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United States District Court, S.D. Florida.

HUMAN RIGHTS DEFENSE CENTER, Plaintiff,
v.
Ricky D. DIXON, et al., Defendants.

CASE NO. 21-CV-81391-MIDDLEBROOKS

|
Signed March 29, 2023

Synopsis

Background: Publisher brought action alleging that Florida Department of Corrections (FDOC) rules banning publications containing advertising promoting three-way calling services, pen pal services, purchase of products or services with postage stamps, conducting business or profession while incarcerated, and gambling violated First Amendment. Bench trial was held.

Holdings: The District Court, Donald M. Middlebrooks, J., held that:

publisher's claim that rule banning publications encouraging or promoting gambling violated First Amendment was not ripe, and

rule banning publications containing other advertisements did not violate First Amendment.

Ordered accordingly.

Procedural Posture(s): Judgment.

Attorneys and Law Firms

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

DONALD M. MIDDLEBROOKS, UNITED STATES
DISTRICT JUDGE

*1 Human Rights Defense Center ("HRDC" or "Plaintiff") initiated this First Amendment and Due Process challenge against officials ("Defendants") of the Florida Department of Corrections ("FDOC") on August 10, 2021. (DE 1). On August 24, 2022, I entered an Order Granting in Part Defendants' Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment. (DE 150). What remained for trial was Plaintiff's As-Applied First Amendment challenge (against Defendants' in their official capacity) to FDOC's Admissible Reading Rule. (*See id.*).

From September 6 through September 7, 2022, I held a bench trial on Plaintiff's remaining claim, at which the Parties presented documentary and testimonial evidence. (DE 166; DE 167). Upon careful consideration of the entire record, including the evidence adduced at trial, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT¹

I. HRDC AND ITS PUBLICATIONS

1. Plaintiff Human Rights Defense Center (“HRDC”) publishes two monthly magazines: *Prison Legal News* and *Criminal Legal News*, that it sells for \$36 and \$48, respectively, to inmates in FDOC custody. (Trial Testimony, September 6, 2022 (ECF No. 175) (“Transcript Vol. 1”), 124:7-11). HRDC also sells those same magazines for \$96 per year to the 10% of its subscribers who are professionals or organizations. (*Id.*).

2. HRDC continues to sell its magazines to FDOC inmates despite the presence in those magazines of advertising for goods or services (offered by advertisers to whom HRDC sells ads) that are banned by FDOC rules and despite prior litigation that found that FDOC did not violate the First Amendment when it rejected publications that included such advertising. *See Prison Legal News v. Sec’y, Fla. Dep’t of Corr.*, 890 F.3d 954, 967 (11th Cir. 2018). HRDC made no changes to ads in its magazines despite the federal appellate court’s ruling (Transcript Vol. 1, 105:12-22; 108:1-3), and it has no plan to change its advertising content because it doesn’t see “a reason to,” (*id.*, 167:11-13).

3. *PLN* has an average of 7,000 to 8,000 subscribers. (*Id.* at 101:23-24). *CLN* has between 4,000 and 5,000 subscribers. (*Id.* at 101:25). However, these numbers can change month to month. (*Id.*). HRDC’s printer ships the magazines to subscribers who include prisoners, their family members, advocates, attorneys, academics, prison officials, and defense attorneys, including those in offices of attorneys general. (*Id.* at 100:22-101:2, 101:7-14). HRDC’s subscribers are located in all 50 states, and a few are outside of the United States. (*Id.* at 102:1-6). HRDC has subscribers in jails and prisons in every U.S. state, and, at times, in Puerto Rico and Guam. (*Id.* 102:7-11). Hundreds of thousands of people visit the magazines’ websites or view the electronic versions of the magazines every month. (*Id.* at 101:2-3). Approximately 25-30 inmates in FDOC custody are paid subscribers to HRDC’s monthly publications. (Transcript Vol. 1, 128:6-10; 190:4-7; Defendant’s Exhibit 34).

*2 4. HRDC publishes five books, including *The Disciplinary Self-Help Litigation Manual*. (Transcript Vol. 1, 126:20-25; Defendant’s Exhibit 33). *The*

Disciplinary Self-Help Litigation Manual was initially impounded by FDOC in March 2018, reviewed by the Literature Review Committee (“LRC”) in April 2019, and reviewed again in a Special Meeting by the LRC in December 2021 and deemed to not be admissible reading material under FDOC’s rules. (Defendant’s Exhibit 10G).

5. HRDC’s magazines are not rejected due to advertisements by the Federal Bureau of Prisons, or by prisons in large states, like California, New York, or Texas, by other prisons in the Eleventh Circuit Court of Appeals, or by Florida jails. (*Id.* at 102:12-103:2).

6. Paul Wright, HRDC’s Executive Director, testified at trial that if HRDC had to stop including the offending ads, it “would have a very serious financial impact on us.” (Transcript Vol. 1, 108:10-14). Advertising in HRDC’s publications target inmates. (Revised Joint Pretrial Stipulation (ECF No. 156) (“PTS”), ¶ 23). HRDC’s main types of advertisers are pen pal services, book sellers, and lawyers. (PTS, ¶ 23). One of HRDC’s longstanding advertisers is writeaprisoner.com. (Transcript Vol. 1, 176:2). Another longstanding advertising customer of HRDC is Elite Paralegal and Prisoner Services (Transcript Vol. 1, 178:25-179:7), which sell “research” services to inmates.

