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 *AMICI CURIAE* OF R STREET INSTITUTE, AMERICANS FOR PROSPERITY, THE CATO INSTITUTE, REASON FOUNDATION, AND THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER

NILA BALA
R STREET INSTITUTE
1212 New York Ave., NW
Suite 900
Washington, DC 20005
(202) 525-5717

VICTOR BERNSON
CASEY MATTOX
AMERICANS FOR PROSPERITY
1310 N. Courthouse Rd.
Suite 700
Arlington, VA 22201
(703) 224-3200

JOHN N. ESTES III
Counsel of Record
DONALD P. SALZMAN
THOMAS A. PARNHAM, JR.
TODD D. KELLY*
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com

TREVOR BURRUS
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200

Counsel for Amici Curiae

**Admitted to practice in Virginia only; supervised by a member of the D.C. Bar.*

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD
INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906
(434) 978-3888

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. Self-Directed Legal Education Furthers Rehabilitation and Civic Involvement	5
II. The Scope of the First Amendment Is Not Defined By the Whims of the Government	12
CONCLUSION	21

TABLE OF AUTHORITIES

CASES Page(s)

Beard v. Banks,
548 U.S. 521 (2006) 13, 14, 19

Brown v. Plata,
563 U.S. 493 (2011) 5

Chevron U.S.A., Inc. v. Nat. Res. Def. Council,
467 U.S. 837 (1984) 15

Gentile v. State Bar of Nev.,
501 U.S. 1030 (1991) 18

Jacobellis v. State of Ohio,
378 U.S. 184 (1964) 17

Marbury v. Madison,
5 U.S. 137 (1803) 14

McKune v. Lile,
536 U.S. 24 (2002) 3, 6

Miller-El v. Cockrell,
537 U.S. 322 (2003) 15

Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue,
460 U.S. 575 (1983) 16

Nat'l Fed'n of Indep. Bus. v. Sebelius,
567 U.S. 519 (2012) 15

Near v. Minnesota,
283 U.S. 697 (1931) 16

New York Times Co. v. United States,
403 U.S. 713 (1971) 12, 16

Overton v. Bazzetta,
539 U.S. 126 (2003) 5

TABLE OF AUTHORITIES—Continued

Page(s)

Pell v. Procunier,
417 U.S. 817 (1974)..... 3, 13, 15

Pereira v. Sessions,
138 S. Ct. 2105 (2018)..... 15

Procunier v. Martinez,
416 U.S. 396 (1974)..... 19

Schneider v. Smith,
390 U.S. 17 (1968)..... 12

Sessions v. Dimaya,
138 S. Ct. 1204 (2018)..... 18

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,
502 U.S. 105 (1991)..... 15

Thornburgh v. Abbott,
490 U.S. 401 (1989)..... 13, 18, 19

Turner v. Safley,
482 U.S. 78 (1987)..... 5, 12, 13

West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943)..... 14

CONSTITUTION

U.S. Const. amend. I .....*passim*

STATUTES

28 U.S.C. § 2244 9

42 U.S.C. § 1997e 10

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page(s)

Bureau of Justice Statistics, U.S. Dep't of Justice, Bull. No. NCJ 250374, *Correctional Populations in the United States*, 2015 (2016) 5

David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 Geo. Wash. L. Rev. 972 (2016) 4, 15

Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413 (1996) 16

Emily Music, *Teaching Literacy in Order to Turn the Page on Recidivism*, 41 J.L. & Educ. 723 (2012) 8

Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 First Am. L. Rev. 291 (2013) 12

Felicity Rose et. al., Crime and Justice Institute, *An Examination of Florida's Prison Population Trends* (2017), https://bit.ly/2RWWTZI 6

Fla. Dep't of Corrections, *Annual Report: Fiscal Year 2016-2017* (2017) 5, 10

Fla. Dep't of Corrections, *Florida Prison Recidivism Report: Releases from 2010 to 2016* (2018) 6

TABLE OF AUTHORITIES—Continued

Page(s)

Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983)..... 16

Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward A Community-Focused Theory and Practice*, 36 Colum. Hum. Rts. L. Rev. 241 (2004)..... 7

