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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

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

Defendants.

No. 3:12-CV-71-SI

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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In response to PLN's lawsuit, the Columbia County Jail adopted a new mail policy for the eighth time in just the three years since Sheriff Dickerson was elected. Although he has maintained his Postcard-Only Policy for incoming and outgoing mail challenged by PLN, the Sheriff claims that his new policy allows delivery of PLN's incoming mail so PLN lacks standing to challenge the Postcard-Only Policy and that by changing his policies he has mooted all of PLN's claims for injunctive relief.

But the Sheriff's claimed improvements have not rendered his policies constitutional or deprived PLN of standing, nor has he met his heavy burden of establishing mootness. Contrary to his assertions, PLN has standing in its own right to challenge the Jail's Postcard-Only Policy since the policy still prohibits incoming letters from businesses like PLN and outgoing mail from prisoners who want to write letters to or subscribe to PLN. Finally, even if the Sheriff now allows delivery of letters from businesses to prisoners, as he claims, PLN may continue its First Amendment facial overbreadth challenge to the Jail's "friends and family" plan restricting incoming "personal" mail to postcards, because PLN has organizational and third-party standing.

I. The Sheriff's Recent Mail Policy Changes Do Not Render PLN's Request for Injunctive Relief Moot

The Sheriff's recent changes do not moot PLN's claims or the need for a preliminary injunction because the policy is still unconstitutional and he failed to meet the heavy burden of proving he has "irrevocably eradicated" the need for judicial protection sought by PLN.

A. The Sheriff's Revised Policy Still Violates the Constitution

The Sheriff continues to maintain his Postcard-Only Policy, which he admits still prohibits incoming personal and business mail in envelopes and all outgoing mail. And, his newly-adopted policy on due process is incomplete and confusing.

1. The Sheriff Still Bans All Outgoing Mail that Is Not a Postcard

The Sheriff's current mail policy bans outgoing mail that is not a postcard. Dkt. 32-6 at 3 ("Inmates may send postcards they receive in their initial inmate hygiene kit or through jail commissary. . . The jail does not permit any other form of personal mail for inmates."). A copy

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of the only postcard made available to prisoners is attached as the last page of the Inmate Manual. *See* Ex. A to B. Berg Dec., at 27. According to the Inmate Manual, "You may not … 1. Draw or write anything on a postcard in the address area or on the picture of the postcard other than name and address information." *Id.* at 11. So, a prisoner may write content only on the back of the postcard, not on the photograph of Oregon's first Sheriff emblazoned on the front—which takes up one-third of the writing space on a postcard. The Sheriff's policy continues to restrict prisoner's First Amendment rights to communicate with their spouses, children, parents, friends, pastors, doctors, and organizations and businesses with whom they wish to correspond.

The Sheriff contends that prisoners are free to send postcards to PLN. Dkt. 29 at 8. And, with regard to subscription and book order forms, "these are permitted as long as they originate and are paid for outside the jail" or a prisoner may request approval of a supervisor to send a business reply envelope. *Id.* at 8-9. In other words, prisoners may *not* return subscription and book order forms to PLN; someone outside the Jail must do that for them or the prisoner must seek special permission from a supervisor who may reject the request. And the Sheriff's current policy prohibits a prisoner from sending letters to PLN. As a result, PLN plainly has a legally protected interest in challenging the Postcard-Only Policy because it interferes with PLN's First Amendment right to receive mail from prisoners.

2. The Sheriff Still Bans Incoming Personal and Business Mail That is Not a Postcard

The Sheriff's current policy prohibits inmates from receiving personal or business correspondence unless it is a postcard:

> **Postcards for Personal or Personal Business Mail**
> . . . Inmates may receive postcards…. The jail does not permit any other form of personal mail for inmates.
>
> **Initial Processing of Incoming Mail**
> …Return mail to sender (unopened if possible) or the USPS if any of the following apply: (1) Incoming personal mail that is not a postcard, except privileged (legal or official) mail. . .

Dkt. 32-6 at 3, 9.

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The Sheriff contends that his Postcard-Only Policy now permits delivery of PLN book catalogs as "junk" or "bulk" mail not on a postcard, Dkt. 29 at 9, so no preliminary injunction is needed. PLN does not agree. Bizarrely, the Sheriff's policy defines catalogs as "junk mail" only if they meet the third prong of the *Miller v. California*, 413 U.S. 15, 39 (1973), obscenity test: "when taken as a whole, lacks serious literary, artistic, political, educational, religious, or scientific value." Dkt. 32-6, at 1. Under his definition, PLN's book catalogs are not junk mail. And, the Sheriff's alleged "junk mail" exception is not new; he has accepted such mail since at least July 2010. *See* Ex. 10 to Wright (Second) Dec., at 5; Ex. A to Berg Dec., at 12. Moreover, his actions are contrary to his words. Despite claiming that PLN's catalogs are deliverable as "junk mail" the Sheriff has repeatedly censored them. *See e.g.* Dkt. 8-1 Exs. A through H.

And the Sheriff's contention that PLN's catalogs are allowed as "bulk mail" is no better. His policy does not define "bulk mail," but the Postal Service used the term to refer to mail sent at a postage rate lower than first class. *Prison Legal News v. Lehman*, 397 F.3d 692, 697 (9th Cir. 2005). So, the Sheriff's policy allows delivery of catalogs when mailed at bulk mail rates, but not when mailed first class. As recognized by the Ninth Circuit repeatedly, distinctions based on postal rate are an irrational basis for prison censorship. *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001); *PLN v. Lehman*, 397 F.3d at 700. And PLN mails its book catalogs via first-class mail, so the catalogs do not qualify as bulk mail anyway. Dkts. 8 and 11.

