can be identified just like any other normal outside call. *See* Jan. 6 Tr. 48:11-52:18. PLN has included advertisements for these discount phone services, moreover, since 1996. Jan. 5 Tr. 42:7-9. And the FDOC

has offered no evidence that the advertisements led to any problems before 2003 or during the 55-month censorship-free period before the 2009 rule change.

The FDOC and the District Court ignored these facts, but that does not make them any less true. Because the record clearly establishes that PLN does not contain advertisements for three-way calling services, any renewed concern with those services cannot justify the FDOC's return to censoring PLN. Indeed, the evidence that the District Court found to justify the three-way call concern—that the prison was suspecting increased frequency of such calls—is entirely unrelated to PLN's advertisements. And even that irrelevant finding by the District Court was supported by no *actual* evidence. The FDOC's own institutional representative could not recall "any specific incidents that led to the [FDOC] change the rule." Jan. 6 Trans. 13:8-13. Nor could he recall a single incident where a three-way call bypassed the Securus system. Jan. 6 Tr. 14:2-5. Thus, nothing in the record links the FDOC's concerns with PLN's advertisements for local-number services. Without that connection, the FDOC's censorship of PLN cannot logically rest on its concerns about three-way calls.

Second, the FDOC allows prisoners to engage in primary conduct that directly prevents the prisons from knowing the precise identity and location of call recipients. The FDOC constrains prison calls by limiting prisoners to a list of 10 phone numbers that are approved in advance by the FDOC. But these lists are not limited to

traditional "land-line" numbers that belong to a specific home in a specific location. Prisoners may also list cell phone numbers, which can then be used by any individual in any location. *See* Order 20. This *direct* threat to the FDOC's purported security concern far outpaces the purported *incidental* threat that PLN's *advertisements* for local-number services could possibly present. And the FDOC could prohibit or limit these types of calls, but it has not. *Cf. Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996). Other courts have found constitutional violations where a prison's policy contains similar "loopholes that undermine its rationality and the credibility of [the prison's] concerns." *Cal. First Amendment Coalition v. Woodford*, 299 F.3d 868, 881 (9th Cir. 2002). The FDOC's permissive attitude toward the direct threat posed by cell phone calls suggests that its application of the Rule to PLN is either pretextual or illogical. Either way, it fails the first *Turner* factor, and for that reason it cannot be sustained.[3]

The FDOC does not even claim any material change of factual circumstances with respect to the other three categories of verboten advertising. The District Court simply lumped all the categories together and in doing so obscured the fit problems

[3] In addition, when it was directly asked about its reasons for altering the Rule, the FDOC did not mention any changes in phone technology. *See* Pl's Ex. 30, #2 (noting the *only* reason the FDOC amended the Rule was because it noticed an increase in advertisements). This post-hoc litigation position should thus not be credited at all.

with the FDOC's censorship. But, as noted, PLN does not even include advertising for three-way calling. And the District Court never separately analyzed supposed concerns with pen-pal and outside employment advertisements. Thus, there are no factual findings or legal conclusions to justify censorship on either basis.

Nor could there be. As with three-way calls, the FDOC previously told this Court that it would not censor PLN based on pen-pal advertisements because it no longer had any security concerns with those advertisements. *See McDonough*, 200 Fed. App'x at 875 (noting that PLN contains pen pal advertisements); *id.* at 878 (noting FDOC's insistence that it will not censor PLN based on its advertisements). The advertisements from PLN that tend to fall within §3(l)'s outside business prohibition simply offer prisoners money for doing something, like drawing a picture or writing an article. Yet, prisoners are already prohibited from conducting a business or profession while incarcerated, which sweeps so broadly as to prevent inmates from being paid to write articles for publication. *See* Fla. Admin. Code R.33-602.207; *McDonough*, 200 F. App'x at 875. Thus, whatever the abstract concerns with advertisements for outside services, there is no evidence linking the specific advertisements in PLN with any increased security concern.

That leaves only the concern with advertisements for stamp-payment services, but that is where the FDOC's "fit" problem is most glaring. The Department allows prisoners to possess up to 40 stamps at any given time, and it allows prisoners to

receive stamps from their families. If the FDOC were gravely worried about prisoners' use of stamps as currency, then it would hardly allow them to stock-pile the essential element of a stamp-based economy—nor would it allow prisoners to send outgoing mail containing stamps to companies that purchase stamps or accept stamps as payment. And PLN's stamp-payment advertisements scarcely pose a commensurate risk. At best, they raise a secondary concern, especially if the FDOC is already comfortable with the amount of stamps it allows prisoners to possess. Similar advertisements, moreover, have been found in PLN's publications since its founding, including the period of years when the FDOC allowed *Prison Legal News* into its prisons without restriction. The FDOC offered, and the District Court found, no evidence that stamp-payment systems have triggered a new and significant threat—let alone any evidence linking any such increased threat with PLN's specific advertisements. Unsubstantiated, generalized claims of prison security cannot justify the FDOC's specific censorship of PLN's important speech.[4]

[4] The foregoing is true regardless of whether the FDOC relies on §3(l)'s enumerated prohibitions or §3(m)'s umbrella clause. Because this is an as-applied challenge, the relevant consideration is whether the FDOC's censorship of PLN—whatever the regulatory basis—is rationally related to a legitimate, neutral penological interest. The FDOC has not offered any additional justification for censoring PLN under §3(m)'s broader scope. Its application is therefore no more rational and no less intrusive on PLN's First Amendment rights.