7. In addition to the advertising that HRDC sells to others, until approximately two years ago HRDC’s own publications offered to sell inmates publications in exchange for postage stamps. (Transcript Vol. 1, 106:1-9; Defendant’s Exhibit 19 (showing change in HRDC’s promotional materials to no longer list stamps as a method of payment for publications)). While HRDC stopped accepting stamps as payment for their publications in 2021, despite receiving \$10,086.45 worth of stamps in 2021, HRDC will not edit or redact the *Disciplinary Self Help Litigation Manual* to remove the ads in that book that state HRDC accepts stamps for its products, even though the prohibited ads are on the last pages of the publication, because HRDC plans to wait until it has sold all of the “hundreds or thousands” of already-printed copies which were printed between 2014 and 2015. (Transcript Vol. 1, 106:3-107:17; 164:25-166:19; Defendant’s Exhibit 42).

8. HRDC ads slots are desirable to its advertising customers because the ads reach the targeted inmates, are shared 10 or 11 times on average, and result in 60% of the readers of its magazines purchasing at least one advertised product. (Transcript Vol. 1, 129:15-131:13 and 132:6-10).

II. FDOC

9. FDOC is the 3rd largest prison system in the United States, currently housing more than 81,000 inmates in 143 facilities. (PTS, ¶ 1; Trial Testimony, September 7, 2022 (ECF No. 176) (“Transcript Vol. 2”), 137:2-5 and 116:22-117:1). 60.9% of the inmates housed by FDOC are incarcerated for violent offenses. (PTS, ¶ 2). 14.8% of the inmate population housed by FDOC are sex offenders. (*Id.*, ¶ 3). 64.8% of FDOC’s \$2.7 billion budget for 2020-2021 was spent on security. (PTS, ¶ 1).

10. FDOC currently has an unprecedented staffing shortage, with a vacancy rate of 31.17%. (*Id.* ¶ 4). FDOC currently has over 5,400 vacancies within the correctional officers series, which has resulted in FDOC having to call in the National Guard to assist with operations. (Transcript Vol. 2, 116:22-117:1, 141:19-24).

*3 11. FDOC rules are designed to protect inmates and staff and the public; protecting physical safety is important. (PTS, ¶ 7). According to FDOC’s Deputy Director of Institutional Operations, Carl Wesley Kirkland, Jr., who has decades of corrections management experience, FDOC is constantly reviewing its processes and procedures to try to stay ahead of inmates and people on the outside who are trying to aid inmates to introduce contraband and violate FDOC’s rules. “We initiate a process to help make it a much safer environment and then they turn around and figure out a way to circumvent that.” (Transcript Vol. 2, 30:9-19).

12. FDOC tries to avoid situations that lead to inmates violating FDOC rules. A rule violation in and of itself presents a security risk to both inmates and FDOC staff because staff must engage inmates regarding the rule violations, and these negative interactions with inmates can lead to violence or an attempt to agitate other inmates, which endangers everyone involved. Moreover, engaging inmates about rule violations may require the use of force by officers, which is something FDOC tries to avoid. (Transcript Vol. 1, 218:15-17, 220:9-15). FDOC does not encourage or otherwise permit inmates to violate FDOC rules by engaging in the prohibited activities advertised in HRDC’s publications. (Transcript Vol. 2, 57:25-58:3).

13. An increasing problem at FDOC’s facilities is the introduction of contraband allowing inmates to access the internet, *e.g.*, cell phones and wireless devices are

introduced to FDOC facilities through visitors, drones flying near perimeter fencing, and persons throwing disguised items (containing phones, hotspots, *etc.*) over perimeter fences. (Transcript Vol. 1, 203:15-204:5).

14. FDOC began allowing inmates to use “tablets” (a FDOC-approved mobile electronic device) in FDOC facilities in 2018 to access emails, books, movies, and other media on a secure closed network. (Transcript Vol. 2, 45:11-46:14).

15. Inmates frequently hack their tablets to have access to unapproved internet resources, allowing them to engage in unmonitored communications. Since October 2021 there have been approximately 3,000 hacked tablets discovered by FDOC. Inmates use jail broken tablets to organize and fund contraband activities, use unauthorized external (PayPal, Cash App) means of financial transactions to extort and threaten harm to other inmates in protective management units instead of the inmate trust fund, and to engage in other prohibited activities such as gambling via fantasy sports leagues, all of which increase the security risk to inmates and FDOC staff. (Transcript Vol. 2, 46:15-48:13, 44:13-16, 18:11-14; Defendant’s Exhibit 26).

16. The use of hacked tablets by inmates has resulted in a labor-intensive review to go through and collect every tablet and run it through the security system to detect whether it has been hacked; if it has been hacked, it is confiscated, and staff initiate the disciplinary process. (Transcript Vol. 2, 47:15-21). FDOC has many rules designed to control who an inmate communicates with, what financial transactions they can make, and what property they can possess. (PTS, ¶ 8).

