No. 18-355

In the
Supreme Court of the United States

PRISON LEGAL NEWS,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Since its 2009 about-face, the Florida Department of Corrections (FDOC) has violated Petitioner's (and its advertisers' and inmates') First Amendment rights by rejecting every single issue of *Prison Legal News*—totaling over 100 issues in nearly a decade—on the basis that its advertisements pose a purported security threat. While this Court has repeatedly held that First Amendment rights do not end at the prison gate, that is no longer true in Florida. Florida alone has identified these purported security concerns, and Florida alone has seen fit to ban *Prison Legal News* based on its advertising content. Yet there is nothing idiosyncratic about FDOC that would justify its alone-in-the-nation policy—although articles about civil rights violations in FDOC facilities might explain it. Nor, despite the facts that *Prison Legal News* circulated within FDOC for nearly two decades and continues to circulate in every prison system in the country including the federal Bureau of Prisons, has FDOC ever set forth any experience-based evidence to justify its outlier policy. Throughout its blanket censorship of *Prison Legal News*, FDOC has eschewed numerous other more direct means of addressing its claimed security concerns. The net result is that Petitioner is left with no alternative route for delivering its important content to Florida inmates.

The decision below upheld this blanket censorship by granting blind deference to FDOC officials' unsupported conjecture. But that approach is plainly out of step with this Court's decisions and other lower courts' faithful application of those precedents. Those decisions categorically require that prisons must come

forth with more than a mere speculative connection between their claimed security interests and their curtailment of First Amendment freedoms. And this Court's most recent apposite decision emphasized that prison officials' security claims must be rooted in experienced-based evidence, rather than speculation. *See Beard v. Banks*, 548 U.S. 521 (2006) (plurality). The absence of experience-based evidence of non-speculative difficulties is particularly glaring given the reality that *Prison Legal News*, complete with its advertisements, has circulated without incident for nearly three decades in every other prison system throughout the country. The question here then is not *whether* to defer to the views of prison officials, but *which* prison officials merit deference, the speculative views of current FDOC officials or the experience-based judgments of countless prison officials who allow *Prison Legal News* to circulate in their own institutions.

The threat to First Amendment values and the risk that censorship could spread explains the outpouring of amicus support and underscores the importance of this Court's review. Everyone from publishers, to advertisers, to prison officials, to faith leaders, to an intellectually diverse array of legal experts recognizes the threat to free speech and meaningful review of prison policies posed by the decision below. Yet, Respondent conspicuously did not even bother to address their views. If allowed to stand, Florida's we-don't-like-your-advertisers justification for censorship will undoubtedly change from an outlier to a roadmap for curtailing free speech rights. Rather than let this constitutional error and resulting censorship spread, the Court should grant

certiorari and invalidate Florida's unconstitutional ban.

I. The Eleventh Circuit's Decision Is Out of Step With This Court's Precedents And Other Circuits' Faithful Application of Those Decisions.

The decision below is fundamentally inconsistent with this Court's precedents. For decades, this Court's precedents have made clear that First Amendment rights do not disappear within the prison walls or outside them, as "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." *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). While courts owe prison officials some level of deference, their views must be supported by concrete evidence—not mere conjecture—and that deference cannot "mak[e] it impossible for prisoners or others attacking a prison policy . . . ever to succeed." *Beard*, 548 U.S. at 535. The limits on deference to prison officials are especially critical where the officials' judgment is an outlier and the restrictions are aimed at outside publications. *See id.*; *Thornburgh*, 490 U.S. at 408.