James Madison, 1 Annals of Cong. (1789)... 12

Jeffrey D. Morenoff & David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 Ann. Rev. of Soc. 411 (2014), https://bit.ly/2Ad3hFp 7

Jessica Feierman, *"The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 Harv. C.R.-C.L. L. Rev. 369 (2006)..... 4, 8, 9, 10

Jim Thomas, *Prisoner Litigation: The Paradox of the Jailhouse Lawyer* (1988)... 9

John Dannenberg, *Tenth Circuit Holds Prisoner Has Burden Under PLRA to Plead Administrative Exhaustion*, Prison Legal News, Aug. 15, 2004, https://bit.ly/2C9Gbkq..... 10

Jolene van der Kaap-Deeder et. al., *Choosing When Choices Are Limited: The Role of Perceived Afforded Choice and Autonomy in Prisoners' Well-Being*, 41 Law & Hum. Behav. 567 (2017)..... 10

TABLE OF AUTHORITIES—Continued

Page(s)

Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Settings*, 44 Rutgers L. Rev. 699 (1992) 8

Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults* (2013) ... 8

Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555 (2003)..... 9

Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049 (2008) 7

Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans.) (1975)..... 3

Milton Friedman, *An Economist's Protest* (1975)..... 3

Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Pub. No. 2016-040, *Highlights from the U.S. PIAAC Survey of Incarcerated Adults: Their Skills, Work Experience, Education, and Training* (2016)..... 7

Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* (2014)..... 5, 7

TABLE OF AUTHORITIES—Continued

Page(s)

Nathan James, Cong. Research Serv., RL34287, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism* (2015) 6, 8

Nelson Mandela, *Conversations With Myself* (2010) 3

Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), https://bit.ly/2kxbnxV 6

Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 Fordham Urb. L.J. 1671 (2001) 6

Recent US Supreme Court Rulings of Interest: Habeas Corpus, Prison Legal News, Oct. 15, 1997, https://bit.ly/2NAyNkp 10

Summer J. Syndeman et al., *Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis*, 3 Psychol. Pub. Pol'y & L. 207 (1997) 9

Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Anti-terrorism and Effective Death Penalty Act of 1996*, 41 Harv. L. C.R.-C.L L. Rev. 299 (2006) 9

Victoria Mckenzie, *The Silencing of Prison Legal News*, The Crime Report, June 12, 2018, https://bit.ly/2OMUi6f..... 11

INTEREST OF *AMICI CURIAE*[1]

R Street Institute (R Street) is a nonprofit, nonpartisan, public-policy research organization founded in 2012. Its mission is to engage in policy research and outreach to promote free markets and limited, effective government, including in the area of criminal justice and civil liberties. R Street's Criminal Justice & Civil Liberties Policy program produces research and commentary on public policy related to all stages of the criminal justice system, and promotes reforms that prioritize public safety, due process, individual liberty and fiscal responsibility.

Americans for Prosperity (AFP) exists to recruit, educate, and mobilize citizens to take an active role in building a culture of mutual benefit where people succeed by helping others improve their lives. AFP's activists nationwide advocate and promote policy issues that will advance that culture, including criminal justice reform, free speech, and limited government. This case concerns AFP because arbitrary government restrictions on speech should not inhibit prisoners from learning about their constitutional rights.

The Cato Institute (Cato) is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of constitutional government that are the

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel has made any monetary contribution to the preparation or submission of this brief. The parties received at least 10 days' notice of the intention to file this brief.

foundation of liberty. To those ends, Cato conducts conferences, files amicus briefs, and publishes books, studies, and the annual *Cato Supreme Court Review*.

Reason Foundation (Reason) is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as *amicus curiae* in cases raising significant legal and constitutional issues.

The Rutherford Institute (Rutherford) is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by John W. Whitehead, Rutherford specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with Rutherford have represented parties and filed *amicus curiae* briefs in the federal Courts of Appeals and Supreme Court. Rutherford works to preserve the most basic freedoms of our Republic, including the rights guaranteed to prisoners by the First Amendment.

