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16 UNITED STATES DISTRICT COURT
17 DISTRICT OF OREGON
18
19

20 PORTLAND DIVISION PRISON LEGAL
21 NEWS, a project of the HUMAN RIGHTS
DEFENSE CENTER,

22 Plaintiff,

23 v.

24 COLUMBIA COUNTY; COLUMBIA
COUNTY SHERIFF'S OFFICE; JEFF
25 DICKERSON, individually and in his capacity
as Columbia County Sheriff,

26 Defendants.
27

No. CV 12-71-SI

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

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Nearly two years ago, in April 2010, the Columbia County Jail adopted a mail policy that prohibited all letters, restricting all incoming and outgoing mail to postcards only. The Jail's policy also prohibited delivery of magazines to prisoners, and failed to afford due process. The Jail then censored numerous letters, book catalogs, and monthly subscription journals that PLN mailed to Columbia County prisoners.

On January 13, 2012, PLN filed this lawsuit and notified the County that PLN was planning to file a motion for preliminary injunction. PLN then engaged in a series of discussions with Columbia County to secure a stipulation to the preliminary injunction, during which time the County asserted that it had adopted a different policy that had not been publicly disclosed. That policy was constitutionally deficient too. Last week, on Friday, January 27, 2012, the County declined to stipulate to a preliminary injunction, instead informing PLN that the Jail would issue a new mail policy. Later that day, the County sent PLN a copy of a new mail policy. That policy retains many provisions that continue to violate PLN's First and Fourteenth Amendment rights. Accordingly, PLN is proceeding with this motion.

Prison Legal News respectfully moves for an order preliminarily enjoining Defendants: from (1) enforcing unconstitutional jail mail policies to reject or otherwise censor news journals, subscription materials, book offers, book catalogs, and other correspondence, and (2) ordering Defendants to afford to Plaintiff, prisoners, and other correspondents due process notice and an opportunity to challenge Defendants' censorship decisions.

I. FACTS

A. Parties

Plaintiff Prison Legal News ("PLN") is a project of the Human Rights Defense Center, a non-profit corporation. Declaration of Paul Wright ¶7. PLN publishes a monthly journal of corrections, news, and analysis by the same name: *Prison Legal News: Dedicated to Protecting Human Rights*. *Id.* ¶4. PLN has approximately 7,000 subscribers in the U.S. and abroad, including attorneys, journalists, public libraries, judges, and prisoners at about 2,200 correctional

1 facilities nationwide. *Id.* ¶¶6-7. PLN regularly receives correspondence from prisoners in
 2 correctional facilities around the country in which they ask questions and report on prison
 3 conditions. *Id.* at 8. PLN engages in core protected speech and expressive conduct on matters of
 4 public concern, such as prison operations and conditions, prisoner health and safety, and
 5 prisoners' rights. *Id.* ¶9; *see Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005) (PLN's
 6 mail to prisoners is protected by the First Amendment).

7 Defendants include Columbia County and the Columbia County Sheriff's Office, which
 8 operates the Columbia County Jail in St. Helens, Oregon. As is evident from the Sheriff's Office
 9 website Inmate Jail List at any given time, the Jail houses convicted prisoners and pretrial
 10 detainees charged with federal or state crimes. *See, e.g.,* Ex. 10¹ to Declaration of Katherine
 11 Chamberlain.

12 Defendant Jeff Dickerson is the Sheriff of Columbia County. *See* Ex. 1. The Sheriff is
 13 responsible for Jail operations, the training and supervision of its staff, including those who
 14 interpret and implement the mail policy for prisoners, and is the policymaker for the Jail,
 15 including its mail policies. *See id.*; *Cf. Oviatt By & Through Waugh v. Pearce*, 954 F.2d 1470,
 16 1477 (9th Cir. 1992) ("There is no question that Sheriff Pearce was the final policymaker with
 17 respect to internal procedures at Multnomah County Detention Center."); *Cortez v. County of*
 18 *Los Angeles*, 294 F.3d 1186, 1187 (9th Cir. 2002) ("[W]e hold that the Los Angeles County
 19 Sheriff ('Sheriff') acts as the final policymaker for the County of Los Angeles ('County') in
 20 establishing and implementing policies and procedures for the safekeeping of inmates in the
 21 county jail"); *Davis v. Mason County*, 927 F.2d 1473, 1480-1481 (9th Cir. 1991) (holding
 22 Washington sheriff is policy-maker over jail).

23
 24
 25
 26 ¹ All numbered exhibits are attached to the Declaration of Katherine Chamberlain; all
 27 lettered exhibits are attached to the Declaration of Paul Wright.

B. Columbia County Jail Censors PLN's Mailings and Articles

In December 2010 and the months thereafter, Prison Legal News mailed its monthly journal, informational brochures about subscribing to PLN, a catalog of books that PLN offers, book offers, subscription renewal letters, and fundraising letters, in envelopes addressed personally to prisoners at the Columbia County Jail. *See* Wright Dec. ¶¶10-28; *E.g.*, Exs. LLL (exemplar of one of the rejected *Prison Legal News* journals); MMM (informational subscription brochure), NNN (book catalog); OOO (book offer); DDD (subscription renewal letter); PPP (fundraising letter).

But the Jail censored the one-page informational brochures, book catalogs, and book offers that PLN mailed to nearly 30 prisoners. Wright Dec. ¶¶13-26, 28; Exs. A through QQQ. When censoring these mailings, the Jail returned some of them to Prison Legal News. Wright Dec. ¶14. On four of the returned envelopes, the Jail stamped just "RETURN TO SENDER," without stating any reason for the rejection. *See* Exs. H, O, T, V. Similarly, on another five returned envelopes, the Jail stamped "INSPECTED BY COLUMBIA COUNTY JAIL" with a checkmark next to "REFUSE/VIOLATES SECURITY," without explaining what violated security. *See* Exs. E, Q, U, W, AA. On yet another eighteen envelopes, the Jail affixed a sticker that reads "As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out going mail," *see* Exs. A, B, C, D, F, G, I, J, K, L, M, N, P, R, S, X, Y, Z.

The Jail also censored at least thirty-seven issues of the *Prison Legal News* journal that PLN mailed to prisoners held in its custody. Wright Dec. ¶17. When censoring these mailings, the Jail returned only some of them to Prison Legal News. *Id.* On four of the returned envelopes, the Jail stamped just "RETURN TO SENDER," without stating any reason for the rejection. *See* Exs. BB, CC, DD, JJ. On three other returned envelopes, the Jail marked "INSPECTED BY COLUMBIA COUNTY JAIL" and "REFUSE/VIOLATES SECURITY," without stating what violated security. *See* Exs. KK, LL, NN. On two returned envelopes, the

1 Jail stamped “INSPECTED BY COLUMBIA COUNTY JAIL” with checkmarks next to
 2 “CONTRABAND” and “REFUSE/VIOLATES SECURITY,” again, with no explanation. On
 3 yet another nineteen envelopes, the Jail affixed a sticker that reads “As of April 1, 2010 The
 4 Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out
 5 going mail.” *See* Exs. EE through II, PP through CCC. The Jail also censored at least eight
 6 other issues of *Prison Legal News* that it did not return to PLN. Wright Dec. ¶¶18-25; Campo
 7 Dec. ¶6; McCarter Dec. ¶6; St. Helen Dec. ¶6; Kay Dec. ¶6.