The decision below ignored these limits by uncritically deferring to FDOC's speculation at every step of the analysis. While intermittently paying lip-service to this Court's decisions, the Eleventh Circuit contradicted their main thrust. Rather than requiring "experience-based conclusion[s]," that demonstrate more than a "formalistic logical connection" between the regulation and the purported penological objective, *Beard*, 548 U.S. at 533, 535, the Eleventh

Circuit credited FDOC's unsupported assertions that *Prison Legal News'* advertisements "create the possibility" that prisoners might seek to evade prison rules, App.29 (quotation mark omitted), and it endorsed Florida's draconian response—banning *Prison Legal News* in toto—because it "certainly help[s] advance" FDOC's penological interests, App.43 (quotation marks omitted). In a telling summary of its reasoning, the Eleventh Circuit proclaimed that FDOC's bald assertions are "all *Turner* [*v. Safley*, 482 U.S. 78, 90-91 (1987)] requires." *Id.* But *Beard*, *Thornburgh*, and *Turner* require far more, especially when it comes to outside publications, outlying policies, and situations where a prison previously allowed the publication without incident.

The Eleventh Circuit's extreme deference is out of step not just with this Court's precedents but also with other circuits' decisions faithfully applying those precedents. *See Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) (granting relief to PLN based, in part, on Oregon ban's outlier status); *California First Amendment Coalition v. Woodford*, 299 F.3d 868, 882 (9th Cir. 2002) (prisons "must at a minimum supply some evidence that . . . potential problems are real, not imagined"); *Brown v. Phillips*, 801 F.3d 849, 854 (7th Cir. 2015) ("some data is needed to connect" the prison's goals "with a ban on" otherwise protected speech); *Wolf v. Ashcroft*, 297 F.3d 305, 308 (3d Cir. 2002) (prison must "demonstrate that the policy's drafters could rationally have seen a connection between the policy and the interests" through "more than a conclusory assertion" to succeed (quotation marks omitted)); *Whitney v. Brown*, 882 F.2d 1068, 1074 (6th Cir. 1989) ("prison officials do not set

constitutional standards by fiat"); *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) ("prison officials *must present credible evidence* to support their stated penological goals"). Had the Eleventh Circuit taken the same approach as those other circuits, FDOC inmates would be reading *Prison Legal News* today.

Respondent's efforts to distinguish these precedents factually cannot obscure their fundamental legal inconsistency with the Eleventh Circuit's approach. Indeed, the Eleventh Circuit's analysis here could not be more different from the Ninth Circuit's approach in *Prison Legal News v. Cook*. Both cases implicated Petitioner's "core protected speech." 238 F.3d at 1149. Yet, in *Cook*, the Ninth Circuit refused to defer to prison officials' justifications for their policy of banning all standard mail, after properly scrutinizing each unsupported rationale and noting that Oregon's policy is a national outlier. *Id.* at 1151. By contrast, the Eleventh Circuit approached FDOC's justifications with a credulous eye, adopting its expert's speculative testimony wholesale and dismissing Florida's outlier status as irrelevant. Likewise, in *California First Amendment Coalition v. Woodford*, the Ninth Circuit, while analyzing a prison policy under *Turner*, squarely rejected the prison's rationales as based on "questionable speculation." 299 F.3d at 880.[1] And

[1] In fact, the prison official responsible for the policy struck down in *Woodford* joined an amicus brief arguing that Florida's policy is an unnecessary, illogical, and extreme response to the state's claimed security interests. *See* Former Corr. Officials Br.27.

despite their factual differences, the core teaching of multiple other circuits' precedents in this area is that, when applying *Turner*, a "bare assertion" is not enough to warrant deference to prison officials. *Brown*, 801 F.3d at 854; *Wolf*, 297 F.3d at 308 (holding that "more than a conclusory assertion" is required); *Ramirez v. Pugh*, 379 F.3d 122 (3d Cir. 2004) (same); *Whitney*, 882 F.2d at 1074 (rejecting notion that "anything prison officials can justify is valid because they have somehow justified it"); *Beerheide*, 286 F.3d at 1190 ("prison officials cannot simply point to any impact to win their case").