Amici have a particular interest in this matter because, by allowing Florida officials to censor *Prison Legal News* based on an unsupported invocation of nebulous "prison security and public safety interests," the Eleventh Circuit failed to consider the substantial benefits to providing prisoners access to reading materials that support rehabilitation and civic engage-

ment. The Eleventh Circuit's decision amounts to an abdication of the Judiciary's constitutional role in safeguarding individual liberty, and encourages the government to impose arbitrary and capricious restrictions on the First Amendment rights of prisoners.

SUMMARY OF THE ARGUMENT

This Court has noted that because "most offenders will eventually return to society," one of the "paramount objective[s] of the corrections system is the rehabilitation of those committed to its custody." *McKune v. Lile*, 536 U.S. 24, 36 (2002) (quoting *Pell v. Procunier*, 417 U.S. 817, 823 (1974)). There are a number of steps that prisons can take to facilitate rehabilitation, such as offering substance abuse treatment, education programs, and chaplaincy services. But it is also vitally important that government "leave things alone when that is the best course of action." Milton Friedman, *An Economist's Protest* 6 (1975); *see also* Michel Foucault, *Discipline and Punish: The Birth of the Prison* 265–66 (Alan Sheridan trans.) (1975) (observing that "[d]etention causes recidivism" when it "impos[es] violent constraints" on prisoners through "[t]he arbitrary power of administration").

Left to their own devices, there are prisoners for whom "the cell is an ideal place to learn to know [themselves], to search realistically and regularly the process of [their] own mind and feelings." Nelson Mandela, *Conversations With Myself* 211 (2010). Even prisoners who would benefit from formal programming must be allowed to retain some measure of personal freedom and independence if they are to remain engaged and connected with society before returning to productive citizenship upon release.

Consider, for example, those prisoners who choose to subscribe to *Prison Legal News*, a monthly publication

that provides "public education, advocacy, and outreach," and includes information "educating [prisoners] about their civil rights under the law." Pet. 4. At no cost to taxpayers, these prisoners are provided access to "writings from legal scholars, attorneys, inmates, and news wire services" regarding "news and legal developments related to the criminal justice system," which helps educate them on "how to advocate for their rights." Pet. App. 49, 55–56. By helping its subscribers "confront[] injustice and focus[] on problem-solving," *Prison Legal News* "assist[s] in forging a sense of community around the law, learning, and social action." *See* Jessica Feierman, *"The Power of the Pen": Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 Harv. C.R.-C.L. L. Rev. 369, 387 (2006).

Ignoring the obvious benefits of allowing those within their custody to read and reflect on the materials presented in *Prison Legal News*, Florida officials imposed a *de facto* ban on the publication—which, not coincidentally, has printed "dozens of reports exposing corruption and abuses in Florida's penal system," Pet. 5—after concluding that certain disfavored advertisements were so "prominent or prevalent" as to endanger "prison security." They offered no evidence to support that conclusion, instead applying what the District Court aptly described as a "know it when [they] see it" standard. Pet. App. 95 (alteration in original). The Eleventh Circuit nevertheless upheld Florida's ban on *Prison Legal News*, affording near-unlimited deference to prison officials acting "as if unconstrained by judicial review in matters affecting the speech of those in their custody." *See* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 Geo. Wash. L. Rev. 972, 975 (2016).

Although "the professional judgment of prison administrators" must be given some measure of deference, *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), the Constitution requires careful judicial scrutiny of government action that threatens to extinguish First Amendment rights. Imprisonment necessarily requires some curtailment of individual liberty. Indeed, there are many prison rules and regulations that "impinge[] on inmates' constitutional rights" yet are nevertheless "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). But Florida's censorship of *Prison Legal News* is not one of them. Instead, it amounts to an impermissible effort to imprison not only the body but also the mind. This Court should grant the petition.

ARGUMENT

I. Self-Directed Legal Education Furthers Rehabilitation and Civic Involvement.

This Court is well aware of the incarceration epidemic in the United States. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493 (2011) (affirming order requiring California to reduce its prison population). Since 1972, the rate of incarceration in the United States has ballooned from 161 per 100,000 residents to more than 700 per 100,000 residents. *See* Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 33 (2014). Florida, which spends $2.3 billion each year to operate the third largest state prison system in the county, is no exception. *See* Fla. Dep't of Corrections, *Annual Report: Fiscal Year 2016-2017*, at 3 (2017). Nearly 1% of the State's population is incarcerated. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Bull. No. NCJ 250374, *Correctional Populations in the United States*, 2015, at 17, (2016).