3. The FDOC's approach is illogically underinclusive.

Finally, the "fit" problem with the FDOC's approach is further exacerbated by the FDOC's decision not to prohibit all publications that include any advertisement for conduct that violates prison rules. To be sure, such a blanket rule would be unsustainable because virtually every periodical with advertising would include advertisements for services that are lawful and therefore innocuous for most people but which might violate a prison's rules (*e.g.*, "escape to Mexico for the weekend"). The FDOC regulations, however, do not even categorically ban publications with advertisements for three-way calling or stamps. Instead, they prohibit only publications where such advertisements predominate. But the FDOC has never explained how a publication with 2 advertisements for three-way calling is unproblematic, but a publication with 5 such advertisements must be censored.

This underinclusiveness demonstrates not just a lack of fit, but a real threat of discriminatory censorship. The standard added by the FDOC's 2009 amendment to its Rule is impenetrably vague. At trial, no prison official could articulate precisely when a publication's advertising content crossed the line to become impermissibly "prominent or prevalent." Nor could they reasonably be expected to do so without any further guidance from the regulation. "[S]o shapeless a provision" invites "arbitrary enforcement" and masks discriminatory treatment. *Johnson v. United States*, 135 S. Ct. 2551, 2557, 2560 (2015); *see also F.C.C. v. Fox Television Stations*,

Inc., 132 S. Ct. 2307, 2317 (2012). "When speech is involved," clear standards are essential "to ensure that ambiguity does not chill protected speech." *Id.* The FDOC's Rule and its application of that policy raise precisely those concerns. Only a publication aimed at prisoners is likely to have more than one or two of the offending advertisements, and only a publication aimed at prisoners is likely to focus on publishing instances of misconduct by prison officials.

C. PLN Has No Alternative Means of Exercising Its Free Speech Rights, and Accommodating Those Rights Would Have No Significant Impact on Florida Prisons.

The remaining factors also point against the FDOC's impoundment of PLN's publications. As to the second *Turner* factor, the District Court expressly found that PLN has no alternative means of publishing *Prison Legal News* under the FDOC's application of its Rule: "Without advertisements PLN could not print *Prison Legal News*…. [P]rinting a Florida-only edition of Prison Legal News would be cost-prohibitive." Order 9 n.9 (citing Jan. 5 Tr. 60:23-71:14). This is thus not a case where the regulation "bars communication only with a limited class of … people with whom prison officials have particular cause to be concerned." *Turner*, 482 U.S. at 92, 107 S. Ct. at 2263. Nor is it a case where the plaintiff can avoid the restriction by minimally altering its behavior. Instead, it is a case where "*no* 'alternative means of exercising the right' remain open to" PLN, and the "absence of any alternative thus provides 'some evidence that the regulations [a]re unreasonable.'" *Beard*, 548

U.S. at 532, 126 S. Ct. at 2579-80 (quoting *Overton*, 539 U.S. at 135, 123 S. Ct. at 2169). If the FDOC's censorship of PLN is upheld, the publisher will have no choice but to cease distributing its magazine in Florida prisons—a harm that will fall both on PLN and its prisoner-subscribers who rely on its legal updates and information—despite the fact that PLN is based in Florida and has distributed its magazines there since its founding over 25 years ago.

The District Court contradicted its factual finding with the legal conclusion that PLN can communicate with prisoners through other media and can calibrate its advertising content to avoid censorship. Order 47. But this contradicts *Beard*'s teaching that a "*de facto* blanket ban" on certain publications leaves the publisher with no available alternative means of exercising its right and thus raises grave constitutional concerns that support an as-applied challenge to such a "severe" restriction. 548 U.S. at 535, 126 S. Ct. at 2582 (citing *Overton*, 539 U.S. at 134, 123 S. Ct. at 2162). And it ignores the impossibility of discerning the precise bounds of the Reading Material Rule's fuzzy "prominent or prevalent" standard, especially given that prison officials have seen fit to impound *every* single issue of *Prison Legal News* since 2009. *See* Jan. 5 Tr. 65:12-21 ("[The biggest issue, though, … from an editorial perspective, is figuring out what ads to remove, because I don't understand the policy…. So which ads would we remove? Which ads would we keep?").

The FDOC's own actions have demonstrated that PLN has two choices—to stop accepting any of the relevant advertisements or publish a Florida-specific publication—neither of which is actually available to the publisher, as the District Court specifically found. PLN is a not-for-profit publisher whose financial margins are razor thin. *See* Jan. 5 Tr. 38:2-6, 40:11-25, 62:1-19. It depends on advertising revenue to exist, and it cannot easily drop an existing advertiser or add new, compliant advertisements at the FDOC's whim, with no guarantee that the publication will be delivered. *Id.* 47:1-9, 62:1-19. The inescapable effect, if not the underlying purpose, of the FDOC's application of its Rule is thus to eliminate PLN's presence in Florida's prisons. And that effect is an indisputable constitutional harm: "If government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment." *Pitt News v. Pappert*, 379 F.3d 96, 106 (3d Cir. 2004) (Alito, J.); *see also Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 508 (1991) (finding First Amendment harm where a state law "impose[d] a financial disincentive" on certain speech).