That is particularly true in light of FDOC's real-world experience with *Prison Legal News*. Prison officials do not need to allow potentially dangerous contraband to circulate in prisons to back up their speculation that the items are dangerous. But when a publication has circulated for decades without recorded incident, a reprise of censorship cannot rest on speculation disproved by experience. The Eleventh Circuit approved just that here.

While no other Circuit has green-lighted an identical policy of blanket censorship, that is only because no other prison system has imposed a comparable ban or engaged in comparable speculation. Indeed, if there were real-world problems caused by allowing *Prison Legal News* to circulate within prison walls, FDOC could point to concrete evidence based not only on its own experience in the nearly two decades it allowed *Prison Legal News* to circulate but also based on the experience of every other prison system in the land. The fact that FDOC ignored that wealth of real-world experience in favor

of speculation and the Eleventh Circuit then deferred to that speculation underscores that both FDOC's policy and the Eleventh Circuit's decision are national outliers.

II. The Eleventh Circuit's Decision is Incorrect.

Under a proper understanding of this Court's precedents, Petitioner is plainly entitled to relief. FDOC's blanket censorship of *Prison Legal News* is not rationally connected to its claimed security interests. All that FDOC has offered to support its policy is a "formalistic logical connection" between its claimed security interests and its blanket ban. *Beard*, 548 U.S. at 535. But, under this Court's precedents, that is not enough. The only FDOC-specific "experience-based" evidence in this case—the long period before FDOC's censorship began and the 55-month interregnum when it allowed *Prison Legal News* into the prison before reinstating its ban—undercuts FDOC's speculative justification for its policy. Respondent made no showing that there was any increase in security threats during either of those periods, or a downturn in such threats once it began censoring the publication again.[2] And the experience of the countless institutions that allow *Prison Legal News* to circulate without incident only reinforces the lack of any real problem. Indeed, a group of former

[2] Respondent's justifications for its 2009 policy change—that technological developments made it harder to detect three-way calls or offending advertisements were now appearing on the back cover—are remarkably weak. Opp.4-5. FDOC had ample responses to technological advances beyond censorship, and *Prison Legal News* circulated nationwide with the back-cover advertisement and without recorded incident.

corrections officials (including a former FDOC Warden) with over three centuries of collective experience managing prison populations filed an amicus brief expressing their view that FDOC's "ban lacks a valid, rational connection to FDOC's interests in prison security." Former Corr. Officials Br.1, 13-17. FDOC's unadorned, self-serving statement that its ban "helps" avoid "potential" security threats related to certain advertisements is a prototype of what does not suffice.

Nor does Petitioner have alternative means of exercising its constitutional rights with respect to *Prison Legal News*. Like the Eleventh Circuit, Respondent cannot dispute that its policy prevents Petitioner from delivering *Prison Legal News* to prisoner subscribers because it is cost prohibitive for Petitioner to publish without advertisements or publish a Florida-only version of its national magazine. Instead, again like the Eleventh Circuit, Respondent argues that Petitioner's First Amendment rights are not curtailed because its other publications might be permitted into Florida's prisons. *See* Opp.32. But Respondent has not claimed that FDOC consistently allows PLN's other publications into its prisons—because it does not. In all events, the First Amendment does not permit the government to ban a category of speech with impunity merely because it does not ban some other category of speech by the same speaker. *Cf. Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); 18 Orgs. that Favor Freedom of the Press and Oppose Censorship Br.17-19.[3] While their topics

[3] While Respondent denies in one breath that the FDOC policy is content-based, Opp.5, in the next breath it distinguishes *Prison*

are sometimes overlapping, Petitioner's other publications are aimed at their own unique topics and audiences; as a result, their respective content is quite different. Thus, the fact that PLN produces other publications does not absolve FDOC of its blanket censorship of *Prison Legal News*.