8 The Jail censored at least eight of the subscription renewal letters and Info Packs
 9 (collectively “Subscription Renewal Packs”) that PLN sent to prisoners there. Wright Dec. ¶ 32.
 10 The Jail returned some of the censored Subscription Renewal Packs to Prison Legal News. *Id.*
 11 On seven of the returned envelopes, the Jail stamped “RETURN TO SENDER,” and did not
 12 state a reason for censorship. *See* Exs. DDD, EEE, FFF, GGG, HHH, JJJ, KKK. On the other
 13 returned envelope, the Jail affixed a sticker that reads “As of April 1, 2010 The Columbia
 14 County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out going
 15 mail.” *See* Ex. III.

16 Although the Jail censored at least 74 pieces of mail, the Jail did not send to PLN any
 17 rejection notices identifying the mail that the Jail had censored, the dates of the censorship, the
 18 reason for the censorship, the Jail policy provisions that applied, or notifying PLN of any
 19 opportunity to challenge or appeal the censorship decisions. Wright Dec. ¶31. Nor did the Jail
 20 provide the prisoner-addressees with notice that mail sent to them had been rejected, the reason
 21 why, the applicable policy, or notification of an opportunity to challenge or appeal the censorship
 22 decisions. *See* Campo Dec. ¶¶4, 6; McCarter Dec. ¶¶4, 6, 7; St. Helen Dec. ¶¶4, 6, 7; Kay Dec.
 23 ¶¶4, 6, 7.

24 The Jail has also censored mail sent to several prisoners in its custody from individual
 25 correspondents on the ground that the mail was contained in envelopes rather than on a postcard.
 26 For example, as recently as last month, December 2011, the Jail censored a seven-page published
 27

news article printed from the Prison Legal News website entitled “The Failed Promise of Prison Privatization” that an individual, Lucy Lennox, sent to sixteen prisoners. Lennox Dec. ¶¶3-4; Exs. I through XV. On the returned envelopes that contained the same contents, the Jail nevertheless placed a stamp or sticker that stated differing reasons for the rejections: (a) “REFUSE/VIOLATES SECURITY,” (b) “CONTRABAND” and “REFUSE/VIOLATES SECURITY,” (c) “no envelope mail,” or (d) “As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out going mail.” Lennox Dec. ¶4, Exs. I through XV.

C. Defendants Censor Mail Under Facially Unconstitutional Policies

In the past two years, the Columbia County Jail has adopted three different mail policies—all of them in violation of the First and Fourteenth Amendment. In April 2010, the Jail adopted a two-page mail policy that prohibited all letters, restricting all incoming and outgoing mail to postcards only. The Jail’s policy also prohibited delivery of magazines to prisoners and failed to afford any due process rights.

According to Defendants, eighteen months later (effective October 2011) they revised their policy. But that policy continued the Jail’s postcard-only policy, was ambiguous about whether magazines were allowed, and provided for due process to some parties, in some circumstances, and only to a limited degree. The County never made its revised policy publicly available.

Finally, on January 27, 2012, the Jail sent to PLN a second revised, now 16-page, mail policy. This latest policy continues the Jails’ well-established postcard-only policy, purports to allow delivery of some magazines, and provides some due process procedures although they are confusing, inadequate, and scattered among the lengthy policy so are difficult to piece together. This most recent policy is constitutionally infirm and continues to violate PLN’s First and Fourteenth Amendment rights.

1. Unconstitutional Ban on Mail that is Not a Postcard

Since April 1, 2010 the Jail's mail policy has explicitly prohibited mail except in the form of a postcard ("Postcard-Only Policy"). On December 23, 2009 the Columbia County Sheriff's Office's website announced the adoption of new mail policies under the heading: "CCSO Jail Revamping Inmate Mail Policy." Ex. 2 to Chamberlain Dec. In the announcement, Sheriff Dickerson declared:

In an effort to improve efficiency and reduce threats to safety and security by minimizing contraband, the Columbia County Jail is **moving to limit incoming and outgoing inmate mail to postcards only**. . . on March 31, the only envelope mail allowed to come into or go out of the jail will be official and legal mail.

Id. (emphasis added). The announcement further quoted the Sheriff's rationale for adopting the Postcard-Only Policy:

The processing of inmate mail is very time consuming and labor intensive . . . mail coming in sealed envelopes increases the likelihood that contraband will make its way through the security measures we set up. . . **Going to postcards will cut down on the time** we need to take in that screening process, thus **saving the taxpayer the costs** involved in that screening.

Id. (emphasis added). And, finally the announcement explained where to find the Postcard-Only Policy: "The Sheriff's Office will be posting the new guidelines in the Sheriff's Office lobby and on the agency website at: www.co.columbia.or.us/sheriff in the coming weeks." *Id.* An article in *The Daily News* entitled "Columbia County Jail to restrict inmate mail to postcards only" also announced the Jail's adoption of the policy and the Sheriff's justifications. Ex. 3.

As described below, although the County recently revised its mail policy, twice, its current policy continues to prohibit incoming and outgoing mail that is not a postcard.

Original Policy: The first line of the Jail's April 2010 policy stated that "Incoming Mail will be only accepted in the form of commercially-produced postcards or a photograph used as a postcard." Ex. 1. This policy ("Original Policy") was posted on the Sheriff's website at the time this lawsuit was filed (January 13, 2012). Chamberlain Dec. ¶1. The policy also restricted outgoing mail to postcards only, as stated on the sticker found on dozens of pieces of mail

1 returned to Plaintiff: “As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS
2 POSTCARDS, This applies to ALL incoming and out going mail.” *See, e.g.,* Ex. A.

3 **Revised Policy:** On January 19, 2012, the County provided PLN with a copy of a mail
4 policy dated “October 21, 2011” (“Revised Policy”) which the County contended was its current
5 policy.² Chamberlain Dec. ¶18; Ex. 16. This revised version also contained a Postcard-Only
6 Policy, instructing: “All correspondence to and from inmates of the Columbia County Jail will
7 be in the form of a post card unless it is privileged or official mail.” Ex. 16 at pg. 3.

8 **Second Revised Policy:** Eight days later, on January 27, 2012, Defendants provided PLN
9 with a copy of a second revised policy dated “January 26, 2012” (“Second Revised Policy”).³ In
10 this newest version maintains the Jail’s Postcard-Only Policy that Prison Legal News seeks to
11 enjoin. The second revised policy states as follows:

12 **Postcards for Personal or Personal Business Mail**

13 Inmates may send postcards they receive in their initial inmate hygiene kit or
14 through jail commissary. Inmates may receive postcards in any size that is
15 delivered by the U.S. Postal Service up to a maximum size of 5-1/2” tall x 8-1/2”
16 wide. The jail does not permit any other form of personal mail for inmates

17 . . .

18 **Contents of Envelopes and Parcels (Legal and Official Mail Only)**

19 An envelope may only contain written correspondence that meets the
20 definition of legal or official mail. A parcel may only contain up to three books
21 or three periodicals. Mail handlers will consider any other item in the envelope or
22 parcel as contraband and treat it as prohibited mail.

23 *See* Ex. 20 at pg. 4 ¶3, pg. 5 ¶6 (emphasis added). The policy explicitly restricts written
24 communication to postcards, except for legal and official mail⁴—neither of which is at issue in
25 this lawsuit.

26 ² Despite the County’s statement that it had revised its policy, as of January 19, 2012, the
27 Jail’s original April 1, 2010 policy was still posted on the Sheriff’s website. Chamberlain Dec.
¶19; Ex.17.

³ On January 24, 2012, the Sheriff’s Office removed its “Inmate Mail Policy” from its
website and replaced it with a statement that “the inmate mail policy is under review at this
time.” *See* Chamberlain Dec. ¶11, Ex. 11. To date, the Sheriff has not posted either of the
revised policies on his website.

Thus, although the language and form of the policy has changed, the Jail has retained its Postcard-Only Policy, which Prison Legal News challenges.