After censoring letters that PLN mailed, the Sheriff baldly claims that his "current policy allows plaintiff's fundraising letters to be distributed to inmates," Dkt. 29, at 23, without pointing to any provision in their policy that affords delivery of such letters. On its face, the policy permits only letters that constitute legal or official mail.

Moreover, the Sheriff has failed to show why mailing a book catalog in an envelope does not violate the Postcard-Only Policy – thereby violating "other mail restrictions." His policy on "Junk Mail" states that "Jail staff will accept solicited or unsolicited junk mail or bulk mail for

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inmates, *unless it violates other mail restrictions*…." Dkt. 32-6 (emphasis added). The Sheriff claims the Postcard-Only Policy does not apply to catalogs because "the postcard restriction is limited to personal mail." Dkt. 29 at 9. But this gets him nowhere. His mail policy defines "Personal mail" as "Postcards mailed to or from family, friends, organizations, *businesses*, or other unofficial entities." Dkt. 32-6 at 2 (emphasis added).[1] As defined, "personal mail" plainly applies to written communications "to or from…businesses," which includes PLN. That "personal mail" includes all mail from businesses—including junk and bulk mail—is reinforced by the Sheriff's policy on "Initial Processing of Incoming Mail," which states that staff must "Return mail to the sender [that is]. . . Incoming *personal mail* that is not a postcard, except privileged (legal or official) mail." Dkt. 32-6 at 9 (emphasis added). This policy makes no exception for admitting any business mail let alone junk or bulk mail—only for legal or official mail. And since "personal mail" includes business mail, this policy plainly prohibits all business mail other than a postcard. If the Sheriff in fact allows delivery of catalogs and brochures of any kind, and letters, he should say so in his policy.

In short, the Sheriff's policy still prohibits PLN's book catalog and other mail. The plain language of the policy prohibits the delivery of PLN's book catalog, book offers, informational subscription brochures, and letters because they are not postcards. So, if the Sheriff is delivering PLN's catalogs and other mail then it is not because the Jail's policy permits the delivery. The Sheriff's irrational interpretation of his policy to allow delivery of PLN book catalogs and fundraising letters suggests that he delivers PLN's mail now because he is under the scrutiny of this Court. Given the muddled policy language and disingenuous interpretations that the Sheriff gives his policies, scrutiny should continue in the form of a preliminary injunction.

Since the Sheriff states that he bans all incoming personal mail from friends and family and other correspondents that is not a postcard, his Postcard-Only policy applies to all incoming nonlegal mail.

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[1] It is perplexing that the definition of "personal mail" refers only to written communication by "postcards" since that renders the Sheriff's policy requiring all "personal" mail to be sent in the form of a postcard meaningless.

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3. The Sheriff Still Bans Internet-Generated Mail, Including PLN's Online Articles

The Sheriff admits that the Jail will continue to censor PLN's online articles. Dkt. 29 at 18 ("If Ms. Lennox were to send PLN's web article today, it would be rejected because it was not sent directly from the publisher and because it was personal mail not on a postcard."). Therefore, his recent changes to the mail policy did not render this issue moot.

4. The Sheriff's Due Process Procedures Are Constitutionally Inadequate

The Sheriff contends that paragraph 30 of his policy requires notice to the inmate and sender and the notice form describes the procedures to appeal. Dkt. 29 at 9. However, his recent policy changes and recent one-hour training did not fix his inadequate due process procedures.

First, Ms. Lennox's recent experience with sending mail to prisoners reveals that a preliminary injunction is needed to require the Sheriff to provide constitutionally adequate due process. On February 7, 2012, Ms. Lennox mailed an article that she printed from the PLN website and mailed identical copies to eleven prisoners at the Columbia County Jail. Lennox (Second) Dec. at ¶¶3-4. The Jail rejected three of the articles and returned them to Ms. Lennox on February 14, 2012—two weeks *after* the Jail's "formal staff training meeting" on the mail procedures. *Id.* at ¶5. The Jail stamped one of the envelopes "RETURN TO SENDER" but did not state a reason for its decision to censor the mail or provide a Prohibited Mail Notice form to Ms. Lennox. *Id.* at ¶5A. For the two other returned articles, the Jail marked the envelopes "CONTRABAND" and sent Ms. Lennox a Prohibited Mail Notice that states the Sheriff returned her mail because "It is deemed personal mail and not on a postcard." *Id.* at ¶5B-5(E).

Regarding all three censored articles, the Jail failed to give Ms. Lennox any notice of the second reason it censored her mail—because her mail "violated" the "publisher's rule."[2] *See*

[2] Ms. Lennox's mail to prisoners does not violate the "publisher's rule." In *PLN v. Lehman*, 272 F.Supp.2d 1151, 1160 (W.D.Wa. 2003), the district court upheld the Washington DOC's "publishers only" rule that prohibited delivery of "[p]ublications not mailed directly from the publisher/retailer." The DOC's definition of "publications" included "reproduced handwritten or typed/printed or pictorial materials including books, periodicals, newspapers, magazines, and pamphlets" and did *not* include "[c]lippings of newspaper and magazine articles"—which

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Dkt. 29 at 23. Assuming that the Jail censored all of the mail that Ms. Lennox sent to prisoners, as it told the Court it would do, Dkt. 29 at 18, Defendants failed to return eight of the mailings and did not provide Ms. Lennox *any* notice of censorship or opportunity to be heard regarding those mailings. *See also* Mikhaylova Dec. ¶5 (no notice).

