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

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

CHARLES H. DAVIS
Counsel of Record
KEVIN K. RUSSELL
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
cdavis@goldsteinrussell.com

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in the Appendix are law professors who teach and write in the fields of First Amendment law or constitutional rights in the prison context. *Amici* come together out of a shared belief that the Eleventh Circuit's opinion upholding the Florida Department of Corrections' censorship of *Prison Legal News* presents a good vehicle for this Court to reassert the limits of deference given to prison officials under *Turner v. Safley*, 482 U.S. 78 (1987).

In particular, *Amici* Law Professors believe the courts of appeals have consistently misinterpreted *Turner* to give unrestrained deference to prison officials when faced with prisoner attempts to exercise their First Amendment rights. This Court's guidance is necessary to protect against further erosion of these constitutional rights. *Amici* Law Professors also believe that, in the alternative, this Court should reassess the reasonableness standard adopted in *Turner* and instead apply heightened scrutiny to censorship decisions by prison officials, especially given that federal courts have demonstrated the institutional capacity to scrutinize prison restrictions on the free exercise of religion under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq*.

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[1] Pursuant to Supreme Court Rule 37, counsel for *amici* represents that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Letters from counsel for petitioner and respondent granting blanket consent to the filing of *amicus* briefs are on file with the Clerk, and counsel for both parties received timely notice of *amici*'s intent to file this brief.

SUMMARY OF ARGUMENT

When prison officials attempt to restrict a prisoner's assertion of his or her constitutional rights, courts must determine whether that restriction is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). This Court has consistently reiterated that the "reasonableness standard is not toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989) (citation omitted). Nonetheless, the courts of appeals have applied unquestioned deference to prison officials' safety-related justifications for denying publishers' and prisoners' First Amendment rights of dissemination of and access to information, respectively. The decision in this case is emblematic of this trend and its dangers: affording prison officials extraordinary deference, the Eleventh Circuit upheld a decision by the Florida Department of Corrections (FDOC) to censor *Prison Legal News*—which educates prisoners about their legal rights and provides information about conditions in prisons throughout the country—solely because it deemed the publication to have too many advertisements of a particular sort. No other prison system applies the FDOC rule or anything like it. Yet, the Eleventh Circuit upheld the censorship because prison officials in Florida said they disagree with the national consensus and believe the restriction is necessary for prison security. FDOC officials, however, failed to identify any evidence that Florida prisons faced special security risks that would require heightened censorship as compared to the rest of the nation. And the scattered periods when FDOC did not censor *Prison Legal News* showed that there was no increase in security risks or incidents when prisoners received the publication.

In light of the courts of appeals' failure to meaningfully review restrictions on prisoner constitutional rights, Prison Legal News's petition asks whether this Court must reassess the deference provided under *Turner* as applied to *Prison Legal News*. The answer is a resounding "Yes."

I. *Turner* recognized that "separation of powers concerns counsel a policy of judicial restraint" regarding the "[r]unning [of] a prison" because it is an "inordinately difficult undertaking that requires expertise, planning, and the commitment of resources." 482 U.S. at 84-85. The Court, however, did not intend for the *Turner* reasonableness analysis to devolve into whether a prison official's justifications merely could pass an absurdity check. The reasonableness test must delve further into the officials' reasoning because "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Ibid.*; *see also Beard v. Banks*, 548 U.S. 521, 536 (2006) (plurality opinion) ("*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective.").

The courts of appeals have failed to faithfully apply this Court's teachings in *Turner*, time and again simply deferring to prison administrators without any meaningful scrutiny of their justifications. For example, the Fourth Circuit in *Hause v. Vaught*, 993 F.2d 1079 (4th Cir. 1993), upheld a ban on prisoner receipt of periodicals due to the risk of storing flammable materials, even though the same prisoners were allowed to have paper in the form of personal and legal correspondence in their cells. And the Seventh Circuit in *Munson v. Gaetz*, 673 F.3d 630 (7th Cir. 2012), upheld a ban on a prisoner storing a copy of the *Physicians'*

Desk Reference in his cell that prison officials justified due to the content of the book, even though the same book (and content) was available to prisoners in the prison library.

Some courts have mistakenly believed that such extraordinary deference is dictated by this Court's decisions, a misimpression this case provides the Court an opportunity to correct. This Court has struck down only one regulation under *Turner*, and that was the marriage ban in *Turner* itself. Because of the cases that have appeared before this Court and survived reasonableness review, the courts of appeals have taken these results as a license to give unrestrained deference to prison officials.