Pursuant to its Postcard-Only Policy, the Jail censored PLN's informational brochures and subscription order forms,⁵ book catalogs, journals, subscription renewal letters, and fundraising letters. *See* Section I.B., pgs. 3-6. The Jail also used its Postcard-Only Policy to censor mail from individuals sent to prisoners, including articles printed from PLN's website. *Id.* In addition, the Jail's postcard-only restriction on *outgoing* mail prohibits prisoners from sending letters to PLN, about prison conditions or other topics, and from sending PLN subscription forms and book order forms to order books and subscribe to *Prison Legal News*.

2. Unconstitutional Ban on Book Catalogs

At the outset of this litigation, Defendants' policy banned book catalogs, and their newest policy still does.

Original Policy: Defendants' original policy explicitly banned all incoming mail that was not a postcard, book, or newspaper. Ex. 1. On its face, the policy prohibited all other types of publications including catalogs, such as the book catalogs that PLN mailed to prisoners, which the Jail censored. *See, e.g.,* Exs. A through AA, NNN. When rejecting some of PLN's book catalogs, the Jail identified its Postcard-Only Policy as the justification. *See e.g.* Ex. A.

Revised Policy: Similarly, Defendants' revised policy explicitly banned all incoming mail that was not a postcard (unless it was "privileged" or "official" mail), a book, or a

⁴ "Legal mail" is defined as "mail addressed to or from a licensed attorney" that is clearly marked "legal mail." *Id.* at pg. 3 ("Privileged Mail" section). "Official mail" is defined as mail addressed to or from "the sheriff, jail command staff, county administrator, probation authorities, district attorney, state attorney general, Governor, court, a court official, and other confining authorities" that is clearly marked "official mail." *Id.*

⁵ In addition to prohibiting prisoners from receiving book catalogs or subscription order forms because the forms are not postcards, *see* Exs. MMM and NNN, Ex. 20 at pg. 4 ¶3, the Jail's policy also prohibits a prisoner from receiving a subscription order form that *is* a postcard, *see* Ex. 20 at pgs. 11-12 ¶32(c) ("Pod Processing of Incoming Mail . . . staff...will process the inmate mail for their pods as follows: . . . remove subscription-ordering postcards from magazines"). So, the Jail bans subscription order forms *in any form*.

1 periodical. Ex. 16 at pg. 3. So, like the original policy, on its face, the revised policy prohibited
 2 all other mail, including catalogs.

3 ***Second Revised Policy:*** In its newest policy, the word “catalogs” is mentioned only
 4 once, in the definition of “junk mail”:

5 **Junk mail.** Printed material, often sent as mass mailings, such as catalogs,
 6 advertisements, brochures, circulars, and pamphlets whose primary purpose is to
 7 sell, promote or solicit for, a product or service, and when taken as a whole, lacks
 serious literary, artistic, political, educational, religious, or scientific value. Junk
 mail may come using a variety of postage rates.

8 Ex. 20 at pg. 2 (emphasis added). According to the policy, “Jail staff will accept solicited or
 9 unsolicited junk mail or bulk mail for inmates, unless it violates other mail restrictions (such as
 10 containing sexually explicit content).” *Id.* at pg. 5 ¶10. So, according to this new policy, the Jail
 11 now permits delivery of junk mail, but only in the form of a postcard. And the Jail permits
 12 delivery of catalogs that qualify as “junk mail”—that is, catalogs that *lack* “serious literary,
 13 artistic, political, religious, or scientific value.” So, the plain language of Defendants’ newest
 14 policy continues to ban PLN’s book catalogs because they are not a postcard, and, bizarrely,
 15 because the catalog possesses serious literary, political, and educational value and therefore is
 16 *not* “junk mail.”

17 Defendants’ newest Postcard-Only Policy continues to violate the First Amendment,
 18 prohibiting all correspondence including book catalogs that are not on a postcard.

19 3. Unconstitutional Ban on Magazines

20 Since April 2010, the Sheriff’s mail policy posted on his website explicitly banned
 21 magazines, and Defendants censored numerous monthly issues of *Prison Legal News*. The
 22 Sheriff’s purported revised policy, which he never posted for the public to see, was ambiguous
 23 about whether it permitted or prohibited magazines. In response to this litigation the Sheriff
 24 adopted his newest version of a mail policy, which allows delivery of magazines but only if the
 25 magazine and its publisher possess certain arbitrary features.

1 **Original Policy:** The Jail's original policy explicitly prohibited all magazines. Under the
 2 heading "Publications," the policy declared: "We do not accept magazines." Ex. 1 at pg. 3.

3 **Revised Policy:** The revised policy stated that "periodicals may be procured from outside
 4 the jail," but the policy made no mention of magazines and did not define "periodicals." Ex. 16
 5 at pg. 5 ¶11.

6 **Second Revised Policy:** The second revised policy provides that: "An inmate may
 7 receive up to two periodicals on a single mail delivery day. . . Periodicals include magazines. . ."
 8 Ex. 20 at pg. 7 ¶20. However, this policy allows only those magazines that meet certain
 9 requirements and under certain circumstances "[a]n inmate must have someone outside the jail
 10 prepay for any publication he or she receives" and periodicals are restrictively defined as "[a]
 11 magazine, newspaper, or other publication formed of printed sheets that are *issued at least four*
 12 *times a year at regular, specified intervals* from a known office of publication. Periodicals
 13 usually *must have a legitimate list of subscribers and requesters. . .*" *Id.* at pg. 3 (emphasis
 14 added).

15 4. Unconstitutional Lack of Procedural Due Process

16 The Sheriff's mail policies fail to provide adequate due process to PLN, other
 17 correspondents, and prisoners.

18 **Original Policy:** Initially, Defendants' mail policy was entirely devoid of any provisions
 19 for due process. The policy did not require notifying anyone of censorship decisions or of any
 20 opportunity to challenge or appeal censorship decisions. *See* Ex. 1.

21 **Revised Policy:** Then, Defendants' revised mail policy required the Jail to provide the
 22 prisoner-addressees notice when the Jail censored incoming mail. But the policy failed to
 23 require any notice to the publisher or other sender of incoming mail, or to the prisoner or
 24 intended recipient of rejected *outgoing* mail. The policy stated as follows:

25 INCOMING MAIL . . .

26 If mail is rejected the inmate/addressee will receive written notification
 27 explaining:

- i. The correspondence has been rejected,
- ii. The reason it was rejected,
- iii. The process to informally appeal the rejection to the jail commander

A copy of the notification will be placed in the inmate's file.

Ex.16 at pg. 6, II.D.1.b.

Second Revised Policy: Numerous scattered references to due process in the second revised policy are very difficult to make sense of. The confusion itself is likely to cause Constitutional violations. To the extent that the policy can be understood, the following are identifiable deficiencies in due process requirements:

- The "prohibited publications, books or periodicals" provision states that the Jail "should" notify the sender and inmate when the Jail rejects a publication, book, or periodical, but does not make notice mandatory. Ex. 20 at pg. 8 ¶21.

- The "initial processing of incoming mail" provision states that the Jail must provide "notice of right to reconsideration" to the sender of rejected mail, but does not identify what the notice must contain. Nor does the policy provision identify what information must be contained in an appeal or any time limits to appeal. *Id.* at pgs. 10-11 ¶31b.

- The *incoming* mail policy does not require the Jail to notify the prisoner-addressee of his right to appeal when mail addressed to him is rejected. *See id.*

- The *incoming* mail policy does not require the Jail to provide notice of the reason for censorship to the prisoner or to the mail sender. *See id.* at pgs. 10-11 ¶31.

- The *incoming* mail policy states that Jail staff may scan rejected mail as "Returned Mail (Prohibited Mail Slip to follow)" but the policy does not explain what the "Prohibited Mail Slip" will contain or who will receive it. *See id.* at pgs. 11-12 ¶32(e)(6).