Second, the policy provision that the Sheriff references as providing "clear" due process procedures—Paragraph 30—only applies to censorship based on prohibited content or items contained in correspondence but not form-based censorship (e.g. not a postcard). The Jail *confiscates* prohibited items, such as threats, sexually explicit materials, glue, or paint. Dkt. 29 at 9; Dkt. 32-6 at 9, 14. That is not the kind of censorship PLN challenges here.

Third, notably, it took the Sheriff nearly two pages to summarize the provisions scattered over his current policy that touch on notice and appeal procedures.[3] Dkt. 29 at 6-8. It is no surprise that the Jail staff is arbitrarily enforcing the procedures and continue to deny due process to individuals who send mail to prisoners at the Jail.

Based on Ms. Lennox's very recent experience it is evident that the Jail's current mail policy and staff training did not correct the Jail's unconstitutional procedures and practices. The Sheriff needs a concise and clear order from the Court that requires him to provide due process notice and an opportunity to be heard whenever his censors mail.

B. The Sheriff Has Not Shown He Has "Irrevocably Eradicated" His Prior Policies

The Sheriff argues that PLN is not entitled to any injunctive relief at all—preliminary or permanent—because he "voluntarily" ceased his conduct. *See* Dkt. 29 at 14. But he has presented no evidence that he has stopped his prior misconduct for good, not to mention his

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individuals (who are not a publisher/retailer) could send to prisoners. Ms. Lennox's mail constituted the latter, so her mail did not fall within the "publishers only" rule.

[3] The Sheriff claims that his policies offer more due process than "that agreed to by plaintiff" in *PLN v. Spokane County*, and that PLN is monitoring Spokane's compliance with its Consent Decree. Dkt. 29 at 21. This is incorrect. The Consent Decree requires the jail to provide constitutionally adequate due process but neither the Decree nor PLN approved Spokane's subsequent mail policy nor does the Decree provide for PLN to monitor compliance.

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ongoing unconstitutional conduct.

The Sheriff bears "'[t]he heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170, 189 (2000) (burden of proof "lies with the party asserting mootness.") The Supreme Court has explained the Sheriff must meet a very high threshold:

> [T]he standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is *stringent*: "A case might become moot if subsequent events made it *absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur*."

Id. at 189 (emphasis added) (citation omitted). The Sheriff must show the Court that "interim relief or events have completely and *irrevocably eradicated* the effects of the alleged violation." *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1274 (9th Cir. 1998) (emphasis added) (citation omitted). "Irrevocable" means "not to be revoked or recalled; unable to be repealed or annulled; unalterable." *See* www.dictionary.com. "Eradicate" means "to remove or destroy utterly; extirpate." *Id.* So, his burden is indeed heavy.

The only peppercorn the Sheriff offers for finding Plaintiff's request for relief moot is his partial policy change and his one-hour training for staff. *See* Dkt. 32 at 3, 8. The Sheriff has a history of censoring mail contrary to his claimed policies, including just last month (*See* Lennox (Second) Dec.), and repeated violation of due process notice. So his mere assertion that he no longer bans magazines is insufficient evidence of compliance. Because his policies still violate the Constitution, and he has failed to prove that his prior unconstitutional policies and practices have ended in a final and inalterable way, PLN's request for an injunction is not moot.

1. The Sheriff Has Not Asserted Let Alone Demonstrated that He Will Never Return to the Policies and Practices He Claims to Have Voluntarily Ceased

The Supreme Court's standard contemplates that mere cessation is by itself inadequate. The Ninth Circuit has rejected assertions of mootness by voluntary cessation of conduct by government actors who "have neither asserted nor demonstrated that they will never resume [the challenged conduct]; nor have they offered any reason why they might not return in the future to

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their original views on the utility of [the challenged conduct]."[4] *Norman-Bloodsaw*, 135 F.3d at 1274 (holding voluntary change in policy by public actor did not moot claims); *see also Olagues v. Russoniello*, 770 F.2d 791, 794-95 (9th Cir. 1985) (holding U.S. Attorney to "heavy burden" of showing challenged conduct had been "completely and irrevocably eradicated").

The Ninth Circuit has recognized that voluntary change in policy is easily reversed so it is often insufficient to moot the challenge to government violations. For example, the court held that a school board's decision to remove all advertising from a football field to avoid a First Amendment challenge to its advertising policy did not moot the controversy since the school board was free to change its policy at any time. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 963 n. 1 (9th Cir. 1999); *see also Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir.2003) (holding challenge to campaign finance laws not moot, even though law had been repealed, because the State's voluntary cessation did not foreclose future reenactment).

Nowhere in his brief or supporting declaration does the Sheriff assert or demonstrate he will not revert to his old policies and practices, let alone abandon those still in place. Even a statement by the current Sheriff—who serves at the will of the electorate and whose term expires this year, Ex. 9to Wing Dec—that he is committed to complying with the Constitution—is not sufficient to demonstrate that he, let alone the Sheriff's Office and the next Sheriff, will not revert back to the old ways. The Sheriff has not even done that.

2. The Sheriff's Policy Change on the Heels of Plaintiff's Motion for Preliminary Injunction Strongly Weighs Against Mootness

When a defendant's voluntary conduct results from impending litigation, a court should be wary of finding mootness, which is plainly the case here. The U.S. Supreme Court cautioned: "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 333 (1952).