17. All reading material sent to an inmate, whether in hard copy or delivered electronically, must be approved by FDOC. (Fla. Admin. Code r. 33-501.401, Defendant’s Exhibit 1; Fla. Admin. Code r. 602.900(4)(g), (5)(p), Defendant’s Exhibit 7).

III. THE ADMISSIBLE READING MATERIAL RULE

18. Pursuant to Fla. Admin. Code r. 33-501.401 (the “ARM Rule”) (Defendant’s Exhibit 1), inmates are only allowed to order, receive, or possess publications under certain conditions. (*Id.*, ¶ 9).

*4 19. A publication that “encourages, provides instructions on, or facilitates gambling” is prohibited. (Fla. Admin. Code r. 33-501.401(15)(e)). Prior to June 9, 2020, the ARM Rule did not include a prohibition on publications that related to gambling.

20. Section 15(g) of the ARM Rule prohibits admission or possession of a publication that “encourages, provides instruction on, or facilitate the commission of a crime.” (This corresponds to Section (3)(f) of the version of the ARM Rule prior to June 9, 2020.)

21. Section 15(i) prohibits admission of a publication that is “dangerously inflammatory in that it advocates or encourages riot, insurrection, rebellion, organized prison protest, disruption of the institution, or the violation of federal law, state law, or Department rules.” (This corresponds to Section (3)(g) of the version of the ARM Rule prior to June 9, 2020.)

22. Section 15(o) of the ARM Rule was amended in 2021, taking effect May 4, 2022, and prohibits publications that contains an ad promoting any of the following types of activity:

1. Three-way calling services;
2. Pen pal services;
3. The purchase of products or services with postage stamps; or
4. Conducting a business or profession while incarcerated.

Fla. Admin. Code r. 33-501.401.

23. Pursuant to Section (15)(p) of the ARM Rule, publications that present “a threat to the security, order or rehabilitative objectives of the correctional system or the safety of any person” are prohibited. Fla. Admin. Code r. 33-501.401(15)(p). (This corresponds to Section (3)(m) of the version of the ARM Rule prior to June 9, 2020.)

24. The 2021 amendment to the ARM Rule was the result of several events: repeated claims by HRDC in prior litigation against FDOC that the language of the then-current version of the Rule was unclear, review of the Constitutional requirements and developing caselaw, staffing shortages, and a regularly scheduled review of the Rule for revision. In 2013, HRDC’s Executive Director was deposed by counsel for FDOC and testified “why not

promulgate a new rule without the words [prominent or prevalent]?” HRDC did not submit comments or request a hearing on the ARM Rule change. HRDC has never filed a challenge to the Rule under Chapter 120. (PTS, ¶ 18).

IV. PROCEDURE FOR IMPLEMENTING THE ARM RULE

25. Pursuant to FDOC’s ARM Rule, the initial impoundment decision is made by an Assistant Warden at the institution where the publication is received. (Fla. Admin. Code r. 33-501.401(16); Defendant’s Exhibit 2). Redaction of the inadmissible material is not permitted. (FDOC Procedure 501.401, Plaintiff’s Exhibit 6).

26. FDOC’s Literature Review Committee (“LRC”) reviews each impoundment, pursuant to the ARM Rule. Fla. Admin. Code r. 33-501.401(22). The LRC includes Bureau Chiefs or their designees from three disciplines: security operations, policy management/inmate grievance appeals, and education/programming. Fla. Admin. Code r. 33-501.401(22)(a); (PTS, ¶ 36). Each member of the LRC provides a unique perspective, but they all apply their training and experience in the corrections setting. Members of the LRC discuss their differences and don’t try to reach consensus, they each make a decision independently with no pressure to change their vote. (*Id.*, ¶ 37).

*5 27. All members of the LRC consider security, order and rehabilitation issues in their review. The members each act independently in their review and are tasked with carrying out their duties under the Rule. It doesn’t matter whether they agree with the Rule or each other. The LRC members are not told how to vote on the publications by the Secretary or anyone else. (Transcript Vol. 1, 61:19-62:3, 24:24-25:1; Transcript Vol. 2, 91:4-15). The context of what is happening in the country or in the penal environment may inform a determination whether something is dangerously inflammatory. For example, in late 2019 to early 2020 there was a large amount of civil unrest in the outside community that impacted the inmates at FDOC. (Transcript Vol. 2, 91:16-92:4).

28. Pursuant to Sections 23 and 24 of FDOC’s ARM Rule, a publisher may request a review of a decision to impound a publication and may request reconsideration of a prior decision by the LRC. Fla. Admin. Code r. 33-501.401.

29. In addition, FDOC's Secretary or a publisher may request a special meeting of the LRC. Fla. Admin. Code r. 33-501.401(25). If a publisher seeks that level of review, it must write to the library services administrator, Fla. Admin. Code r. 33-501.401(25)(c), and provide relevant information, which is then forwarded to the Bureau Chief of Programs/Education, who then schedules a special meeting of the Bureau Chiefs, Fla. Admin. Code r. 25(e). (PTS, ¶ 38). At a special meeting of the LRC, each publication is reviewed independently, as a fresh look at the publication, and the entire publication is reviewed, page-by-page along with any information the publisher wants to have considered. (Transcript Vol. 2, 88:25-89:7).