The economic costs of over-criminalization and mass incarceration are astronomical. It is estimated that the annual cost to taxpayers of running every state and federal corrections system in the United States is more than $80 billion; when policing, the court system, and familial support are included, the total is closer to $180 billion. *See* Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, Prison Policy Initiative (Jan. 25, 2017), https://bit.ly/2kxbnxV. And these figures, as large as they are, do not even take into account other costs to society such as those associated with the disintegration of the traditional family. *See, e.g.*, Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 Fordham Urb. L.J. 1671 (2001).

Given the high price to the public of incarceration, one of the primary objectives of imprisonment should be the prevention of its recurrence. *See McKune*, 536 U.S. at 36. By any reasonable measure, most prison systems in the United States are not meeting that objective. *See* Nathan James, Cong. Research Serv., RL34287, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism* (2015) (discussing high rates of recidivism in the United States). In Florida, for example, more than a quarter of former prisoners return to prison within three years of release. *See* Fla. Dep't of Corrections, *Florida Prison Recidivism Report: Releases from 2010 to 2016*, at 2 (2018).[2]

---

[2] Florida's recidivism rate appears lower than that of many other states, but that is due to Florida's minimal post-release supervision rather than successful rehabilitation of former offenders. *See* Felicity Rose et. al., Crime and Justice Institute, *An Examination of Florida's Prison Population Trends* 59 (2017), https://bit.ly/2RWWTZI.

A leading cause of recidivism is the severance of ties to the family and community during incarceration, and the subsequent failure to reintegrate former prisoners into society upon release. *See generally* Jeffrey D. Morenoff & David J. Harding, *Incarceration, Prisoner Reentry, and Communities*, 40 Ann. Rev. of Soc. 411 (2014), https://bit.ly/2Ad3hFp; *see also* Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 Wis. L. Rev. 1049, 1055 (2008) (arguing that it is not "merely the strengthening of deviant bonds within prison that leads to increased criminality, but also the weakening of social bonds with family and community on the outside"). Many jurisdictions "deny and inhibit access to a variety of roles that bind most citizens to conventional society to those currently or formerly serving time or under correctional supervision." Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward A Community-Focused Theory and Practice*, 36 Colum. Hum. Rts. L. Rev. 241, 242 (2004). Even upon release, former prisoners face "restrictions on occupational licensing and employment opportunities, loss of parental rights, and prohibition from holding elective office or serving on juries." *Id.* at 242–43.

Job prospects for former prisoners are particularly dim: approximately half of former prisoners remain unemployed within a year of release. *See* Nat'l Research Council, *The Growth of Incarceration in the United States*, *supra*, at 233. Although this is in part due to the many government-imposed restrictions on employment faced by former prisoners, it is also a function of the fact that the adult prison population has significantly lower literacy and education levels than the general population. *See* Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ., Pub. No. 2016-040, *Highlights from the U.S. PIAAC Survey of Incarcerated*

Adults: Their Skills, Work Experience, Education, and Training 6 tbl. 1.2 (2016). Education and post-release employment are among "the most important elements for an ex-offender to successfully transition back into the community." James, *supra*, at 14–15. Those who gain literacy skills and participate in educational programs while incarcerated are less likely to reoffend. *See* Lois M. Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults* xvi (2013); Emily Music, *Teaching Literacy in Order to Turn the Page on Recidivism*, 41 J.L. & Educ. 723, 723–24 (2012).

Of course, prisoner education and literacy provide rehabilitative benefits beyond increasing the likelihood of post-release employment. This is particularly true for legal education and literacy. For example, research shows that legal education classes in junior high school reduce crime. *See* Justin Brooks, *Addressing Recidivism: Legal Education in Correctional Settings*, 44 Rutgers L. Rev. 699, 718 & n.112 (1992). Legal education of prisoners could therefore reduce recidivism by "changing inmates' perceptions and attitudes [about the law], developing their cognitive and analytical skills, and imparting the rudimentary legal skills and knowledge necessary to deal with daily problems both inside and outside of a correctional setting." *Id.* at 718–19. "[B]y confronting injustice and focusing on problem-solving, prisoners can create a positive reality, even within the confines of the prison," which "can also assist in forging a sense of community around the law, learning, and social action." Feierman, *supra*, at 387.