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[4] Recently, the U.S. Supreme Court reaffirmed that government actors are held to the same stringent standard that every other defendant faces. *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 719 (2007).

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In *United States v. Government of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004), the Third Circuit found the Governor's last minute "voluntary" termination of a purportedly illegal contract insufficient to moot the lawsuit against the government: "The timing of the contract termination—just five days after the United States moved to invalidate it, and just two days before the District Court's hearing on the motion—strongly suggests that the impending litigation was the cause of the termination." *See also Smith v. Univ. of Washington Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000) (finding mootness less appropriate when cessation occurred due to the "prodding effect" of litigation, which "tends to indicate that the change was not really voluntary at all."); *Sefick v. Gardner*, 164 F.3d 370, 372 (7th Cir. 1998) ("the current no-display policy, adopted after the commencement of this suit, is not implemented by statute or regulation and could be changed again, so this voluntary cessation of the challenged conduct does not eliminate the [First Amendment] controversy.").

Here, the Sheriff did not change his policy until Plaintiff filed this lawsuit and received notice of PLN's impending motion for preliminary injunction. *See* Dkt. 1 (Complaint filed January 13, 2012); Dkt. 9-4, Exhibit 14 (January 13, 2012 letter requesting conference regarding preliminary injunction motion); Dkt. 32-5, Exhibit E (revised policy adopted January 26, 2012). His timing strongly suggests the lawsuit and impending motion caused his change in policy, instead of a genuine and truly voluntary decision to abandon it. Indeed, the Sheriff states that he changed policies in response to PLN's lawsuit. *See* Dkt. 29 at 5 ("The current policy . . . was drafted within days of the filing of plaintiff's lawsuit[.]").

3. The Sheriff Offers No Explanation or Reason for His Policy Change

Courts should be unmoved to find mootness when a defendant fails to even explain the basis for cessation. Here, the Sheriff offers no reason at all for amending his policy, further calling into question the finality of the change. In *Government of Virgin Islands*, the Third Circuit remarked: "the Governor's sole justification for the termination of the contract was that 'such termination is in the best interest of the Government.' But this statement is extremely general, and surely does not provide any assurance that a similar contract would not be entered

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into again." 363 F.3d at 285.

Indeed, in rejecting mootness of a preliminary injunction appeal where the defendant said it would stop its copyright infringement, the Ninth Circuit remarked, if such a promise were sufficient "any defendant could moot a preliminary injunction appeal by simply representing to the court that it will cease its wrongdoing." *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1154 (9th Cir. 2006). Instead, the Court held, "Concordia's representation that it has no intention to use LGS's architectural plans in the future does not make it 'absolutely clear' that Concordia will permanently refrain from future infringement." *Id.*

Here, the Sheriff does not offer even an inadequate "extremely general" explanation for his cessation, let alone make a specific promise to abstain from illegal censorship of the mail.

4. The Sheriff Has Misrepresented the History and Content of His Mail Policies to the Court, to the Prisoners, and to the Public

a. The Sheriff Has Not Made His Alleged Policies Available

The Sheriff states that he had "never seen" the Inmate Mail Policy that was published on his website for nearly two years before Plaintiff filed this lawsuit. Dkt. 32 ¶8. He states that the mail procedures in that policy are inconsistent with his actual jail mail policies. *Id.* Although the Sheriff's new "Prohibited Mail Notice" directs its recipients to "go to the jail's web page at www.co.columbia.or.us/sheriff" to find the Jail's mail policies,[5] the Sheriff removed the published mail policy from his website on January 24, 2012, and has not posted either his policy dated January 26, 2012 or February 10, 2012. Wing Dec. at 1; Ex. 1 to *id.* Instead, the webpage titled "Inmate Mail" says "the inmate mail policy is under review at this time." *Id.* The Sheriff has made no attempt to correct the information previously posted on his website or make the current policy available to families, friends, and organizations who visit the Sheriff's website to find out what restrictions there are on inmate mail. *See e.g.* Lennox (Second) Dec. ¶7.

Likewise, the Sheriff is withholding information about the new mail policy from

[5] The November 12, 2010, Inmate Manual states that members of the public can read these "mail rules" "on the jail's website at: www.co.columbia.or.us/sheriff." *See* B. Berg Dec. Ex. A at 8.

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prisoners. On February 8, 2012—twelve days after the Jail's January revision became effective—the Jail denied prisoner Berg's request for a copy of the policy, telling him the "legal department" does not want staff to distribute it. *See* B. Berg. Dec. ¶18, 20, and Ex. K to *id.*

The Sheriff's failure to inform prisoners, their correspondents, or the public of his current policy further supports the fact that he is not committed to complying with the constitution and that he has failed to show he irrevocably eradicated his prior conduct.

b. The Sheriff's Policies Banned Delivery of Magazines.

The Sheriff asserts that: "The Jail's policies, however, have always allowed inmates to receive magazines as long as they were new and sent directly from the publisher." Dkt. 29 at 3. But his assertion is demonstrably false. He ignores the plain language of the mail policy posted on his website for the world to rely on for nearly two years. That policy stated: "Magazines: Are not allowed inside the facility." Dkt. 9-1 at 3. He also ignores the plain language of his Inmate Manual given to prisoners, which bears his signature and declares under the heading "Periodicals" that "We do not accept any periodicals." Ex. A to B. Berg Dec. Yet, the Sheriff told the Court his policies "have always" said the opposite. Dkt. 29 at 3.