30. When additional copies of a publication that has been impounded are received by an institution, they are rejected. Fla. Admin. Code r. 33-501.401(17).

31. When a rejected publication is found in an inmate's personal property it will be taken from the inmate. Fla. Admin. Code r. 33-501.401(18). Some inmates have additional restrictions as to certain publications and if those inmates are found with such a publication it will be impounded as contraband. Fla. Admin. Code r. 33-501.401(19)(h).

32. Inmates can raise complaints about mail or publications being impounded by filing a direct grievance with the Secretary of FDOC if they are dissatisfied with application of the ARM Rule to a publication addressed to the inmate. Fla. Admin. Code r. 33-501.401(21). Grievances filed by inmates related to application of the ARM Rule are controlled by the LRC decisions, which are final. Fla. Admin. Code r. 33-501.401(22)(c), (d).

33. FDOC staff received training, conducted by then Senior Assistant Attorney General Neff, at each of the 4 FDOC regions in early 2016, that focused on the injunction issued in *Prison Legal News v. Jones*, Fla. Admin. Code r. 33-501.401, and how to properly fill out a DC5-101 form. A notice, titled "Attention All Mailroom Personnel" was provided to post in mail rooms, with a reminder about the Rule. (PTS, ¶ 32; Transcript Vol. 2, 130:5-17). There are no institution-specific memoranda or directives about how to apply the ARM Rule. (PTS, ¶ 13).

34. FDOC applies the ARM Rule uniformly to all publishers with offending advertisements and does not "censor" HRDC's publications in particular based on the content of their articles. Transcript Vol. 1, 92:18-93:1, 61:1-18; Transcript Vol. 2, 90:8-20.

V. APPLICATION OF THE ARM RULE TO HRDC'S PUBLICATIONS

35. Since at least mid-2017 to present, each issue of *Prison Legal News* and *Criminal Legal News* included at least two ads that are banned by FDOC's ARM Rule, including ads for companies selling subscriptions to pen pal services and ads selling inmates a search service. (Defendant's Exhibit 9-B). HRDC did not request a special meeting of the LRC for a publisher review of the subject publications by writing to the library services administrator prior to filing this lawsuit. (Transcript Vol. 2, 92:25-93:16). In late 2021, after this lawsuit was filed, HRDC accepted FDOC's offer to have the LRC conduct a publisher's review, despite the fact that HRDC had not properly requested such a review, as to all issues of *Prison Legal News* and *Criminal Legal News* from August 2017 to September 2021. (*Id.*, ¶ 41). The Special Meeting as to HRDC's magazines required a multi-day, multi-week review by the Bureau Chiefs. (Transcript Vol. 2 (testimony of Alan McManus, FDOC Bureau Chief for Policy), 86:8-21).

*6 36. On December 17, 2021, FDOC informed HRDC that the LRC had upheld the impoundment or determined that the publication should be impounded/rejected, as to all issues of *Prison Legal News* and *Criminal Legal News*. (*Id.*, ¶ 42). Each of the monthly issues of *Prison Legal News* and *Criminal Legal News* has more than one ad that violates FDOC's ARM Rule's 15(o) and/or 15(p). (Transcript Vol. 2, 88:25-89:19; Defendant's Exhibits 10-H; Plaintiff's Exhibit 11). The special review overturned prior impoundments based on the "inflammatory" nature of the publications and instead relied on other provisions of the ARM Rule. (Trial Tr. vol. 1, 114:16-21). Accordingly, I do not view the reasoning behind those initial impoundments as being at issue.

A. THREE-WAY CALLING

37. Inmates' use of three-way calling services is banned by Fla. Admin. Code 33-602.205(2)(a) (Defendant's Exhibit 5), which also prohibits inmates from calling numbers that are "then transferred to other telephone numbers." Such types of call historically have been

shown to facilitate criminal activity, and can be used to conduct illegal business, arrange for contraband, escapes, or threats to victims or witnesses. (Transcript Vol. 2, 38:17-39:2). Inmates are only allowed to call persons who are authorized account holders with FDOC's phone vender, which addresses FDOC's penological interest in monitoring inmate communications with persons who might be victims or witnesses, or co-conspirators with the inmate. (PTS, ¶ 19). When a third person is brought into a call, FDOC doesn't know who that person is because they are not linked to a specific phone account; an inmate can use that system to intimidate a witness or a victim, because the person receiving that call won't hear the initial prompt that says this call is coming from a FDOC inmate. (Transcript Vol. 2, 38:2-16).

38. FDOC's current phone service provider system attempts to automatically detect and terminate three-way calls, but it is not 100% effective, resulting in occasionally failing to detect three-way calls or mistaking a legitimate call for a three-way call, and inmates and persons outside the facility repeatedly try to beat that technology despite FDOC's rule prohibiting such calls. (PTS, ¶ 20; Transcript Vol. 2, 36:2-37:7). When FDOC's current phone service provider started providing service in 2021, it inadvertently failed to activate the automatic-termination feature as to three-way calls, which was specified in FDOC's rules (Fla. Admin. Code r. 33-602.205(2)(j)(4), Defendant's Exhibit 5); that oversight has been corrected. (Transcript Vol. 1, 208:18-209:4). (FDOC's prior phone service provider had the automatic termination feature activated. (Transcript Vol. 1, 211:2-6.)) Although three-way calls were recorded during that year during which the new provider had failed to activate the automatic termination feature, FDOC does not have the man hours to review the recordings of such calls. (Transcript Vol. 1, 210:3-11).