As to the third *Turner* factor, accommodating PLN's rights would not have a detrimental effect on prison resources or on the safety of others. Because there is no actual evidence that PLN's advertisements have ever undermined the FDOC's security interests (or those of any other prison or jail in the country), there is simply

no basis on which to conclude that allowing PLN's publications in Florida's prisons again—as the FDOC did from 1990 to 2003 and 2005 to 2009—would have *any* negative effect on those prisons. And dialing back its aggressive application of the Rule to PLN would undoubtedly *reduce* the FDOC's administrative load. The LRC would no longer need to weigh the prominence or prevalence of each relevant advertisement in PLN's publications. Nor would it have to satisfy the due process requirements that it has largely (and unlawfully) been ignoring.

The District Court's analysis of this factor was abbreviated and conclusory. Without sorting through the relevant evidence—or lack thereof—it summarily accepted the FDOC's position that PLN's publications contain "dangerous amounts of advertising content." Order 48. And it concluded that this objection alone was enough to find for the FDOC on this factor. *Turner* and its progeny do not require unflinching deference to prison officials' characterization of potential threats, but that is precisely what the District Court employed.

D. The FDOC's Application of Its Rule Is an Exaggerated Response to Its Security Concerns.

As to the fourth *Turner* factor, FDOC's censorship of PLN is a wildly exaggerated response to its security concerns.

The FDOC's practice of censoring PLN for its advertising content is a complete outlier. While the policies in other prisons are not dispositive, and while *Turner* does not require a least restrictive means analysis, the practices of "other

well-run institutions [are] relevant to [the court's] determination of the need for a particular type of restriction." *Martinez*, 416 U.S. at 414 n.14, 94 S. Ct. at 1812 n.14; *see also Holt*, 135 S. Ct. at 866 (finding, in the RLUIPA context, that a prison could adopt more accommodating policies because the vast majority of other prisons had done so). And when every other well-run prison and jail in the country sees fit to allow PLN to circulate with the precise same advertisements, the evidence of an exaggerated response is overwhelming. After all, this is not a situation where Florida faces some unique dynamic that might justify its alone-in-the-nation policy. Other prisons face concerns with stamp-based payments or three-way calls and respond to those concerns with sensible regulation of primary conduct, not censorship of critically valuable publications.

In that regard, the situation here is reminiscent of the dynamic the Supreme Court recently faced in *Holt v. Hobbs*. In that case, Arkansas, and Arkansas virtually alone, dealt with a security concern faced by every institution in the country by categorically forbidding all beards, even a half-inch long, to prohibit the concealment of contraband. 135 S. Ct. at 866. The Supreme Court held that Arkansas's application of the rule against a Muslim prisoner violated his religious freedom, based in part on the State's inability to prove that its actions were necessary to achieve its interest in prison security. Citing *Martinez*, the Court found it compelling that "vast majority of States and the Federal Government … allow

inmates to grow beards while ensuring prison safety and security." *Id.* Although the legal test was different, it is telling that not one Justice rose to defend Arkansas' outlier policy. Florida should fare no better.

The FDOC, moreover, has obvious alternative means of accomplishing its objectives while accommodating PLN's constitutional rights. As to phone calls and stamp-payment services, it could close its policy loopholes—allowing cell phone calls and the possession of stamps, not to mention stamp stock-piling—that pose much more obvious risks to its purported security concerns. It could also adopt the policy that New York has chosen to accommodate PLN's constitutional rights by attaching a notice to PLN's publications stating that the magazine may have advertisements for services that prisoners are prohibited from using. Jan. 5 Tr. 83:2-18. Although this approach would add some cost and time to the prisons' review of incoming mail, it would obviate the time needed to page through every issue of *Prison Legal News* to assess whether the relevant advertisements are impermissibly prominent or prevalent, and it would eliminate any need to send each issue to the LRC for review. The cost of stapling a standard 1-page notice to each issue, moreover, would be *de minimis* compared to the massive infringement on PLN's constitutional rights under the current approach. Because PLN sends its publications only to subscribers and occasionally to a limited class of potential subscribers, this approach would not cause a flood of publications requiring attention. Indeed, New

York's experience is instructive. Despite its large prison population, that State has not found it cost- or time-prohibitive to accommodate PLN's constitutional rights.

The District Court downplayed this alternative on the ground that the "FDOC *may be* constrained in ways that New York's department of corrections is not." Order 49 (emphasis added). But the FDOC offered no evidence to support that speculation, and courts cannot dismiss obvious examples out of hand simply because there "may be" differences between prison systems. Otherwise, the fourth *Turner* factor would be meaningless. The fact remains that no other State sees fit to censor PLN's publications based on their advertisements; the FDOC has given the courts no reason to believe it faces unique security threats from those advertisements; and New York's approach provides a clear roadmap for accommodating PLN's constitutional rights at *de minimis* cost. The fourth *Turner* factor decisively supports PLN.