Also, the Jail repeatedly censored magazines while the Sheriff's alleged internal policies permitted their delivery. In addition to censoring PLN's monthly journals, *see* Dkt. 8, ¶17, the Jail also censored magazines from other publishers, including *National Geographic*, *Newsweek*, and *Bloomberg Weekly*, and told the prisoner-addressee that the Jail's postcard policy prohibited delivery of magazines, *see* Weisenberger Dec. at ¶5. And on December 25, 2011—just three weeks before this lawsuit was filed—the Jail wrote to prisoner Bradley Berg "WE DO NOT ALLOW MAGAZINES." Ex. J to B. Berg Dec. In short, the Jail censored magazines for at least 12 months while claiming its internal policies permitted their delivery.

Finally, the Sheriff's claim that his policy now allows delivery of magazines is flawed. As noted in PLN's Motion, the Jail's policy permits delivery of only those magazines or periodicals "issued at least four times a year at regular, specified intervals…." Dkt. 32-6 at 2. He fails to articulate a legitimate basis for restricting any periodicals.

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The Sheriff either knowingly violated the First Amendment or else he recklessly disregarded the unconstitutional practices of his staff that took place on a regular basis. The Jail's repeated censorship of PLN's journal and the magazines of other publishers cannot be chalked up to staff misunderstanding the Sheriff's allegedly "true" but undisclosed policies; rather the censorship resulted from his published policies. The Sheriff's credibility is in doubt.

c. The Sheriff Has Misrepresented the History of His Mail Policies, and His Personal Knowledge of Them.

Defendant Jeff Dickerson became Columbia County Sheriff as of January 2009. Dkt. 32 ¶1. Since then, the Sheriff's Office has adopted at least *eight* versions of a Jail mail policy. But the Sheriff has acknowledged only six of them. *See* Dkt. 32, Exhibits A through F.

The seventh version of the Sheriff's policy, dated April 1, 2010, Dkt. 9-1, Ex. 1, was posted by the Sheriff's Office on his website for twenty months until he took it down after this lawsuit was filed in late January 2012, *see id.*; Dkt. 9 ¶11. Although the Sheriff's Office announced in December 2009 that it will be posting the new guidelines "on the agency website at www.co.columbia.or.us/sheriff in the coming weeks," Dkt. 9-1 Ex. 2, the Sheriff now declares that "Prior to receiving plaintiff's complaint, I had never seen this document," Dkt. 32 ¶8.

The eighth known version of the Sheriff's policy is found on pages 7 through 10 of the "Columbia County Jail Inmate Manual" dated "11/12/10." Ex. A to B. Berg Dec.[6] At least one relevant mail policy provision in that Manual—the one that bans "periodicals"—does not mirror any of the mail policies the Sheriff presented to the Court, Dkt. 32-1 through 6. In his declaration, the Sheriff failed to acknowledge the existence of the Manual, but he cannot credibly deny he was aware of it because it bears his signature. Ex. A to B. Berg Dec. at 1.

There may be other descriptions or versions of the Sheriff's policies as well. His March 3, 2010 and July 19, 2011 versions announced that "An Inmate Mail Guide will be made available to the public explaining mail rules . . . Copies of the Inmate Mail Guide will also be

[6] An Inmate Manual dated 07/23/10 and labeled "rev3" contains the same provisions. *See* Ex. 10 to Wright (Second) Dec. Discovery will reveal whether the Sheriff changed the mail policy in other revisions to the Inmate Manual during his tenure.

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made available to inmates upon request." Dkts. 32-2 at 1; 32-3 at 1. Likewise, in his most recent policy version, the Sheriff acknowledges the existence of "the *Inmate Manual*" and promises to "make copies of the Inmate Mail Guide available to the public." Dkt. 32-6 at 13 ¶39. The Sheriff did not submit any manuals or guides or post his policy on his website, so Plaintiff and the Court cannot determine whether they track his latest claimed policy.

The Sheriff cannot be relied on to comply with the Constitution absent a court order.

d. The Sheriff Failed to Adequately Supervise Jail Staff in the Past and Has Failed to Improve His Supervision

Sheriff Dickerson acknowledges that throughout his tenure he has been responsible for establishing procedures for handling prisoners' mail. Dkt. 32 ¶3. But the evidence reflects that he did not shoulder his responsibility and he failed to ensure that his Jail complied with the Constitution. Either the Sheriff put in place the policies and practices that his staff have used to violate the rights of PLN, his prisoners, and many others, or else for the majority of his tenure the Sheriff was oblivious that his staff created unconstitutional policies, published them on his website, compiled them in an Inmate Manual that they gave to his prisoners, and implemented them on a daily basis in his Jail. Either portrait undermines the Sheriff's argument that the Court can rely on him to comply with the Constitution on his own.

The Sheriff states that he is "investigating how the purported mail policies [on his website] were created, but it appears that some staff may have misunderstood the mail policy and were rejecting non-postcard size mailings addressed to inmates, instead of having the corrections staff process the inmate mail." Dkt. 29 at 3 n. 1. And the Sheriff declares that he only recently learned that his front office employees were rejecting mailings before sending them to corrections staff and they sometimes placed a sticker and other notations on the rejected mail referring to incorrect mail procedures. Dkt. 32 ¶¶8-9. He paints a picture of a few isolated incidents of negligence on the part of office staff. That is not what happened. Instead, over at least a 12-month period, the Jail censored at least 74 pieces of PLN's mail. *See* Dkt 8 at ¶¶16-26, 28. Why were the front office staff equipped with stickers and stamps that said "As of April 1, 2010, The Columbia County Jail ONLY ACCEPTS POSTCARDS This applies to ALL

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incoming and out going mail" and "CONTRABAND"?