- The *outgoing* mail policy does not require the Jail to provide notice of the reason for censorship to the prisoner or to the intended recipient. *See id.* at pgs. 12-14 ¶¶34-38.

- The *outgoing* mail policy states that the Jail staff will scan the prisoner's name and "appropriate bar code to reflect the proper disposition of the mail" including "Mail Returned

(Prohibited Mail Slip to follow)” but the policy does not explain what the “Prohibited Mail Slip” will contain or who will receive it. *See id.* at pg. 14 ¶37(a)(2)(C).

- The “returning mail to sender” provision states that when the Jail returns “unopened mail (other than postcards), a mail handler will use the ‘return to sender’ stamp in place of the sticker.” This is the same procedure used by the Jail to return mail to PLN in the past, which failed to provide adequate due process notice of the reason for rejection and did not provide any notice of an opportunity to be heard. *Id.* at pg. 15 ¶44.

- If the Jail *confiscates* (rather than returns) a “prohibited item” the policy does not require the Jail to give the prisoner notice of his right to appeal. *Id.* at pg. 10 ¶30.

The newest policy fails to afford due process. Several provisions are plainly inadequate. Collectively, Defendants’ latest iteration of a due process procedure is a mess. It is impossible to make sense of how the scattered pieces of the sixteen-page policy (which was formerly a two-page policy) fit together, if at all. Under the Jail’s Original and Revised policies, Defendants failed to provide adequate due process notice of the reason for its censorship decisions and failed to provide any notice of an opportunity to be heard to PLN. *See* Section I.B. above at pgs. 3-6. And under Defendants’ newest policy, it is likely that Defendants will continue to provide inadequate due process when the Jail censors incoming and outgoing mail.

II. ARGUMENT

Following their mail policies, the Defendants censored a great deal of PLN’s mail, as well as the mail of prisoners and other correspondents, and did so without due process notice or an opportunity to challenge the censorship decisions. By adopting and applying these policies to censor correspondence between Prison Legal News and prisoners in the Columbia County Jail, and by doing so without due process, the Jail is irrationally interfering with protected expressive activities and chilling future speech.

Defendants’ purported revisions to their mail policies fail to render them constitutional. Since PLN will continue to communicate with prisoners confined in the Columbia County Jail,

Defendants' policies and practices will likely violate PLN's free speech rights in the future and do so without due process, causing irreparable harm. Wright Dec. ¶¶32-36. For the reasons explained below, Plaintiff respectfully moves the Court to enter a preliminary injunction that prohibits the Defendants from violating the Constitution during this litigation.

A. Preliminary Injunction Standard

When asked to grant a preliminary injunction where the public interest is at stake, a court must consider whether: (1) the plaintiff is likely to succeed on the merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *California Pharmacists Assoc. v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009); *see also* Fed. R. Civ. P. 65(a).

B. PLN is Likely to Succeed on the Merits

1. First Amendment

Plaintiff's right to correspond with prisoners through the mail is protected by the First Amendment. *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) ("*PLN I*"). In *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989), the Supreme Court recognized that publishers have a protected First Amendment interest in access to prisoners. *See also Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) ("*PLN I*").

Prison Legal News's correspondence with prisoners is "core protected speech" because it addresses issues of corrections policy and other social and political matters of public concern, which "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal citation omitted); *see also PLN I*, 238 F.3d at 1149. "[T]he conditions in this Nation's prisons are a matter that is both newsworthy and of the greatest public importance." *Pell v. Procunier*, 417 U.S. 817, 831, n.7 (1974). A "blanket prohibition against receipt of the publications by any prisoner carries a heavy presumption of unconstitutionality." *Pepperling v. Crist*, 678 F.2d 787, 791 (9th Cir. 1982).

To withstand First Amendment scrutiny, a prison policy restricting *incoming* mail must be “reasonably related to legitimate penological interests” under the four “Turner” factors:

(1) whether the regulation is rationally related to a legitimate and neutral governmental objective, (2) whether there are alternative avenues that remain open to the inmates to exercise the right, (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

PLN II, 397 F.3d at 699 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The first of these factors can be dispositive: “if a regulation is not rationally related to a legitimate and neutral governmental objective, a court need not reach the remaining three factors.” *Id.*; *see also*, *PLN I*, 238 F.3d at 1151.

Defendants are required under *Turner* to articulate how their policy furthers a legitimate penological interest; it may not be presumed:

The initial burden is on the State to put forth a “common-sense” connection between its policy and a legitimate penal interest. If the State does so, the plaintiff must present evidence that refutes the connection. *Id.* at 357. The State must then present enough counter-evidence to show that the connection is not so “remote as to render the policy arbitrary or irrational.” *Id.*

Clement v. Cal. Dept. of Corrections, 220 F. Supp.2d 1098, 1109 (N.D. Cal. 2002) (citing *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999)).

Although corrections officials often emphasize that courts afford deference to their experience, it is well-recognized that the *Turner* test “is not toothless.” *Thornburgh*, 490 U.S. at 414.

Prison authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then *demonstrate* both that those specific interests are *the actual bases* for their policies and that the policies are reasonably related to the furtherance of the identified interests. An *evidentiary showing* is required as to each point.

Walker v. Sumner, 917 F.2d 382, 386 (9th Cir. 1990) (emphasis added). The government may not pile “conjecture upon conjecture” to justify infringement of constitutional rights. *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988).

a. **Postcard-Only Policy Unconstitutionally Infringes Free Speech**

(1) **First Turner Factor: The Ban is Irrational**

Defendants' Postcard-Only Policy was arbitrarily conceived. The Sheriff explained publically that Defendants adopted the policy "In an effort to improve efficiency and reduce threats to safety and security by minimizing contraband," and "Going to postcards will cut down on the time we need to take in that screening process, thus saving the taxpayer the costs involved in that screening." Ex. 2 to Chamberlain Dec.

Here, the same outcome is reached. Arguments that the Postcard-Only Policy was implemented to save time and money, and increase security by preventing smuggling of contraband, do not justify the Jail's extremely broad censorship policy, banning all mail other than postcards.

(a) *The Ninth Circuit Has Previously Rejected Defendants' Justifications*

Applying *Turner*, the Ninth Circuit has repeatedly rejected these same rationales for prison policies that arbitrarily restrict a publisher's right to communicate by mail with prisoners. *See PLN II*, 397 F.3d 692, 699-701 (9th Cir. 2005) (striking down ban of non-subscription bulk mail and catalogs); *Ashker v. California Dept. of Corrections*, 350 F.3d 917, 924 (9th Cir. 2003) (striking down policy requiring approved vendor labels); *PLN I*, 238 F.3d 1145, 1149-51 (9th Cir. 2001) (striking down ban on bulk rate non-profit subscription mail); *Morrison v. Hall*, 261 F.3d 896, 904-05 (9th Cir. 2001) (striking down ban on for-profit bulk rate mail); *Crofton v. Roe*, 170 F.3d 957, 959-61 (9th Cir. 1999) (striking down ban on gift subscriptions).

In *PLN I*, the Oregon Department of Corrections asserted that banning all standard-rate mail enhanced prison security because mailroom staff could concentrate on "timely processing acceptable mail and thoroughly inspecting such mail for content and contraband." 238 F.3d at 1151. The Ninth Circuit rejected this rationale: "The reality is that all incoming mail must be sorted . . . distinguishing between non-profit organization standard mail and regular/ commercial standard mail is not unduly cumbersome[.]" *Id.* Similarly, in *PLN II*, when the Washington

1 Department of Corrections claimed that it banned non-subscription bulk mail to reduce mail
 2 volume and increase security, the Court rejected this rationale again: “While mailroom staff may
 3 have to spend more time analyzing the content of non-subscription bulk rate mail and catalogs,
 4 such a ban . . . is not rationally related to the goal of reducing contraband.” 397 F.3d at 700.
 5 Notably, the Defendants here censored PLN’s subscription brochures and book catalogs virtually
 6 identical to those censored by the Defendants in *PLN II*. So, here, the same outcome is reached.