* * *

In the end, the FDOC's censorship of PLN rests on no more than its unsupported say-so. It previously disclaimed any security concerns with PLN's advertising content. It has offered no reason to justify its dramatic reversal. Any security concerns it does have are unrelated to the specific advertisements PLN runs in its publications. No other state prison system, nor county jail, nor the federal government considers it necessary to censor PLN. There are obvious and effective alternatives for the FDOC to achieve its objectives without infringing PLN's rights.

And its failure to pursue those options makes it impossible for PLN to exercise its rights in Florida's prisons. If there is any meaningful limit to the deference courts afford prison officials, this case must cross that line. The District Court's First Amendment ruling should be reversed with instructions to enter judgment enjoining the FDOC's application of the Admissible Reading Material Rule to PLN and ordering that all censored issues of PLN be distributed to their intended recipients.

II. The Department's Review Procedures Violate PLN's Due Process Rights.

The Supreme Court has established that "[t]he interest of prisoners and their correspondents in uncensored communication … is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment." *Martinez*, 416 U.S. at 418, 94 S. Ct. at 1814; Order 52-53; *see also Perry*, 664 F.3d at 1367-68. And as the District Court properly held, due process requires three minimal procedural safeguards each time that liberty interest is infringed: (1) The intended recipient must be notified; (2) the sender must be given a reasonable opportunity to protest the decision; and (3) the complaints must be referred to a prison official other than the person who originally disapproved the correspondence. *See Martinez*, 416 U.S at 418-19, 94 S. Ct. at 1814; Order 53.

Notice is critical to a publisher's opportunity to contest an impoundment decision. "[T]he right to be heard ensured by the guarantee of due process has little reality or worth unless one is informed that the matter is pending and can choose for

himself whether to appear or default, acquiesce or contest." *Richards v. Jefferson Cty.*, 517 U.S. 793, 799, 116 S. Ct. 1761, 1766 (1996) (quotation marks and citations omitted). "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right *they must first be notified*.'" *Hamdi v. Rumsfeld*, 542 U.S. 507, 533, 124 S. Ct. 2633, 2648-49 (2004) (citations omitted) (emphasis added).

Because each act of censorship infringes a publisher's liberty interest in free speech with its intended recipient, courts have not hesitated to find due process violations when prison officials fail to notify a publisher, like PLN, each time its mail is intercepted. *See Jacklovich v. Simmons*, 392 F.3d 420, 433-34 (10th Cir. 2004) (holding that PLN is "entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate-subscribers … providing adequate individualized notice to the publisher would appear to impose a minimal burden.") (citations omitted); *Prison Legal News v. Cook*, 238 F.3d 1145, 1152-53 (9th Cir. 2001) (holding that Prison Legal News was entitled to notice each time its publication was censored by prison officials); *Prison Legal News v. Lehman*, 397 F.3d 692, 701 (9th Cir. 2005) (same); *Montcalm Publ'g Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996) (holding that rejection notices must be delivered to the publishers of disapproved publications because publishers are better situated than prisoners to

challenge the censorship); *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986) ("[W]e hold that the mail censorship regulation is insufficient because it fails to require that notice and an opportunity to protest the decision be given to the author of the rejected letter…. Without notifying the free citizen of the impending rejection, he would not be able to challenge the decision which may infringe his right to free speech."); *Trudeau v. Wyrick*, 713 F.2d 1360, 1366-67 (8th Cir. 1983) (holding that it was the prison official's duty under *Martinez* to provide notice to both the author and the intended recipient of a letter).

A. The Department Violated PLN's Due Process Rights By Consistently Failing to Notify PLN of Impoundment Decisions and Thereby Depriving It of an Opportunity to Challenge the Decisions.

The evidence in this case conclusively established that the FDOC consistently violated PLN's due process rights by failing to provide adequate notice of its impoundment decisions. The District Court found that, with respect to 42% of the *Prison Legal News* issues the FDOC censored, it provided PLN *no notice at all* about the impoundment. *See* Order 26. And that failure rate more than doubled—to 87%—when considering the FDOC's *defective* notices, which did not identify the applicable prison regulation or the pages of the publication that violated the relevant rule. *See* Pl's Post-Trial Br. 6, 9 & Ex. A, Doc. 241; Order 26 n.18 (adopting PLN's summary of defective notices); Pl's Ex. 46 (providing every notice PLN received from FDOC). Of the 36 months for which PLN did receive some kind of notice, 21

of them did not list the page numbers on which FDOC employees believed there were objectionable advertisements. *See* Pl's Post-Trial Br. 9, Doc. 241 (collecting record citations). Of the remaining 15 notices, 4 were inadequate because they did not state which subsection of the rule was allegedly being violated. *See id.* And an additional 3 were rejection notices with no prior impoundment notice, indicating that the LRC had already made its final decision. *See id*.[5] Clearly, FDOC's system of purporting to provide a single, representative notice per issue of *Prison Legal News* does not work well enough to ensure that PLN is provided with *any* notice of the FDOC's censorship, much less factually accurate notice that informs PLN of the scope of the censorship at the various FDOC prisons.