39. FDOC's phone service provider automatically terminated thousands of calls each month that it had detected as attempts at three-way calls and the number continues to be in the thousands because inmates are "still trying to circumvent the detection system." (Transcript, Vol. 2, 35:8-36:1). Inmates know about some of the technology and attempt to circumvent it by blowing into the phone receiver so that the system does not detect the sound made when another call is joined. (Transcript Vol. 2, 36:19-24).

40. These interests are reflected in the ARM Rule, Section (15)(o)(1), which bans ads for three-way calling services. These interests also are reflected in Fla. Admin. Code r.

33-602.900(7)(1)(21), which bans inmates from receiving on their tablets any ads for three-way calling services.

B. PEN PAL SERVICES

*7 41. Inmates are prohibited from placing ads soliciting pen pals. Fla. Admin. Code 33-210.101(12), (Defendant's Exhibit 3). That prohibition has been in place for a long time to protect the public and the inmate, and also to protect corrections staff and to be able to effectively manage FDOC institutions. (PTS, ¶ 21). Inmates also are prohibited from using e-communications to solicit or advertise for pen pals. Fla. Admin. Code r. 33-602.900(7)(j), (Defendant's Exhibit 7).

42. FDOC does not prohibit inmates from having a non-inmate pen pal when there is a pre-existing relationship with that individual, because FDOC encourages inmates to maintain existing social relationships. But if an inmate established that relationship through a pen pal service, the inmate may lose his or her mail or e-communications privileges as a result of violating FDOC's ban. (Transcript, Vol. 1, 216:4-217:1).

43. Inmate pen pal services are designed to promote an inmate (who pays a fee to the service) to the public, a far-ranging audience over which FDOC has no control. When inmates participate in a commercial pen pal service, that results in a labor-intensive review by FDOC staff of incoming and outgoing mail to monitor for security risks, exploitation (of the member of the public or the inmate), and to search for contraband. FDOC doesn't have the resources to constantly monitor the social media sites to see if inmates have profiles posted. (Transcript Vol. 2, 58:7-10). It would be a very heavy burden on FDOC to have to engage with private pen pal services companies to request that they remove ads of FDOC inmates. (Transcript Vol. 1, 214:22-215:2).

44. FDOC already has to address existing attempts to smuggle contraband or send threats through the mail (*see, e.g.,* Defendant's Exhibit 25. Transcript Vol. 1, 211:19-212:3). The additional efforts needed to investigate and issue disciplinary reports would be an extra burden on FDOC, because when FDOC discovers that an inmate has posted a profile on a pen pal service, FDOC issues a disciplinary report and orders the inmate to take the profile off the service and will continue with

disciplinary action until the inmate stops engaging in that pen pal service. For example, after this litigation revealed that there are FDOC inmates who currently have profiles on writeaprisoner.com., disciplinary actions were initiated as to those inmates. (Transcript Vol. 1, 213:4-13, 214:5-12; Transcript Vol. 2, 58:14-59:1). Also, when inmates are found to have violated their tablet or kiosk use privileges by engaging in pen pal services, they are subject to suspension of such privileges, pursuant to Fla. Admin. Code r. 33-602.900(8)(b), which creates additional work for FDOC staff, and increases the risk of negative interactions between FDOC staff and inmates who are being told they can no longer communicate with family or friends because they have lost those privileges.

45. There are many examples of the problems with inmates engaging in pen pal services. Sex offender John Paul Everhart met a female FDOC inmate through a website for prisoner pen pals and asked her to lie about their relationship (the inmate was soon to be released and Everhart wanted her to live with him). When Everhart's home was searched "computer printouts of contact information from various prisoner pen pal websites" and "letters written to different women inmates" were discovered. *U.S. v. Everhart*, 562 F. App'x 937, 939-40 (11th Cir. 2014). (PTS, ¶ 26).

*8 46. The reported decision regarding sex offender Everhart is an example of what has been an increasing problem of human trafficking, specifically targeting female inmates, that was discussed at trial by Deputy Director Kirkland. (Transcript Vol. 2, 55:2-22). Persons on the outside use these pen pal services to engage an inmate in conversation, make "all kinds of promises," including "depositing money into the inmate's account, giving the inmate promises of, ... when they are released, they will pick them up at the prison, they can provide housing for them, help them find a job, things of that nature." (Transcript Vol. 2, 55:10-16).

47. Other examples of inmates utilizing pen pal services and then engaging in criminal conduct with their pen pal or attempting to do so include former FDOC inmate Billy Boyette who went on a killing spree in early 2017 that left four women dead, and his accomplice for this spree was Mary Rice, who met him as pen pals while he was in jail. *Rice v. State*, 284 So.3d 1130, 1131, 1133 (Fla. 1st DCA 2019). (PTS, ¶ 25).