Encouraging prisoners to engage constructively with the legal system through an increased legal education can have beneficial impacts on both the

prisoner *and* the legal system. A more legally savvy prisoner is less likely to file a frivolous lawsuit or a lawsuit that will be dismissed for procedural errors. *See* Feierman, *supra*, at 382–83 & n.84 (citing Jim Thomas, *Prisoner Litigation: The Paradox of the Jailhouse Lawyer* 156 (1988)). Because prisoners file disproportionately more civil suits than other citizens, the reduction in frivolous suits and procedural errors should help reduce the burden that prison litigation puts on an already overburdened court system. *See* Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1575 (2003) (noting that inmates were 35 times more likely than non-inmates to file a civil lawsuit in 1995). And filing a lawsuit that is not immediately deemed frivolous or dismissed can improve a prisoner's sense of "procedural justice," which can create and reinforce a more positive view of the legal system and society generally. *See* Feierman, *supra*, at 387 n.114 (citing Summer J. Syndeman et al., *Procedural Justice in the Context of Civil Commitment: A Critique of Tyler's Analysis*, 3 Psychol. Pub. Pol'y & L. 207, 210 (1997)).

Prisoners face serious barriers to self-advocacy, which can dim their view that the legal system, and society, are treating them fairly. For example, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) created a one-year statute of limitations for habeas petitions filed by State prisoners. 28 U.S.C. § 2244(d)(1). Prisoners without access to legal information may be uninformed about the time limit or unable to educate themselves in time to file a petition within these time constraints, foreclosing forever potential review of constitutional violations. *See* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 Harv. L. C.R.-

C.L L. Rev. 299, 315–16 (2006). Similarly, the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e, created obstacles for legally uninformed inmates, particularly the requirement that prisoners exhaust administrative remedies before filing suit in federal court.[3] These problems have been made worse in recent years as prisoner access to adequate law libraries has decreased, leading to a subsequent increase in the filing of inadequate court papers which result in dismissal. *See* Feierman, *supra*, at 380.

To *amici*'s knowledge, although Florida offers some education programs, *see* Fla. Dep't of Corrections, *Annual Report: Fiscal Year 2016-2017*, *supra*, at 33–40, it does not provide *legal* education to prisoners that might mitigate these obstacles to self-advocacy. Even if it did, such government-run programs are not a substitute for introspection and self-directed study by prisoners—which can be more effective, at no cost to taxpayers. *See, e.g.*, Jolene van der Kaap-Deeder et. al., *Choosing When Choices Are Limited: The Role of Perceived Afforded Choice and Autonomy in Prisoners' Well-Being*, 41 Law & Hum. Behav. 567 (2017) (discussing research showing that prisoners who are afforded autonomy with regard to leisure

---

[3] *Prison Legal News* has reported on developments in case law involving both AEDPA and the PLRA. *See, e.g.*, John Dannenberg, *Tenth Circuit Holds Prisoner Has Burden Under PLRA to Plead Administrative Exhaustion*, Prison Legal News, Aug. 15, 2004, https://bit.ly/2C9Gbkq; *Recent US Supreme Court Rulings of Interest: Habeas Corpus*, Prison Legal News, Oct. 15, 1997, https://bit.ly/2NAyNkp. In addition, the Human Rights Defense Center, which publishes *Prison Legal News*, also publishes a number of self-help reference books dedicated to assisting incarcerated pro se litigants, including the *Prisoner's Self-Help Litigation Manual* and the *Habeas Citebook*. Order forms for these books appear in issues of *Prison Legal News*.

activities, work, and education report higher quality of life while incarcerated, which promotes rehabilitation). Although the State may keep those convicted of crimes in *physical* custody, their *minds* must remain free to constructively and appropriately engage with communities outside of prison, which is critical in allowing a return to productive citizenship upon release.