Secretary Jones has not marshaled sufficient evidence to establish that these factual findings were erroneous—let alone clearly so. The Secretary's opening brief begins with a statement that the FDOC's rule "was specifically created to meet the requirements of due process." Appellant's Br. 4. But the regulation's design is irrelevant if its notice requirements were not followed on a regular basis. Likewise, it does not matter, as the Secretary suggests it does, that PLN received many pages of impoundment notices about *some* issues of its magazine, *see id.* at 37, if it did not

[5] Although the District Court mentioned only the 42% total failure rate, it credited PLN's summary of the FDOC's notice deficiencies. Order 26 n.18. Thus, it also adopted the 87% deficiency rate. The Secretary's opening brief does not acknowledge this factual finding.

receive similar notices for many *other* issues. Due process is not a sometimes requirement. Each deprivation of due process works a unique harm.

Nor is there any reason for this Court to reverse the District Court's refusal to credit an FDOC official's statement that the Department, as a matter of policy, sends notice for every impounded publication. But PLN presented evidence demonstrating that it had not received adequate notice for the vast majority of its issues since 2009. The District Court correctly found that PLN's specific evidence outweighed the FDOC's assertions. And on appeal the Secretary has offered nothing close to the sort of overwhelming evidence necessary to support a clear error finding.[6]

The FDOC's due process violations were exacerbated, moreover, by the LRC's limited review process. The Reading Material Rule's "prominent or prevalent" standard turns on how the relevant advertisements relate to the publication as a whole. Yet, under the FDOC's system of review, the LRC reviews *only* the relevant advertisements, "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." Order 22-23. Thus, the process and normal review materials

[6] The Secretary also curiously suggests that PLN must have received notice for every issue because it did not tell the FDOC that it was not receiving notices. Appellant's Br. 10. But when PLN did not receive notice, it did not know that its publication was impounded (and thus that it should have received notice). Unless the FDOC means to concede that it was applying a blanket ban on PLN, this argument makes no sense.

prevent the final arbiter of impoundment decisions from conducting the evaluation the Rule requires. This is problematic in its own right, as the District Court acknowledged. *See* Order 50. *Martinez*'s independent review requirement cannot be satisfied by a *pro forma* review that is inherently incapable of evaluating the mailroom officials' impoundment decisions under the required standard.

This narrow review is especially problematic when PLN is denied adequate notice of which specific advertisements were included in the limited materials sent to the LRC for review. And those problems are compounded further still when PLN is denied accurate information about whether certain other FDOC institutions chose not to censor PLN publications. At times, PLN has succeeded at convincing the LRC to reverse an impoundment decision (and even to overturn its own previous ruling affirming an impoundment decision) by dispelling misperceptions about the prevalence of a certain type of advertisement or the nature of a publication—in other words, by filling in the massive holes that are inherent in the LRC's limited review. *See* Pl's Ex. 56 (Letter from LRC Chair to P. Wright reversing previous impoundment of PLN book) ("[W]hen we originally reviewed the publication in February of 2012, we only had a portion of the front cover and the single page from the publication noting that the book could be purchased by stamps."). If PLN does not know when and why its publications are impounded, it cannot provide any

context for the LRC's review—making an already problematic process even worse. *See id.* (stressing the value of PLN's participation in review process).

B. The District Court's Injunction Was Justified and Should Be Expanded.

Nor are the Secretary's legal arguments any more persuasive. First, she asks this Court to decide whether a procedural due process violation, based on the failure to provide adequate notice and an opportunity to be heard, can rest on negligence by individual prison officials. *See* Appellant's Br. 18. But while the better view is surely that the Due Process Clause guarantees notice and a meaningful opportunity to be heard, not just a process that avoids recklessness in its failure to provide notice, *see, e.g.*, *Sourbeer v. Robinson*, 719 F.2d 1094, 1104-05 (3d Cir. 1986); *cf. Jones v. Flowers*, 547 U.S. 220, 126 S. Ct. 1708 (2006) (requiring government to take steps beyond certified mailing to ensure that notice was received), the Court need not reach that issue because the District Court expressly found that "the FDOC's failure to provide notice exceeded negligence." Order 58. "The systemic failure of FDOC personnel to provide notice," the court went on to conclude, "indicates a substantial risk [that was] disregarded by FDOC administrators." *Id.* "At the very least," this amounted "to recklessness or gross negligence, which everyone agrees suffices for a due process violation." Order 58-59 (citing *Burch v. Apalachee Cmty. Health Servs., Inc.*, 840 F.2d 797, 802 (11th Cir. 1988), *affirmed sub. nom. Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990)). The Secretary completely ignores this

holding and thus asks this Court to resolve a question that is entirely irrelevant to the District Court's ruling.[7]

The evidentiary record, moreover, conclusively supports the District Court's conclusion. FDOC officials unquestionably knew of the failures because PLN frequently, after discovering from prisoners that an issue had been impounded, wrote to the FDOC explaining that its mail was being censored and that PLN had not received notice from the FDOC. *See, e.g.*, Pl's Ex. 67a at 17; Ex. 77 at 5. Despite this knowledge, the FDOC failed to do anything to correct the deficiencies. That failure was not a mere negligent failure to foresee a potential harm. It was deliberate indifference to PLN's due process rights. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 839, 114 S. Ct. 1970, 1980 (1994).