7 In addition, the Jail’s policy continues to restrict *outgoing* mail to communication by
 8 postcard interfering with PLN’s right to receive letters from prisoners. This, too,
 9 unconstitutionally inhibits the publisher’s First Amendment rights:

10 Communication by letter is not accomplished by the act of writing words on
 11 paper. Rather, it is effected only when the letter is read by the addressee. Both
 12 parties to the correspondence have an interest in securing that result, and
 censorship of the communication between them necessarily impinges on the
 interest of each.

13 *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), overruled in part on other grounds by
 14 *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989) (“we acknowledge today that the logic
 15 of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations
 16 concerning outgoing correspondence.”).

17 The Jail has a far more limited interest in restricting outgoing mail than incoming
 18 mail. *Thornburgh*, 490 U.S. at 413 (“The implications of outgoing correspondence for
 19 prison security are of a categorically lesser magnitude than the implications of incoming
 20 materials.”) Accordingly, the government must meet a higher standard to justify
 21 censoring outgoing mail than the *Turner* test. Since 1974, the government has had to
 22 show “First, that the regulation or practice in question must further an important or
 23 substantial governmental interest unrelated to the suppression of expression.” *Martinez*,
 24 416 U.S. at 413. “Second, the limitation of First Amendment freedoms must be *no*
 25 *greater than is necessary* or essential to the protection of the particular governmental
 26 interest involved. Thus a restriction on inmate correspondence that furthers an important

1 or substantial interest of penal administration will nevertheless be invalid if its sweep is
 2 *unnecessarily broad.*” *Id.* at 413-14 (emphasis added). “*Martinez* required a close fit
 3 between the challenged regulation and the interest it purported to serve.” *Thornburgh*,
 4 490 U.S. at 411.

5 The Defendants’ asserted security rationale for adopting their Postcard-Only
 6 Policy, to reduce contraband entering the Jail, simply does not apply to mail *leaving* the
 7 facility. And, the Defendants’ remaining rationale—the policy reduces time screening
 8 mail—fails under the *Turner* test for the reasons explained herein, so must accordingly
 9 fail under the more demanding *Martinez* test.

10 In sum, the Ninth Circuit has already rejected the efficiency and security
 11 justifications offered by Defendants here, and under the standards set forth by the United
 12 States Supreme Court Plaintiff is likely to show that Defendants’ mail policies are
 13 unconstitutional.

14 (b) *The Policy is Not Rationally Related to Saving Time and*
 15 *Money*

16 Inspecting and delivering mail other than a postcard is not significantly more burdensome
 17 than censoring the mail, even according to the Defendants’ long-standing inadequate procedures:
 18 (i) stamping the mail “Return to Sender”; (ii) placing a “postcard policy” sticker on the mail; and
 19 (iii) returning the censored mail. And, if Defendants provided constitutionally-required due
 20 process notice and opportunity to be heard when they censored mail, they would also have to:
 21 (iv) fill out a mail rejection notice; (v) deliver the mail rejection notice to the prisoner; (vi) send
 22 the mail rejection notice to the sender or intended recipient; and (vii) respond to prisoners and
 23 their correspondents who exercise their rights to appeal the Jail’s censorship decisions. Thus,
 24 any argument that the policy saves time and money is meritless. Moreover, as explained below,
 25 since correspondents must send multiple postcards to communicate what they could fit in a letter
 26 the Jail must process all of the postcards instead of the contents of one envelope. This further
 27 undoes any rational connection between the Jail’s stated interests and its mail policy.

(c) *The Policy is Overbroad and Not Rationally Related to Enhancing Security*

The Postcard-Only Policy is a substantially overbroad means of enhancing security. The mail policy already bans any mail that: contains “controlled substances;” “would endanger the safety or security of the facility or person;” or contains “threats of physical harm. . . plans to escape, criminal activity . . gang-related material . . .” Ex. 20 at pg. 2 (“Contraband”) and at pgs. 16-17 (“Prohibited Mail”). Until April 2010, the Jail screened for security threats in other ways, which it cannot show to be ineffective. And, the policy captures *all* correspondence, including those least likely to contain hazardous substances—like letters, book catalogs, and informational brochures from publishers.

Importantly, even if it could show that its Postcard-Only Policy leads to some savings of time or money, the Jail nevertheless cannot place constitutionally-protected speech on the chopping block to cut costs. In other contexts where the constitutionality of prison regulations has been challenged, the Ninth Circuit has held that “efficiency and cost effectiveness” are not “valid *security* concerns.” *Jeldness v. Pearce*, 30 F.3d 1220, 1230 (9th Cir. 1994) (emphasis in original) (holding prison’s “cost and management concerns . . . must be applied consistently with the requirements of Title IX.”). Free speech is not a commodity like paper towels that the Jail can reduce to save money so as to have more time for security.

Defendants have no legitimate justification for singling out all regular correspondence to censor, except postcards. The Defendants’ distinction between forms of written communication is arbitrary—and harmful. Letters, book catalogs, and written communications other than postcards often contain core political and social speech or invite the reader to request such speech, as PLN’s subscription brochures and book offers do. Letters facilitate the exchange of views on poor jail conditions and how to alleviate them, on legal rights, on how to address private medical, psychological, and educational needs, and many other important topics. For centuries, letters have facilitated the exchange of ideas, in detail.

1 In stark contrast, postcards provide so little space that meaningful exchange of ideas is all
 2 but foreclosed. While Defendants might allow correspondents to mail multiple postcards, that
 3 results in virtually no corresponding benefit to Defendants, who must review each postcard. For
 4 example, in place of a correspondent's three-page double-sided 8.5" x 11" paper letter in a
 5 single envelope the Jail would have to review and process at least twelve single-sided postcards
 6 written by the sender conveying the same speech. So, there is no appreciable decrease in mail
 7 volume except at the arbitrary expense of protected speech.

8 (d) *The Policy Deters Speech*

9 Importantly, the only reasonable explanation for Sheriff Dickerson's statement that
 10 "Going to postcards will cut down on the time we need to take in that screening process, thus
 11 saving the taxpayer the costs involved in that screening," Ex. 2 (emphasis added), is that the
 12 policy deters, chills, and suppresses speech. See Wright Dec. ¶17-19; see also *Ashker v.*
 13 *California Dept. of Corrections*, 350 F.3d 917, 921 (9th Cir. 2003) (noting that the prison's
 14 approved-vender label policy caused a publisher to stop sending books to correctional facilities).
 15 If Defendants have any evidence that mail volume has decreased since adopting their Postcard-
 16 Only Policy it is simply the result of erecting unreasonable obstacles to communication. Since
 17 the policy requires publishers and others who wish to communicate with prisoners, to conform
 18 their written communications to an unusually restrictive and burdensome form, it would not be
 19 surprising that prisoners and their correspondents have been deterred from communicating
 20 entirely.