48. FDOC's legitimate interest in preventing inmates from participating in commercial pen pal services is reflected in the ARM Rule, Section (15)(o)(2), which

bans publications with ads for pen pal services. These interests also are reflected in Fla. Admin. Code r. 33-602.900(7)(1)(21), which bans inmates from receiving on their tablets any ads for pen-pal services.

C. POSTAGE STAMPS AS CURRENCY

49. Inmates are prohibited from using postage stamps as currency, by Fla. Admin. Code 4.33-210.101(22) (Defendant's Exhibit 3), and any excess stamps found in an inmate's property are considered contraband. (Transcript Vol. 2, 33:7-12). Inmates are limited as to the number of stamps they may possess, pursuant to Fla. Admin. Code 33-602.201 (Appendix One, Authorized Property List) (Defendant's Exhibit 4), to reduce the opportunity for stamps to become an untracked type of currency since postage stamps historically have been used as informal currency in penal institutions, because they are easily accessible. (PTS, ¶¶ 12, 28).

50. To monitor every transaction at the canteen window where an inmate purchases postage stamps would be "extremely labor intensive." (Transcript Vol. 1, 218:10-12). It already is very labor intensive to monitor all outgoing mail. The recent change to FDOC's Routine Mail Rule, whereby non-privileged and non-legal mail is scanned electronically, has resulted in an increase in mail disguised as "legal mail," and that has resulted in a burden on staff who must research each piece of legal mail to determine if it is being sent by a legitimate court address or attorney's office. When staff suspect it is not legitimate legal mail or privileged mail, the mail is turned over to FDOC's Inspector General's Office for further investigation – all of which causes a burden on FDOC. (Transcript, Vol. 2, 29:1-16).

51. When inmates are using stamps as currency, FDOC staff have to engage in extra labor to confiscate such mail and write disciplinary reports, and then have negative interactions with a "very volatile population of people" that could lead to violence against staff, the use of force, and more disciplinary reports – all of which are a burden on FDOC. Transcript (Vol. 1, 219:25-220:15).

52. These interests are reflected in the ARM Rule, Section (15)(o)(3), which bans publications with ads inviting inmates to use postage stamps as currency. These interests also are reflected in Fla. Admin. Code r. 33-602.900(7)(1)(21), which bans inmates from receiving

on their tablets any ads for the purchase of products or services with postage or virtual stamps.

D. CONDUCTING A BUSINESS

*9 53. FDOC has several rules that prohibit inmates from conducting a business, directly or indirectly, while incarcerated. As described in Fla. Admin. Code r. 33-602.207(2), (Defendant's Exhibit 6), this prohibition on inmates engaging in businesses also is based on the fact that potential for profit "creates the opportunity for fraud and increases inmate interest in participation in business activity, resulting in an increase in the volume of mail and telephone activity." Additional reasons are that FDOC staff don't have the knowledge to monitor business activity (controlling and validating any purported business activity would require an exhaustive effort to make sure that FDOC is not facilitating improper business activities). (PTS, ¶ 30).

54. The prohibition on inmates engaging in businesses also is addressed in the Routine Mail Rule (Fla. Admin. Code r. 210.101(8)(m)(4), Defendant's Exhibit 3), which restricts incoming mail or publications that include ads for conducting a business while incarcerated, and the Kiosks and Tablets Rule (Fla. Admin. Code r. 602.900(6)(c), Defendant's Exhibit 7), which prohibits inmates from using kiosk or tablet services to "establish or conduct a business, directly or indirectly." Inmates are already conspiring with people outside the prison to introduce contraband and are using PayPal and Cash App to facilitate these illegitimate business activities. (Transcript Vol. 2, 44:13-16; Defendant's Exhibit 30).

55. These interests are reflected in the ARM Rule, Section (15)(o)(4), which bans publications with ads inviting inmates to engage in a business while incarcerated. As well as in Fla. Admin. Code r. 33-602.900(7)(l)(21), which bans inmates from receiving on their tablets any ads for conducting a business while incarcerated.

E. FANTASY SPORTS

56. Pursuant to Fla. Stat. § 849.08 gambling is a crime; similarly, pursuant to Fla. Stat. § 849.14, betting is a crime. The Attorney General of the State of Florida determined that participation in a fantasy sports league

where a fee is paid and where the results yield a cash payment to the winning contestant violates Fla. Stat. § 849.14. (Defendant's Exhibit 48).

57. Fantasy sports ads were not at issue in the prior litigation between HRDC and FDOC.

58. The fantasy sports ads in *PLN* are for services that send *information* that allow people to run a fantasy sports league, such as player rankings and statistics. See P9 at DIXON, 1764-1781. These ads do not reference gambling or wagering money on fantasy sports.

59. In June 2002, FDOC added section 15(e) to the ARM Rule, to prohibit inmates from receiving or possessing publications that encourage or promote gambling. Fla. Admin. Code r. 33-501.401, effective date June 9, 2020.

60. FDOC generally claims that ads for fantasy football, even if they just sell game statistics, promote gambling. (Transcript Vol. 1, 30:14-15, 221:5-7). However, it was not clear how frequently this view is enforced.

61. Prior versions of the ARM Rule did not prohibit ads which encouraged gambling. Since the ARM Rule was amended in June 2020 ads which encourage gambling are prohibited; under the prior version of the ARM Rule publications which contained ads which promote fantasy sports gambling may not have been impounded. For example, Rotowire Fantasy Football 2019 was not impounded. (Transcript Vol. 1, 28:5-10).