Such unwavering deference creates substantial opportunities for abuse. When courts will accept almost any justification for censorship, prison officials have little reason to forgo it. At the same time, prison officials have strong incentives to restrict prisoner access to materials like *Prison Legal News* for reasons having nothing to do with security. Publications like *Prison Legal News* inform prisoners of their constitutional rights and assist them in bringing appropriate challenges to the conditions of their incarceration. In doing so, *Prison Legal News* facilitates the pursuit of meritorious claims while cutting down on non-viable, and even vexatious, prisoner litigation. By barring prisoners from receiving this information, prison officials restrict prisoners with viable claims from accessing courts and make it substantially more difficult for those prisoners to force necessary improvements to their incarceration and to identify legitimate abuses

perpetuated by prison officials.[2] And by allowing officials to hide invidious viewpoint or content-based discrimination behind post hoc rationalizations for censorship decisions, the courts create an atmosphere that tolerates abuses of power that go to the heart of what the First Amendment is intended to prohibit.

Certiorari is necessary to reestablish that *Turner* review is reasonableness review with teeth. And the present petition is an ideal vehicle to revisit how the courts of appeals have interpreted *Turner* considering that FDOC stands alone amongst its peers in restricting access to *Prison Legal News* due to its advertising.

II. The Court should also grant certiorari to reconsider whether it should impose a standard of review that requires courts to inquire more deeply into the prison officials' security justifications than *Turner* currently permits. The decision in this case, and others like it, suggests that the *Turner* standard has proven unworkable in practice, too susceptible to blind deference to prison officials' decisions to protect vital First Amendment rights. At the same time, *Turner*'s foundational assumptions have been undermined by the Court's more recent decisions and experience in the prison context. In the years after *Turner*, Congress enacted the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, and the Religious Land Use and Institutionalized Persons Act of 2000,

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[2] Increasing prisoner access to *Prison Legal News* and similar publications also increases prison safety and security by empowering prisoner grievances that could ferret out abusive practices and corrupt corrections officials who tarnish the work of scrupulous prison administrators.

42 U.S.C. § 2000cc *et seq.*, both of which effectively apply strict scrutiny to prison administrators' decision-making. Applying these statutes, this Court and the lower courts have shown that they have the institutional capacity to meaningfully scrutinize prison officials' justifications for policies that burden First Amendment rights without unduly interfering with prison administration. As the courts now have experience applying heightened scrutiny in the area of prisoner First Amendment rights, *Turner*'s main justification for its reasonableness test is robbed of much of its weight.

ARGUMENT

I. THIS COURT'S REVIEW IS NECESSARY TO REESTABLISH THE PROPER ANALYSIS OF CENSORSHIP DECISIONS BY PRISON OFFICIALS.

As detailed in the petition, the Eleventh Circuit's decision relies on an untenable interpretation of *Turner v. Safley*, 428 U.S. 78 (1987), that gives exceptional deference to prison officials' penological justifications even when they are not grounded in either experience or logic. Pet. 28-32. The Eleventh Circuit's approach also illustrates a broader problem with the courts of appeals' treatment of assertions of First Amendment rights within prisons. Because this now-prevalent approach of extraordinary deference is inconsistent with this Court's longstanding treatment of such censorship decisions, this Court's intervention is necessary.

A. This Court Never Intended For Review Under *Turner* To Involve Near Absolute Deference To Prison Officials.

Prisoners retain certain constitutional rights within prison walls, including the right to receive mail and obtain information. *See Thornburgh v. Abbott*, 490 U.S. 401, 409-13 (1989). Protecting this right to information is particularly important for prisoners,[3] as prison officials have strong incentives to prevent prisoners from accessing publications like *Prison Legal News* for reasons having nothing to do with legitimate security interests. A principal function of *Prison Legal News*, for example, is to inform prisoners of their legal rights and to assist them in taking appropriate action to enforce those rights, including through litigation that prison officials may find bothersome. Pet. 4-5. Scrutinizing prison officials' censorship of such publications will ensure that First Amendment rights are protected and that officials may not hide impermissible justifications behind claims of security.