21 In fact, limiting speech to a postcard causes significant inconvenience and increased costs
 22 sufficient to substantially reduce the speech of many prisoners, family members, friends, and
 23 professionals such as doctors, and is sufficient to deter publishers, booksellers, companies, and
 24 others from communicating at all. Correspondents must find a store that sells postcards, buy
 25 multiple postcards and the postage to mail each of them, and fit their communications within the
 26 small confines of the card, allowing room for their own name and address, the addressee's name
 27

1 and address, postage, the postmark, and the Jail's "received" stamp. It is completely impractical
 2 for most publishers, booksellers, and others to spend the resources to create special postcards just
 3 to communicate their messages to the prisoners at this Jail. *See* Wright Dec. ¶34. In short, if
 4 mail volume has decreased it is because Defendants have stamped out protected speech.

5 (e) *The Policy Impedes Rehabilitation*

6 Under the guise of accomplishing objectives that are irrationally and arbitrarily connected
 7 to Defendants' policy, the Postcard-Only Policy hampers the penological objective of
 8 rehabilitation. The Supreme Court has recognized that "the weight of professional opinion
 9 seems to be that inmate freedom to correspond with outsiders advances rather than retards the
 10 goal of rehabilitation[.]" *Procunier v. Martinez*, 416 U.S. 396, 412-413 (1974), overruled in part
 11 on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989). Indeed:

12 Constructive, wholesome contact with the community is a valuable therapeutic
 13 tool in the overall correctional process. . . . Correspondence with members of an
 14 inmate's family, close friends, associates and organizations is beneficial to the
 15 morale of all confined persons and may form the basis for good adjustment in the
 16 institution and the community.

17 *Martinez*, 416 U.S. at 413 n. 13 (quoting Policy Statement 7300.1A of the Federal Bureau of
 18 Prisons and Policy Guidelines for the Association of State Correctional Administrators); *see also*
 19 *Morrison v. Hall*, 261 F.3d 896, 904 n. 7 (9th Cir. 2001).

20 Education during incarceration is widely recognized as "a path to increased employment,
 21 reduced recidivism, and improved quality of life." The Urban Institute Justice Policy
 22 Center, *From the Classroom to the Community: Exploring the Role of Education during*
 23 *Incarceration and Reentry* (2009), at 2 (Ex. 13 at pg. 9). The Bureau of Prisons states:

24 Research demonstrates that education can change thinking, encourage pro-social
 25 behavior, increase employment, and reduce recidivism. Education's power to
 26 transform lives in both tangible and intangible ways makes it one of the most
 27 valuable and effective tools we may have for helping people rebuild their lives
 after incarceration, as well as for combating and reducing criminal justice costs.

Id. at 42 (Ex. 13 at pg. 49); *see also*, Ex. 12. Defendants' censorship impedes prisoners' ability
 to educate themselves during incarceration and thus retards the penological goal of
 rehabilitation.

1 In sum, for both incoming and outgoing mail, Defendants' Postcard-Only Policy is a
 2 grossly overbroad, ineffective, and arbitrary means of achieving their goals, with the primary
 3 effect of suppressing protected speech. As in *PLN I* and *PLN II*, Plaintiff has shown that
 4 Defendant's Postcard-Only Policy is not rationally related to a legitimate penological objective.

5 **(2) Second Turner Factor: Plaintiff Has No Reasonable**
 6 **Alternative Way to Express Its Speech**

7 The second *Turner* factor is whether the government affords Plaintiff an alternative
 8 means to exercise its constitutional rights. The government does not. PLN has no practical way
 9 to reach its intended audience. PLN cannot communicate its speech *by mail* because its letters
 10 and brochures to thousands of persons across the country are not written on postcards, and its
 11 catalog describing 43 different books for sale does not fit onto a postcard. Wright Dec. ¶34.
 12 PLN cannot effectively communicate its written speech by telephone or fly from Vermont to
 13 Oregon to meet with prisoners. *Id.* at ¶33. Like most publishers, PLN cannot tailor its
 14 correspondence to the irrational requirements of a particular jail. *Id.* at ¶¶33-34.

15 Courts have rejected mail policies requiring speech to be communicated in a particular
 16 medium. In *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001), the Ninth Circuit rejected the
 17 Oregon DOC's argument that it could ban bulk-rate mail because prisoners may listen to radio or
 18 watch television instead: "Although radio and television are alternative media by which inmates
 19 may receive information about the 'outside' world, they should not be considered a substitute for
 20 reading newspapers and magazines." *Id.* at 904. Twenty-five years ago, the Fifth Circuit
 21 rejected the same argument in *Mann v. Smith*, 796 F.2d 79, 83 (5th Cir. 1986):

22 [T]he contents of television are different from what one finds in the printed
 23 media. It is not up to the Midland County Sheriff or this court to decide that
 24 television can adequately serve the first amendment right to receive protected
 25 materials.

26 Costly alternatives have likewise been held inadequate. In *PLN I*, 238 F.3d at 1149, and
 27 *Morrison*, 261 F.3d at 904, the Ninth Circuit denied the governments' claims that banning bulk
 rate mail to prisons was permissible because publishers could send mail via first or second class,

1 holding that forcing a publisher to “take additional costly steps” to communicate with prisoners
 2 is unconstitutional. The same is true here.

3 **(3) Third Turner Factor: The Effect on Defendants’ Resources is Minimal**

4 The third Turner factor is the effect on prison staffing and resource allocation. *Turner*,
 5 482 U.S. at 90. As noted above, Jail staff must process all mail whether delivering or censoring
 6 it, and the Jail processed the mail through other methods before adopting its Postcard-Only
 7 Policy.

8 “[T]he policies followed at other well-run institutions [are] relevant to a determination of
 9 the need for a particular type of restriction.” *Morrison*, 261 F.3d at 905 (quoting *Martinez*, 416
 10 U.S. at 414 n.14). PLN has communicated its letters, catalogs, and brochures via mail to
 11 thousands of prisoners country-wide since its founding in 1990. Wright Dec. ¶6. PLN sends
 12 correspondence to about 2,200 correctional facilities, including the Federal Bureau of Prisons,
 13 housing 209,770 prisoners, Ex. 9; the Oregon Department of Corrections housing 13,937
 14 prisoners, Ex. 22; and the Washington Department of Corrections housing over 16,000, Ex. 7;
 15 Wright Dec. ¶7

16 Neither the Bureau of Prisons, the Washington DOC, nor the Oregon DOC restrict
 17 incoming mail to postcards, or ban catalogs. *See* Exs. 6, 8, 21. Indeed, neither Multnomah
 18 County Jail nor Lane County Jail restrict prisoner mail to postcards or ban catalogs. *See* Exs. 4,
 19 5. PLN is not aware of any state or federal prison that limits prisoner correspondence to
 20 postcards. Wright Dec. ¶37. This is strong evidence that the third *Turner* factor favors PLN.

21 **(4) Fourth Turner Factor: Defendants’ Policy Is An Exaggerated Response**

22 The fourth *Turner* factor is whether prison authorities have “readily available”
 23 alternatives. “[T]he existence of obvious, easy alternatives may be evidence that the regulation is
 24 not reasonable, but is an ‘exaggerated response’ to prison concerns.” *Turner*, 482 U.S. at 90.
 25
 26
 27

1 Regardless of Defendants' claimed justifications, the fact that more than 2,000
 2 correctional facilities nationwide accept PLN's materials suggests that the Jail's ban is an
 3 exaggerated response. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1055 (9th Cir. 2011) (holding that
 4 widespread distribution of publisher's materials suggests jail bans may be exaggerated response).
 5 Indeed, until April 2010, Defendants accepted envelopes too.

6 The Sheriff's revised and second revised policies both maintain his Postcards-Only
 7 Policy. Accordingly, a preliminary injunction is necessary to protect PLN from Defendants
 8 censoring its protected speech during the pendency of this lawsuit.