Allowing prisoners to access *Prison Legal News* is thus a cost-free way to promote the rehabilitation process and encourage prisoners' reintegration into society. *Prison Legal News* "reports on legal developments in the criminal justice system and other topics that affect inmates." Pet. App. 10–11. The monthly publication includes "writings from legal scholars, attorneys, inmates, and news wire services" that are consistent with its missions to "inform the public about events in prisons and jails and the need for progressive criminal justice reform, to inform prisoners and their advocates about these events and how to advocate for their rights, and to enhance rehabilitation for prisoners, ensure transparency and increase accountability of prison officials." *Id.* at 49, 55–56. Indeed, in the absence of sufficient prison law libraries, "*Prison Legal News* is [often] the only up-to-date source of information prisoners have" regarding developments in the law. Victoria Mckenzie, *The Silencing of Prison Legal News*, The Crime Report, June 12, 2018, https://bit.ly/2OMUi6f.

As a periodical designed specifically to provide legal information to prisoners, *Prison Legal News* is essential to fostering a sense of procedural justice and engendering positive views of the legal system and society. The Eleventh Circuit, by focusing so intently on Florida's assertion of a need for "prison security," lost sight of this legitimate penological objective.

Arbitrary regulations that impede prisoners' efforts to rehabilitate themselves only further the cycle of mass incarceration in the United States and its many detrimental effects on society. This Court should grant the petition.

II. The Scope of the First Amendment Is Not Defined By the Whims of the Government.

The Eleventh Circuit viewed this Court's decision in *Turner* as requiring it to defer completely to unsubstantiated assertions of government officials. But the mere invocation of "prison security" is not a trump card that can be used by officials to silence those with whom they disagree. Unquestioning deference to government officials defending seemingly arbitrary regulations that impinge upon the freedom of the press is incompatible with the Founder's vision of the Judiciary as "the guardian[]" of the Bill of Rights and "an impenetrable bulwark against . . . every encroachment upon [the] rights expressly stipulated for in the Constitution." *New York Times Co. v. United States*, 403 U.S. 713, 718 n.5 (1971) (Black, J., concurring) (quoting James Madison, 1 Annals of Cong. 457).

The fundamental purpose of our written Constitution, and particularly the Bill of Rights, was to protect individual liberty against government encroachment—"to take government off the backs of people." *Schneider v. Smith*, 390 U.S. 17, 25 (1968). The potential for government encroachment on individual liberty is magnified in the prison setting. "[I]t is the nature of authoritarian institutions to not be sensitive to speech interests, and often to be hostile to them." Erwin Chemerinsky, *The Hazelwooding of the First Amendment: The Deference to Authority*, 11 First Am. L. Rev. 291, 301 (2013). When government officials

are given "great authority," they "will often use it, and use it unfairly." *Id.*

By necessity, incarceration requires some constraints on individual liberty. Even so, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. "[N]or do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). Although "courts should ordinarily defer" to the "expert judgment" of corrections officials, they must not "abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Pell*, 417 U.S. at 827. In *Turner*, for example, the Court sustained a challenge to a prison regulation after determining that "the rehabilitative objective asserted to support the regulation . . . [was] suspect." 482 U.S. at 99. In *Thornburgh*, the Court remarked that *Turner*'s "reasonableness standard is not toothless." 490 U.S. at 414. And in *Beard*, the Court noted that "the deference owed prison authorities" does not preclude those "attacking a prison policy . . . ever to succeed." *Beard v. Banks*, 548 U.S. 521, 535 (2006).

In this case, the Eleventh Circuit failed to heed this Court's admonition regarding the importance of a careful and independent review of prison regulations. Reasoning that it "does not . . . sit[] as a super-warden to second-guess the decisions of the real wardens," Pet. App. 20, the Eleventh Circuit held that the mere assertion by the government that censorship would "certainly help[]" prison security and public safety was "all *Turner* requires," *id.* at 42–43. But the Court of Appeals has confused an overbearing "super-warden" with an independent Judiciary—one of the hallmarks of our constitutional system. Although courts do not

sit as "super-wardens," they do have an overriding duty to determine "if a law be in opposition to the constitution." *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803). That duty cannot be outsourced to government officials merely because they claim some expertise.