Such scrutiny is also necessary to ensure that incarceration does not result in unjustifiable infringement of a variety of important constitutional rights. As this case illustrates, even beyond its harm to vital First Amendment interests, unwarranted censorship risks other constitutional rights, such as access to courts. By restricting access to information about how prisoners can assert their legal rights, prison officials

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[3] Correspondents and publishers also maintain constitutional rights regarding access to prisoners. *Abbott*, 490 U.S. at 408. Although framed within the context of prisoner First Amendment rights, this case further implicates the First Amendment rights of publishers in the prison setting, which also are analyzed under the *Turner* standard. *Id.* at 412-13.

hinder prisoners from both challenging their own incarceration and forcing improvement in the conditions of confinement through civil suits. And by denying prisoners access to information about prison conditions in their own and other systems, prisoners are less able to identify potential abuses perpetuated by officials. Pet. 19 (identifying *Prison Legal News* articles critical of FDOC).

Recognizing these dangers, the Court in *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974), emphasized that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." Although acknowledging that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," the Court insisted that "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims." *Ibid.* Accordingly, the Court struck a balance, invalidating regulations "concerning personal correspondence between inmates and noninmates." *Abbott*, 490 U.S. at 408. The Court found that the regulations did not "further an important or substantial governmental interest unrelated to the suppression of expression," and the limitations were "greater than is necessary or essential to the protection of the particular governmental interest involved." *Martinez*, 416 U.S. at 413.

The Court revisited this standard in *Turner* and *Abbott*, holding that "*Martinez* should, or need, [not] be read as subjecting the decisions of prison officials to a strict 'least restrictive means' test," and instead adopting a reasonableness standard. *Abbott*, 490 U.S. at 411-13. *Turner* explained that *Martinez* "turned on

the fact that the challenged regulation" restricted the rights of non-prisoners, while the intra-prison communications at issue in *Turner* did not involve non-prisoner rights. 482 U.S. at 85. For a case solely focusing on "prisoner rights," the Court held that a reasonableness analysis sufficiently protects prisoner constitutional rights while appropriately deferring to prison officials' expertise in prison security. *Id.* at 87-89. The Court, however, did *not* intend for this reasonableness standard to become a rubber stamp on the prison officials' justifications, particularly in cases involving the rights of a non-prisoner publisher. *See supra* n.3. Instead, it instructed courts to scrutinize a prison's asserted justification in light of four factors: (1) whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) "the absence of ready alternatives." 482 U.S. at 89-91 (internal quotation marks omitted). At each stage of the analysis, the Court made clear, reviewing courts must look beyond officials' facial justifications to determine if there is evidence supporting their safety concerns. *Ibid.* Applied in this way, "the *Turner* standard . . . is not toothless." *Abbott*, 490 U.S. at 414 (quotation marks omitted).

The Court reaffirmed the rigor required by *Turner* more recently in *Beard v. Banks*, 548 U.S. 521 (2006). In a dissent, Justice Ginsburg argued that it is insufficient for officials simply to assert that "in our professional judgment the restriction is warranted." *Id.* at

556 (Ginsburg, J., dissenting). Although differing on *Turner*'s application to the case before the Court, four justices agreed that a simple assertion of security need is not enough. Reiterating that the "constitutional interest here is an important one," the plurality emphasized that "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Id.* at 535 (plurality opinion).

Although the Court has stepped away from the more protective language of *Martinez*, it has since made clear that the *Turner* reasonableness test is not merely an illusory restraint on prison officials, but instead requires those officials to assert a logical and justifiable penological purpose for limiting a prisoner's constitutional rights. *Johnson v. California*, 543 U.S. 499, 547 (2005) (Thomas, J., dissenting) ("[W]e have never treated *Turner* as a blank check to prison officials. Quite to the contrary, this Court has long had 'confidence that . . . a reasonableness standard is not toothless.'") (quoting *Abbott*, 490 U.S. at 414).

B. The Courts Of Appeals Have Misread *Turner* And Extended Deference Too Far, Resulting In Inconsistent Results.

This Court has described the *Turner* standard as one that requires the lower courts to perform a searching review of prison officials' justifications, but the courts of appeals have failed to faithfully apply *Turner*, resulting in ineffective review of prison regulations and almost absolute deference to officials' penological justifications. This requires this Court's intervention to correct.

1. There are many examples of how the courts have used *Turner* to uphold arbitrary and nonsensical restrictions on speech, as catalogued in David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 Geo. Wash. L. Rev. 972 (2016). Certain of these examples show the depths of deference and complete lack of principled review being performed by these courts.