62. A member of the literature review committee, Melvin Herring, was noncommittal on this point. For example, when asked about a hypothetical issue of *Sports Illustrated* containing an ad for fantasy sports, Herring said it would violate the ARM Rule if it "went in depth into the fantasy football process." (Transcript Vol. 1, 76). And when responding to whether materials with fantasy football ads would be allowed into FDOC today he said: "I would say it's possible. Anything is possible, yes." (*Id.* at 30). Herring attributed the change in enforcement against fantasy football ads not to the new ARM Rule, but to the "changing circumstances" in the prison (*e.g.*, access to tablets and phones) as facilitating gambling in relation to fantasy sports. (*Id.* at 29).

*10 63. FDOC's Deputy Director, Carl Kirkland, was more forceful in his contention that fantasy sports ads would always be banned under the current rule. He testified that fantasy sports is a security concern inside the prison because fantasy sports can be easily concealed on a

sheet of paper, and it is not a congregate activity or collaborative activity. (Transcript Vol. 2, 8:8-22).

64. FDOC allows inmates to watch sports on tv which almost certainly contain fantasy sports ads. In addition, FDOC offers items through the canteen or commissary that can be used for gambling, such as decks of playing cards or dominos. (Transcript Vol. 1, 221).

65. Plaintiff's expert, Mr. John Clark, testified that "there is a gusher of information about sports in newspapers," and "[inmates] are watching on ESPN, they are watching the local sports channel, the statistics, the box scores, you know who is injured. All that stuff is out there. Just in what comes in through the mail or television programming ... they are going to get it through the contraband electronic devices that we are told are around their institution. So I mean, it's a tough one to control." (*Id.* at 192:1-11).

66. Under the new ARM Rule, FDOC has yet to impound one of Plaintiff's publications on the basis that a fantasy sports ad violates the anti-gambling provision. (Transcript Vol. 2, 231-232).

67. And, crucially, in the LRC special review of approximately 111 publications by HRDC, fantasy football was never cited as an issue. (*Id.* at 124-25).

CONCLUSIONS OF LAW

This is the third time that HRDC has sued FDOC over essentially the same ads. In its most recent litigation, HRDC lost its claim that FDOC violated the First Amendment when it impounded or rejected HRDC's publications that include ads that violated the ARM Rule. *Prison Legal News v. Jones*, Case No. 4:12cv239-MW/CAS, 2015 WL 12911752 (N.D. Fla. Oct. 5, 2015), *aff'd* *Prison Legal News v. Sec'y, Fla Dep't of Corr.*, 890 F.3d 954 (11th Cir. 2018) (hereinafter "*PLN* 2018"). At trial, HRDC agreed that *PLN* 2018 is binding on this Court unless it could show that FDOC now allowed prisoners to engage in the same conduct that the ARM Rule prohibits. (Transcript Vol. 2, 233-34). I find that it has not. And unlike Plaintiff's expert, I cannot otherwise go beyond the Eleventh Circuit's opinion. *See id.* at 210 ("I am sure I know more about corrections and dangers in prisons than those judges."). As to the fantasy sports ads, I do not believe the claim is ripe for review. I

will address these two categories of ads in reverse order.

A. FANTASY SPORTS ADS

While I find FDOC's reasoning as to fantasy sports questionable, Plaintiff's as-applied challenge to the ARM Rule's "ban" on fantasy sports ads is not ripe for review because the new ARM Rule has yet to be *applied* to such an ad.

"Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies of sufficient concreteness to evidence a ripeness for review." *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). The "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Contl. Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). To determine whether a case is ripe, courts assess "(1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Digital Properties*, 121 F.3d at 589.

*11 Under the first prong of the ripeness analysis, fitness for judicial review, the Eleventh Circuit's decision in *Harrell v. The Fla. Bar* is conclusive. 608 F.3d 1241 (11th Cir. 2010). In *Harrell*, a lawyer brought an as-applied First Amendment challenge to the Florida Bar's advertising rule. *Id.* at 1261. Like here, the Bar had yet to prohibit some of the lawyer's ads. The Eleventh Circuit held that the lawyer's claim was not ripe because he could proceed with an administrative review of the ads—which had no threat of triggering disciplinary proceedings with the Bar—to obtain the Bar's "final" decision. *Id.* The potential for a final decision that eliminated the need for judicial review, at no real personal cost to the lawyer, counseled in favor of waiting.

The Eleventh Circuit provided an exception to its holding in *Harrell*: "cases where there is nothing to be gained from an agency's interpretation of a rule because the rule's application is clear on its face." *Id.* "Since few, if any, institutional interests would be served by asking an agency to interpret a rule whose application is utterly clear, the absence of an agency opinion ordinarily will not affect whether a challenge to such a rule is fit for immediate judicial review." *Id.* The Court identified one such rule; a rule prohibiting "any background sound other

than instrumental music.” *Id.* (citation omitted). Any ambiguity regarding what “background sound” meant, the Court reasoned, was *de minimis*.