Nor can the Secretary reframe the District Court's holding as based on mailroom officials' "collective negligence." Appellant's Br. 25. Again, the court's holding was crystal clear: It held that "*FDOC administrators*" recklessly disregarded the substantial risk that the prisons were systematically failing to provide notice of impoundment. Order 58-59 (emphasis added). That is, the District Court found recklessness, and it found it at the top of the FDOC's chain of command.

[7] In truth, the Secretary affirmatively *misrepresents* the District Court's holding on this issue, when she says that "the lower court found that various mailroom staff *negligently* failed to provide notice to PLN." Appellant's Br. 18 (emphasis added).

Thus, the Secretary's arguments about collective negligence are irrelevant and her reliance on *Jones v. Salt Lake City*, 503 F.3d 1147 (10th Cir. 2007), is entirely off-point. That decision involved isolated incidents of mailroom negligence where PLN's publications were erroneously rejected; there was no persistent pattern of statewide systemic violations, and it did not involve notice failures. Here, by contrast the FDOC's top administrators consciously decided to apply the Rule to censor PLN, but then recklessly failed to ensure that notice was being sent to the publisher each time its publications were impounded.

Even on the merits, the Secretary's argument fails. At the outset, the argument misunderstands *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986), and *Davidson v. Cannon*, 474 U.S. 344, 106 S. Ct. 668 (1986), which addressed the mental state required for a cognizable "deprivation" under the Due Process Clause. Those cases held that government officials are liable only where their "*deprivation* of life, liberty, or property … [is] intentional." *Sourbeer*, 791 F.2d at 104; *see also Daniels*, 474 U.S. at 328, 106 S. Ct. at 663 (negligent failure to remove objects from a prison stairway); *Davidson*, 474 U.S. at 345, 106 S. Ct. at 669 (negligent failure to protect plaintiff from another inmate). They do not address what mental state, if any, is required to establish that the government has violated due process by failing to provide adequate notice. *Procunier v. Martinez*, meanwhile, specifically holds that due process is required when a prison censors incoming mail.

The distinction makes a world of sense. Where the government fails to provide adequate notice, the constitutional harm does not depend on intentionality; so long as the deprivation is intentional, the lack of notice (and consequently the lack of an opportunity to be heard) is a textbook due process violation. In *Jones v. Flowers*, for instance, the Court was not concerned with whether state officials had acted negligently or recklessly when they failed to send additional notices about a tax sale after the first notices were returned unclaimed. 547 U.S. at 229-30, 126 S. Ct. at 1715-16. Once the Court determined that there had not been adequate notice, the constitutional violation was established. And in *Daniels* the Court recognized this distinction when it specifically contrasted the substantive "deprivation" at issue in that case with a failure to comply with procedural requirements. *See* 474 U.S. at 333-34, 106 S. Ct. at 666 (distinguishing *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974)). Since the FDOC "deliberately deprived" PLN of its First Amendment rights "and failed to provide process that was constitutionally required[,] it was unnecessary for the district court to determine whether that failure was intentional, grossly negligent, or without fault at all, because there would be a constitutional violation in any event." *Sourbeer*, 791 F.2d at 1105.[8]

[8] The Secretary misconstrues the *dictum* in *Davidson* that "the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." 474 U.S. at 348. That statement was made in response to the plaintiff's attempt to recast his claim as a procedural demand that the State "provide him a remedy." *Id.* The Court explained that "the Fourteenth

Nor is there any meaningful division of authority on this question. In *Sourbeer*, the Third Circuit squarely rejected the Secretary's argument. There, as here, the deprivation of liberty—"keeping Sourbeer in administrative custody"—"was itself an intentional act." Thus, "it was not necessary for the district court to make any other state of mind finding" with respect to the prison's failure to provide adequate process. 791 F.3d at 1105. If the Secretary's position were correct, the court explained, "there would be no due process violation where an official who deliberately deprives a person of his life, liberty or property carefully follows established state procedures that are later found to be constitutionally inadequate, because the official would be without fault." *Id.* "Clearly, that is not the law." *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1970)).

The Secretary relies on *Dale E. Frankfurth v. City of Detroit*, 829 F.2d 38 (table) (6th Cir. 1987) (unpublished), and *Brunken v. Lance*, 807 F.2d 1325 (7th Cir. 1986), to support her contrary argument, but neither case establishes binding law on the topic. *Frankfurth* is an unpublished decision that, as far as PLN can tell, has never been cited by any other court (except for the District Court in this case, which

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Amendment does not require a remedy when there has been no 'deprivation' of a protected interest." *Id.* Because there was no notice issue in *Davidson*, the Court had no reason to decide whether claims like PLN's require more than negligence. And later cases, like *Jones*, demonstrate that *Davidson* did *not* decide that question as FDOC suggests.

rejected its analysis). And *Brunken*'s treatment of this question was *dicta* in an alternative holding unnecessary to decide the case that the Seventh Circuit does not appear to have ever relied on since. *See* 807 F.2d at 1331. Thus, rather than asking this Court to resolve a circuit split on this question, the Secretary is asking the Court to unnecessarily *create one*.