The Sheriff claims that he has solved the problems with implementing his policies by holding a one-hour training on February 1, 2012, attended by most of his deputies. *See* Dkt. 29 at 8. His new policies are 17 pages long. Dkt. 32-6. Given the serious problems of censorship and lack of due process afforded by his staff, a one-hour training seems quite meager. As shown by Ms. Lennox's experience, the training was inadequate. *See* Lennox (Second) Dec.

Remarkably, the Sheriff's name is conspicuously absent from the training roster; he neither instructed his staff himself nor did he attend the mail training to see whether they understand his new policies and how to implement them. *See* Dkt. 32-7, Ex. G. And, the Sheriff's Office provided this instruction at the beginning of February before he updated his policy again, on February 10, 2012. He claims the update was not substantive, but he moved around substantive provisions in his lengthy policy, changed some policy language, and does not claim that his staff were notified.

Notably, the Sheriff required only one of the front office staff who handle mail to attend the February 1st training, and asked that person to "share the information with the other full-time staff member and the volunteers who might also handle the mail." *Id.* at ¶27.

II. PLN Has Standing to Challenge All of the Mail Policies at Issue

For the past 21 years, the core of PLN's mission has been public education, advocacy, and outreach in support of the rights of prisoners and in furtherance of basic human rights. Wright (Second) Dec. ¶4. PLN publishes a monthly magazine of the same name, maintains a website, operates an email list, distributes books of interest to prisoners and publishes self-help, non-fiction reference books. *Id.* ¶5.

Prisoners, their family, friends, and advocates, are among the intended beneficiaries of (and do benefit from) PLN's activities. *Id.* ¶6. PLN is frequently contacted by prisoners and individuals who are concerned about the health and well-being of one or more prisoners, and who seek information or materials from PLN on issues related to prisoners' rights. *Id.* ¶7. PLN's website, www.prisonlegalnews.org, gets approximately 100,000 unique visitors per

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month. *Id.* ¶8. The website contains over 23,000 articles, 9,000 court opinions, and 5,000 legal documents in its brief bank, and in excess of 4,000 documents in its publications library. *Id.* The website is the largest online repository related to detention facility news and litigation in the world. It is updated on a nearly daily basis. *Id.*

Since prisoners do not have access to the internet, they rely on friends, family, and others to download and print articles from PLN's website and mail them to prisoners. *Id.* ¶9. Because PLN lacks the resources to communicate this information individually to each prisoner who desires it, PLN has purposely designed its website so that non-prisoners can research topics of importance to prisoners, and download, print, and mail the information to prisoners. *Id.* ¶10. In fact, PLN's website invites anyone to "please feel free to print out articles and send them to the prisoner." *Id.* ¶11, Ex. 1 at 3.

As a recently-released prisoner in Washington and his family declare, the materials on PLN's website are important to and desired by prisoners during incarceration. *See* Wing Dec. ¶¶3-5; Exs. 3, 4 and 5 to *id.* PLN operates a free email listserv with approximately 1,500 subscribers who receive emails on a weekly basis related to detention facility news and litigation. Wright (Second) Dec. ¶13. Many recipients of these emails print and mail articles of interest to friends and relatives in prisons and jails. *Id.* Several times per week, friends or relatives contact PLN by telephone, asking Editor Paul Wright to help them locate material on a particular topic on PLN's website for the stated purpose of printing and mailing it to a prisoner who is their family member or friend.[7] *Id.* ¶14.

The Sheriff's adoption of a Postcard-Only Policy means that no family member, friend, or other concerned individual can ever utilize PLN's website or listserv to print and mail information to prisoners in the Columbia County Jail. *Id.* ¶15. The Jail has censored and

[7] For example, PLN received an email inquiry from the sister of a prisoner in North Carolina referencing PLN's website invitation to print material to send to prisoners. *Id.* ¶12, Ex. 2 to *id.* In her email, the sister asked whether her brother in prison has the right to receive materials printed from the internet. Ex. 2 to *id.*

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rejected materials printed from the PLN website and admits to the Court that it will continue to do so. *See* Dkt. 29 at 18; Lennox (Second) Dec. ¶¶2-8.

The policy prevents prisoners from receiving free material on the PLN website about prisoners' criminal or civil rights, health and safety issues, reasonable accommodation, effective assistance of counsel, or a host of other important issues. Wright (Second) Dec. ¶15. Indeed, the Jail policy prevents family mail containing a website print-out of PLN's article on *Clement v. California Dept. of Corr.*, 364 F.3d 1148 (9th Cir. 2004), which informs readers that the Ninth Circuit "upheld the statewide permanent injunction issued by the U.S. District Court (N.D. Cal.) enjoining the California Department of Corrections' (CDC) policy prohibiting prisoners from receiving Internet-generated mail." *Id.* ¶16; Ex. 3 to *id.*

The Jail's policy also prevents prisoners from receiving the amicus brief filed in *Clement* by PLN. In that brief, PLN informed the Ninth Circuit:

> PLN…maintain[s] a Web site (www.prisonlegalnews.org) where it provides back issues for download, links to other Web sites relevant to prison legal issues, and subscription order forms. PLN often receives printouts of these order forms from first-time subscribers who are incarcerated. As prisoners lack Internet access of their own, they must receive these forms after they are printed out and mailed to them by friends or family. When resources allow, PLN intends to extend its Web site to include legal briefs and other informational material of use to prisoners and prisoner-rights activists. Again, prisoners would have to rely on non-incarcerated friends and family to download, print, and mail those materials to them.