FDOC's censorship of *Prison Legal News* is a particularly egregious example. FDOC justifies its ban on the presence of certain advertisements for services (like three-way calling) it prohibits its prisoners from using. But it does not simply ban any publication advertising such a forbidden service. In fact, it routinely tolerates such advertisements. A publication is banned only if officials deem that the problematic ads are too "prevalent" or "prominent." Fla. Admin. Code r.33-501.401(3)(l). The vagueness of that flabby standard is a problem in itself, *see infra* at 12-13. But it also makes a hash out of any claim that the ban is justified by the belief that prisoners will respond to the ads by breaking prison rules. If FDOC actually believed the ads led to further rule-breaking—which is not supported by evidence—FDOC would censor publications with even a single concerning advertisement. Pet. 28-29.

FDOC's decision to tolerate ads for illicit services no doubt reflects its view that the prison already has adequate means of preventing prisoners from accessing the advertised services that violate the institution's rules. Pet. 22-23. Although FDOC claimed that the censorship was necessary because activities like three-way calling, pen pal correspondence, stamp trading, or use of concierge services could threaten the

safety of persons outside the prison or facilitate criminal activity, FDOC already banned those activities directly. Pet. App. 3-8; *see also* Pet. 13 (describing justifications relied on by court of appeals). During the nineteen years when FDOC did not censor *Prison Legal News*, there was no uptick in the number of incidents involving these banned activities, showing that the prison had ample means to enforce its rules. Pet. 14. And, in some instances, FDOC created limited exceptions *permitting* the underlying conduct. Pet. 22. This is exactly the sort of arbitrary decision-making that *Turner* held to be a threat to the First Amendment, even within prison walls.

The ill fit between the rule and the purported justification gives rise to the suspicion that something else is afoot. At the same time, the vagueness of FDOC's standard creates ample opportunity for officials to ban publications for any number of other unacknowledged and indefensible reasons, including on the basis of viewpoint or content.

Such a malleable standard also promotes the arbitrary decision-making seen here—FDOC justified its 2009 censorship of *Prison Legal News* on an increase in the number of ads in the magazine, but the increase in ads was due to the magazine itself increasing in length. Pet. 14. Thus, the proportion of ads to other content—which should be the determinant of relativistic measures like the "prominen[ce]" or "prevalen[ce]" of ads in a publication—did not change significantly, yet FDOC inconsistently swapped between permitting and banning *Prison Legal News* over a twenty-year period. *Ibid.*; *see also Turner*, 482 U.S. at 89-90 ("[A] regulation cannot be sustained where the

logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.").

FDOC is also the only prison system in the country—federal, state, or local—to censor *Prison Legal News* on the basis of its advertising. Pet. 8-9. The regulations (or lack thereof) adopted by "[o]ther well-run prison systems, including the Federal Bureau of Prisons," are highly relevant to the *Turner* analysis. *Turner*, 482 U.S. at 93; *Martinez*, 416 U.S. at 414 n.14 ("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."). FDOC has failed to identify any concerns that are exclusive to Florida penal institutions that would justify its unique censorship of *Prison Legal News*. Pet. 1.

The Eleventh Circuit nonetheless deferred to prison officials' justifications for their application of the rule to *Prison Legal News*, including that officials could ban any publications that "might enable [prisoners] to break prison rules," and that the "rules certainly help advance [safety] interests." Pet. App. 9, 43. The court called these justifications a "common-sense proposition" and consistently rejected the relevance of the facts showing the arbitrariness of the rule's application, *id.* at 27-43, even though, in prior litigation over application of the rule, FDOC conceded that there were no safety justifications sufficient to uphold the censorship of *Prison Legal News* on the basis of advertising content. Pet. 9-10. As discussed, application of the rule to *Prison Legal News* lacked a rational underpinning and did not result in any change in prisoner

behavior, all while restricting prisoners from information related to enforcing their constitutional rights. These justifications would not pass a reasonableness test in any other field of law, and *Turner* did not apply such a feeble standard within prison walls.

2. The Eleventh Circuit hardly stands alone in its lax application of *Turner*. In *Hause v. Vaught*, 993 F.2d 1079 (4th Cir. 1993), the prisoner challenged the prison's policy of "not permitting detainees to receive books and periodicals in the mail." *Id.* at 1081. Prison officials justified their policy under two rationales. *Id.* at 1083-84. First, they claimed that allowing prisoners to have publications in their cells presented a fire risk, and the court accepted that justification as sufficient to uphold the policy. *Ibid.* The problem is that the prison allowed prisoners to have correspondence and other letters in their cell, which presumably could just as easily start fires. *Ibid.* The court brushed this concern aside by stating that officials' lenience towards some paper in cells did not mean that the prison could not restrict other paper, even though the paper was indistinguishable with regards to flammability. *Ibid.* The court upheld the policy despite its irrationality, which is contrary to *Turner*.