Second, the Secretary claims that the District Court's ruling is inconsistent with the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598 (1976). But this argument was not raised below. In over three years of litigation, the FDOC never once raised this argument—or *any* argument based on supervisory liability—despite filing a motion to dismiss, two motions for summary judgment, a motion for judgment as a matter of law, and a post-trial brief (in which the FDOC was invited to raise any issue it wanted). *See* Jan. 8 Tr. 26:9-10. Pursuant to the "well-settled rule" that an appellate court will not consider an argument raised for the first time on appeal, this argument has been forfeited and should not be considered by this Court. *Jones v. Apfel*, 190 F.3d 1224, 1228 (11th Cir. 1999); *see also, e.g.*, *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 35 (1st Cir. 2001) (holding that board members forfeited objection to supervisory liability under §1983, where they failed to raise the argument at any time during the long history of the litigation).[9]

[9] After the District Court entered the injunction, the Secretary improperly attempted to raise the issue in a Response to PLN's Motion to Alter or Amend the Judgment to add the PLRA findings. *See* Doc. 265. On PLN's motion, the District

In all events, the FDOC's failure to raise *Rizzo* earlier was fully justified, as the decision is wholly inapposite. This is an official-capacity suit. PLN has not sued the Secretary as an individual, but as a representative of the State of Florida and the FDOC. *See, e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 361-62 (1991). She and her delegates are responsible for the operation of the FDOC, the enforcement of its rules, and its compliance with the Constitution. Thus, PLN is not required to demonstrate that the Secretary personally failed to provide notice. Instead, liability can be established where a history of widespread abuse puts the responsible supervisor on notice of the need to correct an alleged deprivation and he or she fails to do so. *See Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1508 (11th Cir. 1995) (upholding a finding of liability by state supervisors). That is precisely what the District Court found here.

The Secretary's reliance on *Rizzo* also fundamentally misunderstands that precedent. *Rizzo* did not announce a new rule of supervisory liability prohibiting the consideration of statistical patterns ever, in any official misconduct cases. The

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Court struck the portions of the Secretary's response not dealing with the PLRA issue, finding them to be improperly raised. *See* Doc. 278. They are thus not part of the record below, and the FDOC does not challenge that ruling in its opening brief. Even if it did, the FDOC's belated attempt to raise the argument comes nowhere close to "clearly present[ing] [the argument] to the district court . . . in such a way as to afford the district court an opportunity to recognize and rule on it." *In re Pan Am. World Airways, Inc., Maternity Leave Practices & Flight Attendant Weight Program Litig.*, 905 F.2d 1457, 1462 (11th Cir. 1990).

Court's analysis was aimed at a different problem. The plaintiffs and the district court in *Rizzo* relied on the percentage of police encounters involving abusive conduct largely to get around Article III standing problems—*i.e.*, to aggregate disparate harms to a broad swath of the public—and to justify a class action. *See* 423 U.S. at 371-77, 96 S. Ct. at 604-07. Here, PLN is the victim of all of the relevant due process violations. There is no standing problem, and there is no doubt that PLN has repeatedly suffered constitutional harms. The District Court noted the percentage of impoundments lacking adequate notice to establish the FDOC administrators' ongoing recklessness in the face of that pattern of abuse, not to stitch together unrelated constitutional harms. PLN did not seek, nor did the District Court impose anything close to the sweeping and unjustified injunction in *Rizzo*.

Third, the Secretary reprises her argument that PLN waived its due process rights because it did not appeal to the LRC every time one of its issues was impounded. This Court should reject the argument for the same reasons the District Court found it unpersuasive. Most obviously, PLN could not appeal when it lacked any notice of impoundment. And the FDOC was not allowed to stop providing notice once PLN was aware that its publications were once again being censored. Each new publication needed to be considered on its own, according to its specific advertisements. And the contents of the required notice (*e.g.*, the applicable rule and the page numbers of offending advertisements) necessarily would change for each

issue. In addition, prison mailroom staff at some institutions were not impounding *Prison Legal News*, on the view that the publication's advertisements did not violate the Rule. Without that information, PLN could not meaningfully challenge each impoundment decision nor can the judiciary conduct meaningful review of the FDOC's actions. Unless the FDOC means to suggest that rejection of every PLN publication was a foreordained conclusion after 2009, and that the reasons did not matter, PLN's right to notice remained a meaningful one.

Thus, the Secretary is wrong to claim that particularized notice was not required. Due process requires that the government notify a publisher when it infringes core free speech rights. That the publisher might suspect his rights have been violated or might eventually hear of the deprivation from a third party is insufficient—especially when, as here, the indirect notice occurs *after* the opportunity to appeal has lapsed. The cases that the Secretary cites do not support her erroneous position. In *United States v. Robinson*, 434 F.3d 357, 366 (5th Cir. 2005), *Cuvillier v. Rockdale Cty.*, 390 F.3d 1336, 1339 (11th Cir. 2004), and *Gonzalez-Gonzalez v. United States*, 257 F.3d 31, 36 (1st Cir. 2001), the government *repeatedly* attempted to provide written notice but its efforts failed for reasons beyond its control. That is not what happened here.