9 **b. Banning Catalogs Is Irrational**

10 The government's ban on all mail that is not a postcard is effectively a blanket ban on
 11 catalogs. That is unconstitutional. In *PLN II*, the Ninth Circuit held a ban on catalogs—
 12 including those virtually identical to the PLN catalogs censored here—violates the First
 13 Amendment, and the Court permanently enjoined the Washington DOC policy. 397 F.3d 692,
 14 696 (9th Cir. 2005).

15 Book catalogs can spark interest in science, literature, music, art, and human rights. And,
 16 as here, a book catalog can offer books that a confined prisoner who is separated from the
 17 outside world needs in order to manage his or her core legal, medical, or personal matters.
 18 PLN's book catalog describes 43 books, dictionaries, and resource materials on the rights of
 19 prisoners regarding health and safety, self-representation in court, finding a lawyer, job searches,
 20 successful reentry upon release from prison, and the mental health crisis in prisons. *See Wright*
 21 Dec. ¶27; Ex. NNN. Since the Ninth Circuit has already held under the first *Turner* factor that
 22 censoring catalogs is irrational, an exaggerated response, and unconstitutional, no analysis under
 23 the other factors is warranted.

24 The Sheriff's revised policies do not provide for the delivery of PLN's catalogs, because
 25 PLN's catalogs are not a postcard. Furthermore, the Sheriff's policies arbitrarily and oddly
 26 prohibit PLN's catalogs even in the form of a postcard. This is because the policies allow only
 27

1 catalogs that are “junk mail” and PLN’s catalogs possess serious literary, political, and
 2 educational value and therefore are *not* junk mail, the only type of catalog that the policies allow.

3 **c. Banning Material Generated from the Internet is Irrational**

4 Similar to the effect of the Sheriff’s policy on catalogs, the government’s ban on all mail
 5 that is not a postcard effectively bans virtually all internet-generated material because such
 6 material cannot meaningfully be placed on postcard. That is unconstitutional. The problem is
 7 illustrated by the Defendants’ December 2011 censorship of a seven-page published news article
 8 printed from the Prison Legal News website entitled “The Failed Promise of Prison
 9 Privatization” that an individual, Lucy Lennox, sent to sixteen prisoners in the Jail. Lennox Dec.
 10 ¶¶3-4; Exs. I through XV.

11 This lengthy news article of particular interest to prisoners cannot be squeezed onto a
 12 postcard or otherwise practically presented on a whole series of postcards mailed separately to
 13 prisoners. For a seven-page article, approximately 28 postcards would be needed. That process
 14 would be cumbersome, requiring the correspondent to find a way to divide and reformat the
 15 article into many pieces and write the sender’s and intended recipient’s name and contact
 16 information on each postcard. And, it would be expensive, requiring the sender to buy nearly 30
 17 postcards and pay the postage for mailing each. And, unsurprisingly, it would be very difficult
 18 for the prisoner to piece together the article and a much greater burden on Jail staff to process
 19 nearly 30 postcards rather than seven pieces of paper in a single envelope.

20 Since the obstacles to mailing and receiving internet materials in postcard form are so
 21 substantial, the practical effect of the Sheriff’s policy is to chill virtually all communication of
 22 internet-generated materials to prisoners.

23 As with catalogs, the Ninth Circuit has already rejected as unconstitutional a ban on mail
 24 generated from the internet. In *Clement v. Cal. Dept. of Corrections*, 220 F. Supp.2d 1098, 1110
 25 (N.D. Cal. 2002), the District Court considered California’s ban on internet-generated mail:
 26
 27

Defendants contend that Internet-generated information provides a particular danger to prison security because the potential high volume of e-mail, the relative anonymity of the sender, and the ability of senders easily to attach lengthy articles and other publications would greatly increase the risk that prohibited criminal communications would enter the prison undetected and would make tracing their source more difficult.

Rejecting all of the Defendants' arguments, the District Court held that "Whatever impact increased mail volume may have on prison resources cannot justify Pelican Bay's ban on materials generated from this particular source." *Id.* at 1112. Accordingly, the Court permanently enjoined the Defendants' ban on Internet-generated information." *Id.* at 1116. The Ninth Circuit affirmed the District Court's ruling in every respect, including the permanent statewide injunction. *Clement v. Cal. Dept. of Corrections*, 364 F.3d 1148, 1152 (2004) ("we affirm its holding that the Pelican Bay internet-generated mail policy violates Clement's First Amendment rights.").

Since Sheriff Dickerson's ban on all mail that is not a postcard is just another way of preventing delivery of virtually all mail generated from the internet, it runs afoul of binding Ninth Circuit precedent finding such a policy unconstitutional.

d. Banning Magazines is Irrational

A preliminary injunction is still needed to protect PLN's right to deliver its monthly journal to prisoners.

Defendants' explicit ban on magazines for 18 months violated the First Amendment. Ex. 1 at pg. 2 ("We do not accept magazines."). Based on this policy, Defendants censored numerous issues of the *Prison Legal News* journal, month after month. *See* Ex. 16. Defendants claim that effective October 2011 they adopted a Revised Policy, which is ambiguous about whether magazines are permitted. Although the Sheriff promised in his Revised Policy that the policy shall "be available to the public through the Sheriff's office website, Ex. 16 at pg. 3, he never posted the policy. Indeed he continued to publicize to the outside world on his website that the "no magazines" policy was still in effect. That is, until after PLN filed this lawsuit and

1 notified the Jail that PLN intended to file this motion for a preliminary injunction. Chamberlain
 2 Dec. ¶¶19, 11; Exs. 17, 11.

3 And Defendants' last minute policy modification, Ex. 20, is insufficient to assure that the
 4 Jail will not censor PLN's monthly journals, as Jail staff has done for many months. The Sheriff
 5 has recently modified his mail policies twice, showing how easily he might make changes again
 6 that interfere with delivery of PLN's journals. And notably, unlike his Original Policy, he did
 7 not issue a public notice on his website announcing either of his purported Revised Policies nor
 8 did he ever post the revisions on his website. It remains to be seen why Defendants never
 9 disclosed their revised policy to the public. But regardless of the reason, by withholding their
 10 actual policy from the public and by failing to afford correspondents due process notice
 11 Defendants have undermined any notion that the Court should just trust them to adopt and
 12 implement a Constitutional policy.

13 Defendants have not conducted their censorship policies and practices in a transparent
 14 fashion so cannot be relied upon to act transparently in the future. If Defendants intend to permit
 15 delivery of PLN's journals then they should have agreed to a stipulated preliminary injunction,
 16 which simply holds them accountable to comply with the policy that Defendants claim to have
 17 adopted in response to PLN's stated intention to file this Motion.

18 2. Fourteenth Amendment

19 The Supreme Court long ago recognized that a publisher's right to communicate with
 20 prisoners is rooted not only in the First Amendment, but also in the Fourteenth Amendment. *Pell*
 21 *v. Procunier*, 417 U.S. 817, 832 (1974). Thus,

22 [T]he decision to censor or withhold delivery of a particular letter must be
 23 accompanied by minimum procedural safeguards. The interest of prisoners and
 24 their correspondents in uncensored communication by letter, grounded as it is in
 the First Amendment, is plainly a "liberty" interest within the meaning of the
 Fourteenth Amendment even though qualified of necessity by the circumstance of
 imprisonment. As such, it is protected from arbitrary governmental invasion . . .

25 *Martinez*, 416 U.S. at 417-18. Repeatedly, the Ninth Circuit has reaffirmed the core principle the
 26 Constitution requires prison officials to afford that notice and an opportunity to appeal their

1 censorship decisions. *See, e.g., PLN I*, 238 F.3d at 1152-53; *PLN II*, 397 F.3d at 701; *Krug v.*
 2 *Lutz*, 329 F.3d 692, 697-98 (9th Cir. 2003).