The prison also justified the policy by claiming that outside publications could be used to smuggle contraband. *Ibid*. The court did not dispute that, as the prisoners argued, this rationale was no justification for banning publications shipped directly to the prisoner from a publisher. But it upheld even that aspect of the policy on the supposition – utterly unsupported in the record – that "most publications sent from publishers and book clubs" arrive at the prison after the prisoner has been transferred to another facility. *Ibid.*

Similarly, in *Munson v. Gaetz*, a prisoner ordered a copy of the *Physicians' Desk Reference* from an authorized vendor because the prisoner wanted to educate himself about prescription drugs and possible side effects. 673 F.3d 630, 631-32 (7th Cir. 2012). Even though the *Physicians' Desk Reference* was available at the prison library, the prison rejected the prisoner's order simply by writing "DRUGS" on a standard form. *Id.* at 632. Applying *Turner*, the court gave almost absolute deference to prison officials, concluding that because the "book[] contain[s] drug-related content and the prison restricted [prisoner's] access to the books because of their drug-related content . . . . [t]here was little else to say." *Id.* at 635. The court found that the library's copy of the book weighed *in favor* of the restriction by providing an alternate means of accessing the information, even though the prison did not base its restriction on physical possession of the book, but on the information contained therein. *Id.* at 636-37.

Courts have also developed different frameworks for applying *Turner*, adopting conflicting approaches even in cases involving similar publications. In *Prison Legal News v. Cook*, the Ninth Circuit applied a burden-shifting framework, where after the publisher "present[ed] sufficient evidence that refutes a common-sense connection between a legitimate objective and a prison regulation, . . . the state must present enough counter-evidence to show that" the policy is not "arbitrary or irrational." 238 F.3d 1145, 1150 (9th Cir. 2001). In contrast, the Fifth Circuit in *Prison Legal News v. Livingston*, like the Eleventh Circuit in its review below, took the prison officials' penological justifications as given and placed the burden entirely on Prison Legal News to disprove those assertions

without requiring the defendants to present counter-evidence. 683 F.3d 201, 215-20 (5th Cir. 2012).

These cases, among others,[4] demonstrate the length to which courts of appeals will contort themselves to defer to prison officials and their penological justifications under *Turner*.

3. The level of extreme deference that has developed since *Turner* permits and encourages authorities to hide invidious viewpoint or content-based discrimination under the guise of post hoc, neutral penological justifications.

The Fifth Circuit has recognized the possibility for such chicanery, while doing little to prevent it:

> [C]ensorship of viewpoints critical of prison systems or prison administrators may disguise itself in a policy of excluding books depicting guard-prisoner conflict on the purported basis that they are likely to incite similar conflict. . . . [But] in the absence of specific evidence indicating that [prison officials] excluded the book to censor its criticism of prisons, as opposed to excluding it because of its potentially harmful effects, [its] decision does not run afoul of *Turner*.

Livingston, 683 F.3d at 218.

Applying *Turner* in a way that effectively provides license for viewpoint and content-based discrimination is intolerable. *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (viewpoint discrimination is an "egregious form of content

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[4] *See* Shapiro, *supra*, at 988-1005.

discrimination" which is "presumptively unconstitutional"). To be sure, incarcerated prisoners and publishers seeking to communicate with them enjoy lesser First Amendment protection. But this Court has recently and repeatedly recognized the need for vigilance against such discrimination in other fields that ordinarily enjoy less robust First Amendment protection. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709 (2012) (plurality opinion) (false speech); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011) (violent imagery); *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011) (commercial speech). If prison officials can conjure up phony penological justifications in support of a censorship policy, including irrational justifications like in *Hause*, there is little to prevent them from discriminating among publications on the basis of their content or viewpoints without having to justify the distinct First Amendment injury occasioned by such discrimination. *See Beard*, 548 U.S. at 552 (Stevens, J., dissenting) (comparing such censorship decisions to "state-sponsored effort at mind control").