Here, the worst that can happen if HRDC sends a publication that violates the ARM Rule—as it has many times—is that FDOC impounds it. HRDC can then go through an administrative appeal process to obtain a final decision from FDOC. While it is true that a violation of a criminal statute or even a Bar rule might give rise to a chilling effect, here there is no real risk of that. Moreover, the exception in *Harrell* is inapplicable. The ARM Rule that purportedly bans *all* fantasy sports ads prohibits a “publication [that] encourages, provides instruction on, or facilitates gambling.” Fla. Admin. Code r. 33-501.401(15)(e). It is not, in the words of *Harrell*, “utterly clear,” how that would apply to Plaintiff’s fantasy sports ads. While Messrs. Kirkland and Neff were averse to such ads, Mr. Herring, a member of the LRC, was more noncommittal. There was no evidence adduced at trial regarding how FDOC applies this rule to other publications; *e.g.*, *Sports Illustrated*. And the LRC special review of over 100 publications did not cite fantasy sports.

Under the second prong, hardship to the parties, the facts do weigh in favor of providing review. Plaintiff has litigated this case through trial and might have to essentially start over if the FDOC impounds a publication on this basis. This is not an ideal outcome to be sure. That being said, it is *Plaintiff’s* burden to establish ripeness and it could have easily done so at any point after the new ARM Rule went into effect. Moreover, given the direct applicability of *Harrell*, I am not persuaded that this claim is **ripe**.

B. CONDUCTING A BUSINESS, STAMPS AS CURRENCY, PEN PALS, AND THREE-WAY CALLING

I address all of these ads, briefly, in one section because I find that they fall squarely within the Eleventh Circuit’s opinion in *PLN 2018*. Plaintiff does not show that the FDOC was doing anything other than what the Eleventh Circuit already held is acceptable.

HRDC’s claim is governed by the standard in *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), and the decision in *Thornburgh v. Abbott*, 490

U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). Pursuant to *Turner*, in order to establish a First Amendment claim, HRDC must establish: “(1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; (2) whether the publisher has alternative means to exercise its right of access to its inmate subscribers; (3) what impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether [HRDC] can point to ... alternative[s] that fully accommodate[] [its] rights at de minimis cost to valid penological interests.” *Prison Legal News v. Sec’y, Fla. Dep’t of Corr.*, 890 F.3d 954, 967 (11th Cir. 2018) (internal citations omitted); *cert. denied* — U.S. —, 139 S. Ct. 795, 202 L.Ed.2d 571 (2019). I will take each in turn.

***12** As to the first factor of the *Turner* standard, there is no question that FDOC has a legitimate governmental interest in public safety and prison security. *See, e.g., Thornburgh*, 490 U.S. at 415, 109 S.Ct. 1874 (regulation promulgated with the purpose of “protecting prison security” is legitimate, since that “purpose ... is central to all other corrections goals”). Plaintiff does not question that. Instead, it argues that FDOC essentially promotes violations of its own rules and thus there is no rational application of the ARM Rule.

I disagree that FDOC promotes violations of its own rules or allows it to such an extent that the ARM Rule as applied to Plaintiff’s publications is irrational. In doing so, I am guided by three principles relied on by the Eleventh Circuit in *PLN 2018*: (1) the *Turner* standard does not require evidence of an actual security breach, instead prison administrators must be able to innovate and anticipate problems, *PLN 2018* at 968; (2) every prison regulation involves compromises (*e.g.*, calling cellphones is acceptable even though three-way calling is not), *id.* at 970; and (3) impoundment of publications need not be a “silver bullet,” *id.* at 976. Viewed under that framework, as I must, Plaintiff’s challenge falls apart.

As to each type of ad, the findings of fact largely speak for themselves. I will just add that I do not find the violations uncovered by Plaintiff as pointing to anything other than prisoners’ ability to creatively circumvent the rules. That does not, however, make application of the ARM Rule irrational. Like any institution, FDOC has limited resources, which include staff and time. FDOC cannot realistically prevent violations of all its rules. The measures Plaintiff wants to see in place to justify the

ARM Rule are overly burdensome. And to the extent the introduction of new technology since *PLN 2018* was decided has increased the number of violations, that too is insufficient to render the ARM Rule irrational. Plaintiff also offered no evidence that other publications with similar advertisements are allowed under FDOC's ARM Rule. In other words, there is no evidence that FDOC is singling out HRDC for censorship.

The rest of the *Turner* factors also cut in FDOC's favor in the same way that they did in *PLN 2018* at 972-76. The facts are so similar that there is no need to reiterate the reasoning here.

CONCLUSION

Accordingly, it is **ORDERED and ADJUDGED** as

Footnotes

¹ As I explain in the Conclusions of Law section, Plaintiff's claim as it relates to fantasy football ads is not ripe. Accordingly, the facts herein are not intended to resolve any dispute on that front, other than to set up the reasoning behind the ripeness analysis.

follows:

1. Plaintiff's as-applied First Amendment challenge to FDOC's impoundments of ads containing fantasy sports is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction (ripeness).
2. Defendant is entitled to judgment in its favor on Count I (First Amendment) of Plaintiff's First Amended Complaint as to every other impoundment at issue in this Order.
3. Final judgment will be entered by separate order.

All Citations

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