Id. ¶16; Ex. 4 to *id.* Eight years later, PLN has met its goal of hosting "legal briefs and other informational material" for printing and mailing to prisoners. *Id.* at ¶16; Ex. 5 to *id.*

Without question, the Sheriff's Postcard-Only Policy prohibiting family, friends, and other individuals from mailing to prisoners materials printed off PLN's website frustrates PLN's core mission of educating prisoners. *Id.* ¶17. As just one example, Ms. Lennox notified PLN that she recently mailed envelopes containing articles printed from PLN's website to prisoners in the Columbia County Jail, but that the Jail returned some of the envelopes to her unopened, and for two stated the Jail returned the mail because it is "not on a postcard." Lennox (Second) Dec.

PLN is frequently contacted by prisoners and their correspondents who complain of

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censorship or of violations of due process rights. Wright (Second) Dec. ¶19. As part of PLN's mission of education and advocacy for prisoners' rights, PLN's editor and staff respond to complaints, investigate them, and are sometimes able to take action to remedy them. *Id.*

Columbia County prisoners have communicated complaints to PLN about the Sheriff's mail policies. *Id.* ¶20. For example, a prisoner wrote the following to PLN:

> I am a mentally ill inmate I experience hallucinations and have severe paranoia, panic disorder, and anxiety. I have done almost 14 years in prisons/jails almost 3 years solitary confinement . . . Any information or help that you may offer or maybe a reference would be awesome!!! Thank you again oh and you like the post card? I'd send copies of my grievances etc. but they won't fit on a card I'm filing on that next.

Ex. 6 to *id.* And the complaints of prisoners in other jails further amplify their close and reliant relationship with PLN, depending on PLN to take legal action to improve their conditions of confinement, as PLN seeks to do for current and future prisoners confined in the Columbia County Jail. For example, prisoners in Washington's Spokane County Jail contacted PLN complaining that the Jail's postcard-only policy interfered with their rights to communicate with family and asked PLN for help to stop the Jail's violation of their rights. *Id.* ¶¶22, 26-27, 29-30. They complained to PLN that:

> "My only source of letting my family know about certain facts about my case and other important personal details of my life is through the mail and I feel as if there is no privacy whatsoever concerning myself and my loved ones." Ex. 8 to *id.*

> "[W]e are no longer able to send or receive mail only post cards no pictures from loved ones of my kids or family…. My family will be trying to contact you too." Ex. 9 to *id.*

> "I have a 15 month old daughter, and am missing inches off her toes (Growth). My grandfather is very ill and doesn't know anything about these new mail changes. He shouldn't have to go out of his way or search for ways to accommodate jail rules. In reference to this new 'Jail Rule,' I can't receive Pictures, mail, 'I miss you dad!' cards, or any other only contact or communication from my family. It is very stressful and psychologically tormenting. I can't sleep or eat well due to this harassment." Ex. 7 to *id.*

> "I am a 32 yr old male with children and am not able to use the phone to communicate with my children or family[.] I cannot receive pictures or anything else of the sort and try to explain this to a nine yr old let alone a 8 or 6 yr old and I know there a lot of people in the county Jail in the same boat/under the same circumstances…." Ex. 11 to *id.* (signed by six

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other concerned prisoners).

> "All of are [sic] mail to family-n-loved ones are on a postcard for the public to read… I was told you might be able to help. This is the refusal form they give me rather than my letters. Thank you." Ex. 12 to *id.*

PLN challenged the Spokane County Jail's postcard-only policy. The Consent Decree that PLN obtained resolving that litigation enjoined Spokane County from enforcing a postcard-only policy for incoming or outgoing mail and to afford due process to all, thereby advancing the rights of the more than 25,000 prisoners who pass through that Jail annually, as well as their families and friends. *Id.* ¶31. Similarly, in 2011, after receiving numerous complaints from the prisoners at the Chelan County Jail in Washington, PLN challenged the Jail's ban on periodicals, magazines, and books, and its failure to provide adequate due process. PLN successfully obtained a Consent Decree permanently enjoining the Defendants from rejecting mail because it is a periodical, magazine, publication, catalog, brochure, or book, and from rejecting mail without giving constitutionally adequate due process. *Id.* at 32; Ex. 13 to *id.* And PLN has successfully challenged other prison and jail mail policies as well. *See, e.g.*, *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001); *Prison Legal News v. Lehman*, 397 F.3d 692, 697 (9th Cir. 2005).

In sum, PLN has a close relationship with prisoners and their families and friends, and PLN has vigorously and repeatedly advocated for their First and Fourteenth Amendment rights in court—on the very same mail policies challenged here. And the adverse effects of the Columbia County Jail's Postcard-Only Policy on prisoners, families, and friends mirrors the experiences of prisoners, and their families and friends, at the Spokane County Jail. *See e.g.,* Exs. C, F through I, B. Berg Dec.