3 Publishers have a right to procedural due process because:

4 Without notifying the free citizen of the impending rejection, he would not be
 5 able to challenge the decision which may infringe his right to free speech . . .
 6 [and] since the inmate-recipient would not have seen the contents of the withheld
 7 letter, he may require the aid of the author to meaningfully challenge the rejection
 8 decision.

9 *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986); *see also, Montcalm Pub. Corp. v.*
 10 *Beck*, 80 F.3d 105, 109 (4th Cir. 1996); *Miniken v. Walter*, 978 F.Supp. 1356, 1363-64 (E.D. Wa.
 11 1997); *Cofone v. Manson*, 409 F.Supp. 1033, 1042 (D. Conn. 1976). Similarly, the prisoner has
 12 a right to due process, *see Procunier v. Martinez*, 416 U.S. 396, 418-19 (1974), which PLN has a
 13 legally-protected interest in securing. If the Jail censors a prisoner's request to subscribe to PLN
 14 or a letter to PLN complaining of censorship of PLN materials the prisoner is in the best position
 15 to evaluate whether his letter was legitimately censored or whether any claimed deficiency can
 16 be cured. And, the prisoner can challenge the decision and try to notify PLN. And, protecting
 17 prisoner rights is part of PLN's organizational mission. Wright Dec. ¶3.

18 Although constitutionally mandated to afford due process to publishers when censoring
 19 prisoner mail, Defendants plainly failed to do so. Defendants gave grossly inadequate notice
 20 when censoring PLN's publications, catalogs, books, and correspondence. For several mailings,
 21 the Jail merely returned the material stamped un-informatively, "RETURN TO SENDER" or
 22 "REFUSE/VIOLATES SECURITY," without identifying any way in which the material violated
 23 security or even what policy applies. These notations did not notify PLN what was
 24 objectionable, how to cure any defect, or how to challenge the rejection. For the censored mail
 25 that the Jail did not return to PLN, the Jail provided *no* notice of censorship at all.

26 And, for envelopes containing identical contents, the Jail at times gave four different
 27 reasons for censorship. This does not comport with the requirements of due process. It suggests
 that the policies are not applied uniformly or that some or all of the asserted reasons are not

1 legitimate, or that they are pretextual. Also, if all four reasons actually justified censorship then
2 the sender and recipient had a due process right to know each of those reasons so that the
3 correspondents could cure each alleged deficiency so the mail would be timely delivered or so
4 the correspondents could challenge each reason on a single appeal. Otherwise, the Jail would
5 censor the same contents again and again, revealing each justification only serially, and requiring
6 correspondents to repeatedly attempt to cure deficiencies or overturn the censorship decisions on
7 repeated appeals. This is fundamentally unfair and unreasonably burdensome for all concerned.

8 Even on mailings where the Jail's cursory notification was that the Jail "ONLY
9 ACCEPTS POSTCARDS" the government failed to notify PLN of any opportunity to challenge
10 the censorship decisions—a core requirement of due process. Indeed, Defendants failed to
11 provide Plaintiff with *any* opportunity to be heard to challenge the censorship decisions.
12 Defendants' rejections provide *no* information about how to challenge censorship decisions, who
13 to contact, what the appeal must contain, or any deadlines.

14 Defendants' Original Policy (April 2010) provided no appeal rights or procedures to
15 anyone. Defendants' Revised Policy (October 2011) required the Jail to provide the prisoner-
16 addressees notice when the Jail censored incoming mail. But the policy failed to require any
17 notice to the publisher or other sender of incoming mail, or to the prisoner or intended recipient
18 of rejected *outgoing* mail. *See* Ex.16 at pg. 6, II.D.1.b.

19 Defendants' Second Revised Policy (January 2012) provides inadequate due process and
20 is hopelessly confusing. There is no cohesive description of a due process policy; instead, the
21 policy is comprised of numerous scattered references to some due process measures, under some
22 circumstances, and only to some correspondents. *See* Section I.C.4. above.

23 Assuming that the Sheriff makes his newest mail policy publicly available, which he has
24 not yet done, the public will be unable to ascertain what the due process procedures are.
25 Likewise, when implementing and enforcing this policy, the Jail's mail staff will be left to use
26 unfettered discretion to apply the confusing and inconsistent policy according to their own

1 interpretations. Such a policy is prone to abuse and arbitrary and random application, resulting
 2 in violations of the Constitution. All told, because the policy cannot be fully understood and
 3 because the provisions that can be understood are constitutionally inadequate, a preliminary
 4 injunction is required.

5 C. PLN Continues to Suffer Irreparable Harm

6 “[A]n alleged constitutional infringement will often alone constitute irreparable harm.”
 7 *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (internal citation
 8 omitted). Indeed, the Fourth Circuit has held that a court “has no discretion to deny relief by
 9 preliminary injunction to a person who clearly establishes by undisputed evidence that he is
 10 being denied a constitutional right.” *Henry v. Greenville Airport Com’n*, 284 F.2d 631, 633 (4th
 11 Cir. 1960).

12 Here, Defendants continue to inflict irreparable harm on Prison Legal News by enforcing
 13 their blanket policies to censor PLN correspondence and book catalogs mailed to prisoners, as
 14 well as outgoing mail from prisoners. Wright Dec. ¶¶32-36. And, to the extent that the Sheriff’s
 15 Second Revised Policy purports to permit delivery of magazines the Defendants cannot be
 16 trusted to transparently adopt and apply this purported policy. This is true especially in light of
 17 their failure to publicly disclose their revised and newer policies and their routine denial of due
 18 process—which prevents PLN and others from monitoring Defendants’ compliance with the
 19 Jail’s policies and the Constitution. If Defendants intend to allow delivery of magazines then
 20 they should have been willing to stipulate to an injunction that they must do so, since it is
 21 indisputable that they have been refusing to deliver PLN’s journals.

22 “The loss of First Amendment freedoms, for even minimal periods of time,
 23 unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And,
 24 Defendants are likely to continue giving inadequate notice for censoring PLN’s future
 25 communications and to continue denying PLN the opportunity to be heard to challenge the
 26 censorship.

1 D. The Balance of Hardships Tips In Favor of Plaintiff

2 Here, the irreparable harm suffered by Prison Legal News is concrete, severe, and
 3 ongoing. Without due process, the government will continue to censor the publisher's mail to
 4 prisoners by banning its subscription forms, book catalogs, book offers, and other mailings
 5 containing core protected speech about publications that criticize government policies, educate
 6 on the rights of prisoners, and that offer insights on the criminal justice system and jail
 7 conditions. In contrast, any potential injuries to the Defendants are minimal and speculative. No
 8 great cost or expenditure of time is required to lift the policies to allow PLN to communicate
 9 with prisoners. The balance of hardships strongly favors Plaintiff.

10 E. The Public Interest Favors Free Flow of Information

11 The First Amendment furthers a compelling public interest. "[P]rior restraints on speech
 12 and publication are the most serious and the least tolerable infringement on First Amendment
 13 rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). The public has an important
 14 interest in protecting the "marketplace of ideas" wherever it may be found, and in the continued
 15 vitality of the Bill of Rights. At the heart of the First Amendment is the right of the press to
 16 disseminate and exchange information on issues of public concern, especially where critical of
 17 the government. The public interest weighs strongly in favor of enjoining Defendants from
 18 enforcing their unconstitutional mail policies and requiring adequate due process.

19 **III. CONCLUSION**

20 Plaintiffs have shown a likelihood of success on the merits and irreparable harm, whereas
 21 Defendants will suffer no meaningful harm from entry of a preliminary injunction. Accordingly,
 22 Plaintiff asks that the Court to order a preliminary injunction, and waive any bond.

23 DATED this 31st day of January, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2012, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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