4. Certiorari is particularly warranted because the lower courts' misapplication of *Turner* may be due, in part, to a misimpression arising from the fact that in the few cases the Court has decided since *Turner*, the Court has almost exclusively sided with prison officials, upholding the restrictions under various safety-related justifications. *See Beard*, 548 U.S. at 530-35 (plurality opinion); *Overton v. Bazzetta*, 539 U.S. 126, 133-36 (2003); *Shaw v. Murphy*, 532 U.S. 223, 230-32 (2001); *Abbott*, 490 U.S. at 414-19; *Turner*, 482 U.S. at 91-93. Indeed, the *only* time the Court has struck down a prison regulation under *Turner* was in

Turner itself, and that was for a restriction on marriage, not a restriction on prisoner-to-prisoner or, more aptly, publisher-to-prisoner correspondence. 482 U.S. at 94-99. Because the regulations that reached this Court have almost uniformly been upheld, some courts of appeals have failed to look deeper into this Court's application of *Turner* and mistakenly assumed that almost any safety-related justification would do, or that almost all justifications are legitimately borne out of concerns for prison safety and security.

II. IN THE ALTERNATIVE, THIS COURT SHOULD RECONSIDER THE AMOUNT OF DEFERENCE GIVEN AND ALLOCATIONS OF BURDENS UNDER *TURNER*.

In light of the courts of appeals' failure to correctly apply *Turner*, the standard has proven unworkable in practice and out of step with recent jurisprudence. Thus, the Court should reconsider *Turner* to require a more searching review of prison officials' justifications for censorship decisions.

1. As just described, the *Turner* standard has proven unworkable in practice. *See Montejo v. Louisiana*, 556 U.S. 778, 792 (2009) (unworkability of precedent is a reason to revisit it). Despite this Court's clear warnings that reasonableness review is not tantamount to abdication of the judicial role, the lower courts have been unable to find a way to give *Turner* review "teeth," instead applying a standard of review that provides only a cursory examination of a policy's justification.

2. At the same time, subsequent legal developments have eroded *Turner*'s underpinnings, another

reason for reconsidering that precedent. *See, e.g.*, *United States v. Gaudin*, 515 U.S. 506, 521 (1995).

The Court moved away from the more searching review of *Martinez* and adopted the reasonableness analysis of *Turner*, *supra* at 8-10, due to concerns that "the judiciary is 'ill equipped' to deal with the difficult and delicate problems of prison management," *Abbott*, 490 U.S. at 407-08 (citation omitted), and its belief that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration," *Turner*, 482 U.S. at 89. The Court felt that a more deferential reasonableness analysis was necessary because it lacked the institutional capacity to judge the appropriateness of penological justifications. The extensive deference that eventually metastasized into the "blank check" now given to prison officials derived from the Court's discomfort with making the sorts of administrative decisions related to prison safety involved in censorship restrictions. *Johnson*, 543 U.S. at 547 (Thomas, J., dissenting).

Since *Turner* and *Abbott*, however, this Court and the courts of appeals have gained extensive experience applying a less-deferential standard to restrictions on prison First Amendment rights. Congress enacted the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, in 1993. RFRA applies strict scrutiny to all state and federal action that substantially burdens religious exercise,[5] including prison operations.

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[5] Prior to RFRA, this Court in *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987), extended the *Turner* reasonableness

42 U.S.C. § 2000bb-1 (requiring "compelling governmental interest" and "least restrictive means"). Although this Court held that RFRA was unconstitutional as applied to the states, *City of Boerne v. Flores*, 521 U.S. 507 (1997), the courts of appeals still apply RFRA to free exercise restrictions allegedly imposed by the federal government, *New Doe Child #1 v. United States*, 901 F.3d 1015 (8th Cir. 2018), including in federal prisons, *Mack v. Warden Loretto FCI*, 839 F.3d 286 (3d Cir. 2016); *Davila v. Gladden*, 777 F.3d 1198 (11th Cir. 2015).

Congress responded to *City of Boerne* by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, which applies the same strict scrutiny of RFRA to a narrow subset of state programs including, as most relevant here, state prisons that accept federal funding. *See Holt v. Hobbs*, 135 S. Ct. 853 (2015). Under RLUIPA:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). Thus, RLUIPA imposed an even higher standard than *Martinez*, which required

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analysis to prisoner Free Exercise Clause claims. It applied *Turner* to the Free Exercise Clause because of similar concerns about the Court's lack of institutional expertise related to prison safety. *Id.* at 349.

only an "important or substantial governmental interest" along with limiting restrictions to "no greater than is necessary or essential to the protection of the particular governmental interest involved." 416 U.S. at 413.