Neither FDOC nor the court below has pointed to any concrete evidence to support the assertion that allowing *Prison Legal News* into Florida prisons would unduly burden or threaten the safety of guards or other inmates. Meanwhile, former prison officials (including a past FDOC Warden) have categorically informed the Court that it would not. Former Corr. Officials Br.17, 20-23. There was no evidence whatsoever that FDOC had to bear any additional material burdens during the 55-month interregnum when it allowed *Prison Legal News* to circulate or in the two decades that *Prison Legal News* circulated before FDOC first tinkered with censorship. Nor did FDOC point to burdens in the federal Bureau of Prisons or correctional facilities across the nation that do not ban *Prison Legal News* based on its advertising. And FDOC set forth no evidence that any such burden was lifted when it resumed its ban in 2009. Especially when a policy would uniquely burden speech that prison officials might be most interested in curtailing—*i.e.*, news articles concerning civil rights abuses in prison—officials must do more than assert speculative security concerns and hypothetical burdens.

Legal News v. Cook, 238 F.3d 1145, on the ground that the policy here is based on content. Opp.24.

Finally, Respondent has virtually no defense of its alone-in-the-nation status and failure to consider obvious alternatives. FDOC's out-of-hand dismissal of more targeted alternatives like those adopted by New York underscores its failure. Opp.10. Pointing out that *Turner* is not a *least* restrictive means test, is no substitute for explaining why ample less-burdensome alternatives would not suffice. Similarly, pointing out that *Holt v. Hobbs*, 135 S. Ct. 853 (2015), involved an RLUIPA claim, Opp.18, does not negate *Holt*'s point that courts should not defer to prison officials when all of their counterparts across the nation take a different view. *See Holt*, 135 S. Ct. at 866 (citing *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974)). Put differently, when the courts confront an outlier policy like the one here or the one in *Holt*, the question is not whether to defer to prison officials, but which ones deserve deference. When prison officials at the federal Bureau of Prisons and in every other state embrace less restrictive policies despite their real-world experience with the same issues of *Prison Legal News* over the past 28 years, those prison officials are entitled to a degree of deference as well. And their actions lay bare the reality that FDOC's response to the problem posed by *PLN*'s advertisements is wildly exaggerated.

III. The Eleventh Circuit's Decision Has Already Become A Roadmap For Curtailing Important First Amendment Freedoms.

The importance of this case for the First Amendment rights of publishers, advertisers and inmates cannot be overstated, as attested by the wealth of amici supporting plenary review. The

speech being suppressed is core protected speech in the prison context, reporting about legal rights and civil rights abuse in prisons. It is the functional equivalent of a ban on reporting about new legislation, political corruption or police misconduct outside prison walls. FDOC's censorship denies prisoners critical educational materials about their legal rights and the most important issues facing incarcerated populations. *See, e.g.*, R Street Inst., Americans for Prosperity, the Cato Inst., Reason Found., and the Rutherford Inst. Br.11. Moreover, the uber-deference applied by the Eleventh Circuit threatens not just First Amendment values, but all constitutional rights within prison walls. *See, e.g.*, Faith Orgs. Br.18-26; Civil Rights Advocacy Org. Br.12-16. And its constitutional harm reaches far beyond PLN to injure its advertisers and subscribers as well. *See, e.g.*, American Friends Service Comm. and Other Prison Legal News' Advertisers Br.1.

Again seeking to benefit from its outlier status, Respondent urges the Court to deny review because its censorship has systematically dwindled PLN's subscribers in Florida and no other jurisdiction has adopted the same blanket ban of PLN based on its advertisements. Opp.35-37. And it downplays the likelihood that other jurisdictions will soon follow suit with the empty observation that they have not done so yet—in the few months since the Eleventh Circuit's decision and while this certiorari petition is still pending before this Court. But the Eleventh Circuit's outlier decision affirming FDOC's outlier policy provides a clear roadmap for other jurisdictions to curtail free speech rights. Denying review of the decision below will only accelerate that predictable

occurrence. This Court should step in now, rather than let unconstitutional restrictions on core protected speech proliferate across the country.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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