In *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), Justice Jackson eloquently explained the *limited* deference that should be afforded the government officials when courts are tasked with

> translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government . . . . which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs.

Id. at 639–40. Justice Jackson remarked that the Court's "duty to apply the Bill of Rights to assertions of official authority [does not] depend upon [its] possession of marked competence in the field where the invasion of rights occurs." *Id.* at 639. The Court "act[s] in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in [a particular field], withhold the judgment that history authenticates as the function of this Court when liberty is infringed." *Id.* at 640.

Amici do not mean to imply that *Barnette* directs lower courts to refuse to "accord deference to the views of prison authorities" with respect to "disputed matters of professional judgment." *See Beard*, 548 U.S. at 530. But Justice Jackson's words are a useful

reminder not to be *overly* deferential on constitutional questions, lest government officials feel "unconstrained by judicial review." Shapiro, *supra*, at 975. Even in long-settled areas of the law, this Court occasionally is called upon to remind lower courts that they may respectfully consider the views of others without abdicating their own responsibilities. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) ("In according *Chevron* deference . . ., some Courts of Appeals [have] engaged in cursory analysis . . . [that] suggests an abdication of the Judiciary's proper role in interpreting federal statutes."); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 538 (2012) ("Our deference in matters of policy cannot . . . become abdication in matters of law."); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[D]eference does not imply abandonment or abdication of judicial review.").

Assuming courts should "ordinarily defer" in matters involving prisoner's rights, *see Pell*, 417 U.S. at 827, the Court should be particularly wary of the Eleventh Circuit's deference to prison administrators in this case for at least three reasons.

First, a more rigorous review is necessary where government officials seek to silence their critics.[4] The chief concern of the First Amendment is the "specter that the government may effectively drive certain ideas or viewpoints from the marketplace" by burdening disfavored speech. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S.

[4] The District Court, noting the lack of precedent from this Court and seemingly conflicting decisions from the Courts of Appeal, voiced uncertainty about what role, if any, the motive of prison officials should play in its analysis. *See* Pet. App. 83–84. The Court of Appeals did not address the issue.

105, 116 (1991); *see also New York Times Co.*, 403 U.S. at 723–24 (Douglas, J., concurring) (noting that the First Amendment was enacted in response to "the widespread practice of governmental suppression of embarrassing information"). To the Founders, "[t]he conception of the liberty of the press . . . . was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct." *Near v. Minnesota*, 283 U.S. 697, 716–17 (1931).

In light of the First Amendment's particular concern for government censorship of disfavored speech, courts must be vigilant in "ferreting out 'improper' motivation" by government officials who seek to "restrict expression simply because [they] disagree[] with the speaker's views." Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189, 227 (1983); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 414 (1996) ("First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."). Uncritical deference to the government censor is incompatible with that mandate. Of course, "[i]llicit . . . intent is not the *sine qua non* of a violation of the First Amendment," and "even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983). But where the government does act in a way that silences its critics, courts must be alert to the potential that the justification it proffers for doing so is mere pretext.

Second, courts cannot defer to a vague and arbitrary test that is incapable of coherent application. The District Court was particularly concerned with the State's determination as to whether certain types of advertisements carried by *Prison Legal News* were so "prominent or prevalent" as to justify impounding a publication:

> The most disconcerting [fact uncovered at trial] is the Rule's vagueness. None of the witnesses at trial were able to articulate any reasonably specific guidelines to determining when advertisements were "prominent or prevalent." Some considered whether font was large and bolded to determine prominence. Others looked to the size of the advertisements. For prevalence, no one could identify a cutoff. With no framework handy, this Court would probably be unable to apply the Rule to those publications at the margins. Yet [Florida] officials felt very strongly about their ability to determine prominence and prevalence correctly. It seems that they, unlike this Court, "know it when [they] see it." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
>
> To make matters worse, the . . . final decision-maker . . . *never* reviews an entire publication or book when it makes its decision. . . . [T]his means that final determinations about prevalence are made without knowing whether, for instance, the four or five pages copied and attached to the impoundment notice are four or five out of one hundred, one thousand.