For more than two decades, this Court and the lower courts have effectively applied the heightened standard of RFRA and RLUIPA to prison safety regulations, and there has been no evidence that this more searching review has led to any uptick in security incidents or other harms to prison operations. *See* Shapiro, *supra*, at 1022-23 (citing statement from federal government that "the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners."). This Court recently explained that RLUIPA "does not permit . . . unquestioning deference" to prison officials and, although "courts should respect [officials'] expertise," "that respect does not justify the abdication of the responsibility . . . to apply RLUIPA's rigorous standard." *Holt*, 135 S. Ct. at 864. And the courts of appeals have regularly applied the heightened scrutiny of RLUIPA to free exercise claims brought by prisoners in state correctional facilities while giving limited deference to prison officials' penological justifications. *See, e.g.*, *Williams v. Annucci*, 895 F.3d 180 (2d Cir. 2018); *Jehovah v. Clarke*, 798 F.3d 169 (4th Cir. 2015); *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014); *Garner v. Kennedy*, 713 F.3d 237 (5th Cir. 2013); *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008); *see also United States v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1341 (11th Cir. 2016) (suit brought by Department of Justice under RLUIPA).

Thus, if *Prison Legal News* had been a religious magazine with the same advertising content, respondent would have the burden of meeting the stringent RLUIPA standard and there would be no question of the district or circuit courts' competency to apply that test. Because the application of RLUIPA has shown that the concerns giving rise to deference under *Turner* and *O'Lone* are tenuous at best, this deference no longer has a strong basis in fact. It is time for a reevaluation of *Turner*.

3. In place of *Turner*, this Court either should adopt the stricter RLUIPA standard discussed above, or at least return to the intermediate scrutiny afforded by *Martinez*, requiring that prison officials demonstrate that a restriction on publisher or prisoner speech "furthers one or more of the substantial governmental interests of security, order, and rehabilitation," and was "no greater than is necessary or essential to the protection of the particular governmental interest involved." 416 U.S. at 413.

This established standard continues to acknowledge the limits of judicial competency, and affords appropriate deference to prison administrator's special expertise. But it protects against the abuses *Turner* has allowed, in several important respects.

First, heightened scrutiny requires prison officials to identify and substantiate a real threat to security, order, or rehabilitation that would be addressed in a material way by the proposed censorship. It simply cannot be sufficient for prison officials to justify censorship on a belief that a publication could create generic, vague safety concerns without having to provide some evidence that there is an actual and realistic danger to either the prison population or the public at

large. Instead, the institution must substantiate the claimed risk to security by providing, for example, evidence of how frequently that harm would occur, how seriously it would manifest, and whether it has happened in other systems that did not take similar censorship steps.

Second, in deciding whether a prison has sustained this burden, courts should look to the experience of other systems. When, as here, a policy stands as a conspicuous outlier from the vast majority of similarly-situated prison systems, the prison should be required to explain the discrepancy and justify its unusual actions with concrete evidence. *See Holt*, 135 S. Ct. at 866; *Martinez*, 416 U.S. at 414 n.14.

Third, although heightened scrutiny does not require prisons to pursue their legitimate ends through the least restrictive means, *see Abbott*, 490 U.S. at 409-13, it does require appropriate tailoring, preventing institutions from unthinkingly adopting policies that are far more speech-restrictive than necessary to address legitimate penological concerns. At the same time, examining the fit between means and ends provides a safeguard against invidious discrimination masquerading as a sweeping response to a legitimate problem.

Finally, although prison officials would maintain the burden to justify their speech restriction, plaintiffs would have the opportunity to respond with evidence demonstrating both the harms caused by the denial of the publication, in terms of their First Amendment rights and to their efforts at rehabilitation, and the potential irrationality of the officials' policy. The courts then would be required to perform a careful, searching review to determine if the justifications for the censor-

ship are substantial enough to overcome the restrictions on prisoner constitutional rights, all while providing some deference to the institution's factual assertions regarding the extent of predicted harms.