The Secretary is also wrong to suggest that PLN has somehow waived its rights by not raising its due process claim through state administrative procedures.

The Supreme Court has "on numerous occasions rejected the argument that a §1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies." *Patsy v. Bd. of Regents*, 457 U.S. 496, 500, 102 S. Ct. 2557, 2559 (1982) (collecting cases); *Cotton v. Jackson*, 216 F.3d 1328, 1331 n.2 (11th Cir. 2000) (noting that a §1983 procedural due process claim does not include an exhaustion requirement). Indeed, this Court has previously permitted procedural due process claims challenging the adequacy of notice to proceed without requiring the utilization of state remedies. *See, e.g., Arrington v. Helms*, 438 F.3d 1336 (11th Cir. 2006); *Grayden v. Rhodes*, 345 F.3d 1225 (11th Cir. 2003).

Finally, the Secretary is wrong to argue that this Court's decision in *Perry v. Secretary, Florida Department of Corrections* eliminated the *Martinez* requirements for this case. *Perry* held that the *Martinez* requirements do not apply when prisons impound "bulk correspondence" sent by businesses "to advertise their services to inmates." 664 F.3d at 1368. But PLN's subscription-based publications are nothing like the undifferentiated mass advertisements at issue in *Perry*. PLN's subscribers have requested, and in most cases paid for, PLN's publications. The publications are not simply dropped off with a request that they be distributed throughout the prison, like bulk mailings are. *See Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 130 n. 7, 97 S. Ct. 2532, 2540 n.7 (1977) (addressing the free speech restrictions on "bulk" mail to prisoners); *Lehman*, 397 F.3d at 700 (distinguishing

PLN's mail from the "bulk mail" at issue in *Jones*); *Cook*, 238 F.3d at 1152 (applying *Martinez*); *Montcalm*, 80 F.3d at 109 n. 2 (defining "mass mailing" as when a sender wished to send a publication, unsolicited, to each and every inmate at a given institution, and concluding that a publication that has been subscribed to was not mass mailing).

Instead, PLN's publications are core political speech sent only to subscribers, and thus are more akin to the personal correspondence at issue in *Martinez*, 416 U.S. at 398-99, 94 S. Ct. at 1804-05, and the publications at issue in *Thornburgh*, 490 U.S. at 403, n.2, 109 S. Ct. at 1876 n.2. As *Perry* explained, with respect to those sorts of communications, *Martinez*'s three-part test for due process has not been disturbed. *See* 664 F.3d at 1368; *see also, e.g., Cook*, 238 F.3d at 1152-53; *Montcalm*, 80 F.3d at 109; *Bonner v. Outlaw*, 552 F.3d 673, 677 (8th Cir. 2009); *Krug v. Lutz*, 329 F.3d 692, 697 (9th Cir. 2003); *Jacklovich*, 392 F.3d at 433. And as explained above, the FDOC has repeatedly failed to satisfy those requirements.

Accordingly, the District Court's injunction should be upheld. But if this Court were to modify the injunction at all, it should modestly expand the injunction to require notice of each unique impoundment decision, rather than just one notice per issue. Different prison officials can, and often do, impound the same issue of *Prison Legal News* for different reasons. When these differences occur, PLN has an interest in being made aware of each reason for impoundment, not just the first

reason or the bare fact of impoundment. And when different prisons disagree about whether a publication should be censored at all, the publisher should be informed that some, but not all, prison mailrooms have deemed the content permissible. Such inconsistent application of a regulation is relevant to First Amendment claims like PLN's challenge in this case, and accurate information about a prison system's impoundment decisions is essential to effective judicial review. But PLN cannot know if such inconsistency has occurred, or the extent to which it has occurred, if the FDOC provides only one notice per issue.

The FDOC offered no persuasive reason why Florida prisons cannot provide notice for each impounded copy of a PLN publication, or at least a notice to PLN that includes the name of each prisoner who was denied a copy of any particular publication. Absent an indication that another FDOC mailroom staff person has already censored that month's edition of *Prison Legal News*, a staff person deciding to impound the publication is required to create 5 copies of an impoundment notice. And each subsequent impoundment already requires mailroom staff to produce a notice for each prisoner-subscriber who was supposed to receive a copy of the publication. There is no reason why they cannot provide a copy of that individualized notice to PLN as well—something the District Court found would impose no extra burden—or at least send PLN a list of which intended recipients did not receive the publication. *See, e.g.*, *Jacklovich*, 392 F.3d at 434 ("We further agree

that providing adequate individualized notice to the publisher would appear to impose a minimal burden."); *Cook*, 238 F.3d at 1152-53; *Lehman*, 397 F.3d at 701; *Montcalm*, 80 F.3d at 109; *Martin*, 803 F.2d at 243-44; *Trudeau*, 713 F.2d at 1366-67. Because the cost to the FDOC is low, the value to PLN is high, and the evidence furthers effective judicial review, this Court should require that the FDOC provide notice for each time it censors a copy of one of PLN's publications.

CONCLUSION

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

Respectfully submitted,

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Dated: December 7, 2015

s/Michael H. McGinley
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I hereby certify that on December 7, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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