Pet. App. 95 (emphasis in original). The District Court dismissed these concerns because Petitioner had not

raised a separate void-for-vagueness claim. *Id.* at 95–96 & n.25. The Eleventh Circuit followed suit. *Id.* at 15 n.8.

Contrary to the suggestion of the Court of Appeals and District Court in this case, Petitioners' failure to bring a separate void-for-vagueness claim does not absolve Florida officials of articulating and justifying the specific basis for censoring *Prison Legal News*.[5] This Court has never required a party to bring a separate void-for-vagueness claim to challenge a prison regulation that infringes on First Amendment freedoms. In *Thornburgh*, for example, the Court considered a party's argument that the regulations under review called for discretion that could be exercised in an arbitrary and capricious fashion. 490 U.S. at 417 n.15. This, of course, is precisely the harm that a void-for-vagueness challenge would address. Rather than ignore this argument because it was not raised as a separate void-for-vagueness claim, the Court held that the regulations were not facially invalid, but directed the Court of Appeals to consider on remand the possibility that "variability in enforcement of the regulations stems solely from the censors' subjective views." *Id.*; *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring) ("Vague laws invite arbitrary powers."); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either

[5] Petitioner in fact sought leave to amend its complaint to add a void-for-vagueness claim. The District Court denied Petitioner's motion, *see* Pet. App. 51 n.5, and the Eleventh Circuit considered the issue to be waived, *id.* at 15 n.8.

the speaker or the message is critical of those who enforce the law.").

Third, deference is inappropriate where a challenged policy is a national outlier that has resulted in a wholesale ban on protected speech. Since 2009, Florida has censored every issue of *Prison Legal News* on the basis of its advertising content; it is the only state to do so. *See* Pet. App. 15–16. The District Court found these facts to be "troubling," *see id.* at 94–95, but the Court of Appeals rejected the District Court's concerns out of hand, asserting that "the policies of departments in other states do not matter so much" because "circumstances vary from state to state," *id.* at 41 n.18. However, the Eleventh Circuit did not identify any circumstance unique to Florida that might be relevant to the regulation at issue. *See id.* (noting, as the sole example of a difference between Florida and another state that does not impound *Prison Legal News*, Arizona's use of dormitories for certain categories of prisoners). In fact, between 2005 and 2009 Florida followed the practice of every other State in allowing *Prison Legal News* to be delivered to prisoners, and faced no major security issues as a result. *See id.* at 60.

Under this Court's precedents, the fact that no other prison system in the United States has a policy like Florida's is not a minor detail to be brushed aside. *See, e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."), *overruled in part on other grounds by Thornburgh*, 490 U.S. 401. Similarly, courts should view a complete ban on speech more skeptically than a less severe limitation. *Beard*, 548 U.S. at 535 ("[I]f

faced with evidence that [it were] a *de facto* permanent ban . . . we might reach a different conclusion in a challenge to a particular application of the regulation.") (second and third alterations in original). The Eleventh Circuit gave short shrift to these precedents, which merits this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

NILA BALA
R STREET INSTITUTE
1212 New York Ave., NW
Suite 900
Washington, DC 20005
(202) 525-5717

VICTOR BERNSON
CASEY MATTOX
AMERICANS FOR PROSPERITY
1310 N. Courthouse Rd.
Suite 700
Arlington, VA 22201
(703) 224-3200

TREVOR BURRUS
CATO INSTITUTE
1000 Massachusetts Ave., NW
Washington, DC 20001
(202) 842-0200

MANUEL S. KLAUSNER
LAW OFFICES OF
MANUEL S. KLAUSNER
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414

JOHN N. ESTES III
Counsel of Record
DONALD P. SALZMAN
THOMAS A. PARNHAM, JR.
TODD D. KELLY*
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
john.estes@skadden.com

JOHN W. WHITEHEAD
DOUGLAS R. MCKUSICK
THE RUTHERFORD
INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906
(434) 978-3888

Counsel for Amici Curiae

**Admitted to practice in Virginia only; supervised by a member of the D.C. Bar.*

October 19, 2018