This Court should take the opportunity to reconsider the deference provided under *Turner* and, in light of the expertise gained in applying RLUIPA to prisoner free exercise claims, place a greater burden on the institution to justify its restrictions on publishers' and prisoners' First Amendment rights.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

CHARLES H. DAVIS
Counsel of Record
KEVIN K. RUSSELL
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
cdavis@goldsteinrussell.com

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APPENDIX

APPENDIX

Titles and university affiliations for identification purposes only

Andrea Armstrong
Professor of Law
Loyola University New Orleans College of Law

Hadar Aviram
Thomas Miller '73 Professor of Law
University of California-Hastings College of Law

W. David Ball
Associate Professor
Santa Clara University School of Law

Monica C. Bell
Associate Professor of Law
Yale Law School

Lynn S. Branham
Visiting Professor of Law
Saint Louis University School of Law

Erwin Chemerinsky
Dean & Jesse E. Choper Distinguished Professor of Law
University of California-Berkeley School of Law

Alan K. Chen
Professor of Law
University of Denver Sturm College of Law

Fred Cohen
Professor Emeritus
SUNY Albany School of Criminal Justice

Holly S. Cooper
Lecturer & Co-Director of the Immigration Law Clinic
University of California-Davis School of Law

Jason C. DeSanto
Senior Lecturer
Northwestern University Pritzker School of Law

Sharon Dolovich
Professor of Law
UCLA School of Law
Director
UCLA Prison Law & Policy Program

Bryan K. Fair
Thomas E. Skinner Professor of Law
Hugh E. Culverhouse Jr. School of Law
at the University of Alabama

James Forman, Jr.
Professor of Law
Yale Law School

Nicole B. Godfrey
Visiting Assistant Professor
University of Denver Sturm College of Law

G.S. Hans
Assistant Clinical Professor of Law
Vanderbilt Law School

Taja-Nia Henderson
Professor
Rutgers Law School
Shon Hopwood
Associate Professor of Law
Georgetown University Law Center

Danielle Jefferis
Clinical Fellow
University of Denver Sturm College of Law

Jennifer Kinsley
Professor of Law & Associate Dean
for Professional Development
Northern Kentucky University Chase College of Law

Andrew M. Koppelman
John Paul Stevens Professor of Law
Northwestern University Pritzker School of Law

Seth F. Kreimer
Kenneth W. Gemmill Professor of Law
University of Pennsylvania Law School

Gregg P. Leslie
Executive Director, First Amendment Legal Clinic
Sandra Day O'Connor College of Law
at Arizona State University

Lyrissa Lidsky
Dean & Judge C.A. Leedy Professor of Law
University of Missouri School of Law

Jules Lobel
Bessie McKee Walthour Endowed Chair
& Professor of Law
University of Pittsburgh Law School

Daniel E. Manville
Director, Civil Rights Clinic
Michigan State University College of Law

Justin Marceau
Professor of Law & Animal Legal Defense Fund
Professor
University of Denver Sturm College of Law

Hope R. Metcalf
Clinical Lecturer in Law & Research Scholar in Law
Yale Law School

Jamelia N. Morgan
Associate Professor of Law & Robert D. Glass
Research Scholar
University of Connecticut School of Law

Michael B. Mushlin
Professor of Law
Elisabeth Haub School of Law at Pace University

Martin H. Redish
Louis & Harriet Ancel Professor of Law & Public Policy
Northwestern University Pritzker School of Law

Keramet Reiter
Associate Professor of Criminology, Law and
Society & Law
University of California Irvine School of Social Ecology

Ira P. Robbins
Barnard T. Welsh Scholar and Professor of Law
American University, Washington College of Law

Laura Rovner
Professor
University of Denver Sturm College of Law

David Rudovsky
Senior Fellow
University of Pennsylvania Law School

Margo Schlanger
Wade H. & Dores M. McCree Collegiate Professor of Law
University of Michigan Law School

Andrew J. Schwartzman
Lecturer in Law
Georgetown University Law Center

David M. Shapiro
Clinical Associate Professor of Law
Northwestern University Pritzker School of Law

Jonathan Simon
Adrian A. Kragen Professor of Law
University of California-Berkeley School of Law

Rodney Smolla
Dean & Professor of Law
Delaware Law School at Widener University

Dean Spade
Associate Professor of Law
Seattle University School of Law

Geoffrey R. Stone
Edward H. Levi Distinguished Service Professor of Law
University of Chicago Law School

Laura Weinrib
Professor of Law
University of Chicago Law School

Carter C. White
Lecturer & Supervising Attorney of the Civil Rights Clinic
University of California-Davis School of Law