And, as in the Spokane litigation, PLN has investigated the censorship by the Columbia County Sheriff at considerable disruption to its operations, which affords it organization standing. As a result of the Jail's policy prohibiting prisoner-family letters, PLN—with only an editor and three other staff—was forced to divert its very limited resources from many other publishing, education, and advocacy tasks to review, respond, and investigate these complaints,

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and strategize how PLN could advocate for the rights of prisoners and their families. Wright (Second) Dec. ¶24. PLN's staff spent several hours on these activities and incurred the cost of postage to write to the complaining prisoners. *Id.* Defendants' interference with communications between family, friends, and prisoners seeking help from PLN frustrated PLN's mission of national education and advocacy for prisoners' rights. *Id.*

> Eight years ago, PLN told the Ninth Circuit in its amicus brief in *Clement:*
>
> PLN has litigated the speech rights of prisoners and their correspondents in order to preserve its own ability to accurately report and effectively distribute legal news relevant to prisoners.... PLN, because of its reliance on the Internet in continuing its mission to provide timely and accurate legal news to prisoners and concerned citizens, and as evidenced by its past involvement in similar litigation, has a strong interest in defending the right of prisoners to receive, and non-incarcerated citizens to send, mail containing speech printed from the Internet.

Id. ¶34, Ex. 4 at 3 to *id.* In light of society's fast growing reliance on the internet and the increasing population of prisoners in America, PLN's legal interest in vindicating the rights at stake here is stronger than ever. *Id.* ¶34.

Plaintiff may challenge the Jail's Postcard-Only Policy in its entirety because PLN has: (a) standing in its own right; (b) organizational standing—the Jail's policy frustrates PLN's mission and diverts its resources; and (c) third-party standing—PLN has been injured and can satisfactorily frame the issues on behalf of non-parties whose legal interests PLN can represent in a First Amendment challenge.

A. PLN Has Standing In Its Own Right

As set forth in Section I(A), on its face the Sheriff's current mail policy continues to ban incoming mail sent from PLN to prisoners and outgoing mail from prisoners to PLN—including, book catalogs, informational brochures, letters, subscription renewal forms, book order forms, online articles. And the due process procedures are inadequate, as described in Section I(A)(4), above. Therefore, the Sheriff's current policies injure PLN rights under the First and Fourteenth Amendments, giving PLN standing in its own right to seek preliminary relief.

B. PLN Has Organizational Standing

A plaintiff must meet Article III constitutional standing requirements: injury, a causal

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connection between the injury and defendants' conduct, and likelihood that the injury can be redressed by the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992).

1. Injury

PLN meets the injury-in-fact requirement under the well-recognized doctrine of "organizational" standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). In *Havens*, a fair housing case, the U.S. Supreme Court explained that, "If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact." *Id.* at 379. Article III is satisfied where the organization suffers (1) frustration of its mission; and (2) diversion of its resources. *See Smith v. Pac. Properties and Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (citing *Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002)).

The first prong is satisfied by demonstrating that the organization's mission is frustrated by the Defendants' conduct. For example, in *Smith*, 358 F.2d at 1105, the court found sufficient that the Disabled Rights Action Committee alleged it was "'organized with the principal purpose of helping to eliminate discrimination . . . Part and parcel to this effort is ensuring an adequate stock of accessible housing for those who are freed to leave the nursing homes.'" *See also Granville House, Inc. v. Dept. of Health & Human Services*, 715 F.2d 1292, 1298 (8th Cir. 1983) (non-profit had standing to challenge HHS's interpretation of the term mental diseases because it "perceptibly impaired Granville's ability to provide its services to indigent patients").

Similarly, the core of PLN's mission is "public education, advocacy, and outreach in support of the rights of prisoners and in furtherance of basic human rights." As explained above, PLN accomplishes this in a significant way by providing materials available for free to non-incarcerated family and friends to print from PLN's website and mail to prisoners in Jail, and inviting individuals to do so—which they do. Lennox (Second) Dec. ¶¶3-4. PLN is frequently contacted by individuals seeking help in doing just that. The Sheriff's current Postcard-Only Policy blocks PLN's use of this educational mechanism 100% of the time. *See e.g.*, Dkt. 10 ¶4;

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Dkt. 19 at 18. PLN's interest and pursuit of this mechanism is long-standing and well-established as illustrated by its amicus brief filed in *Clement* eight years ago. This is ample support that the Sheriff's Postcard-Only Policy frustrates PLN's mission in a legally injurious way.

The second prong requires the organization to show that combating the Defendants' conduct caused diversion of organizational resources. *See NAACP v. Ameriquest Mortg. Co.*, 635 F. Supp.2d 1096, 1102 (C.D. Cal. 2009) (injury where defendants' actions impaired plaintiff's work and drained resources). Prisoners wrote to PLN complaining about the Sheriff's policy and asking for help to stop interference with their correspondence with their families. PLN had to divert the limited time of its staff to read, respond, investigate the censorship, and to strategize solutions; and PLN had to incur costs to correspond with prisoners. The diversion of time and resources satisfies the injury requirement.

2. Causal Connection and Redressability

The injury associated with frustration of PLN's mission and diversion of its resources is caused directly by the Sheriff's Postcard-Only Policy. PLN seeks to enjoin the Policy alleviating PLN's injuries. In short, PLN has standing as an organization to challenge all of the Sheriff's policies.

C. Third-Party Standing

PLN has organizational standing, so it does not need to establish third-party standing. But PLN satisfies the requirements of third-party standing as well. As shown above, PLN suffers the threshold "minimal injury" to satisfy Article III, which leaves only the question of prudential considerations.

1. Prudential Standing Is Suspended in Overbreadth Cases

The prudential standing doctrine generally requires that:

> "[the plaintiff] assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." . . . The reason for this rule is twofold: The limitation "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations

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> of statutes in areas where their constitutional application might be cloudy," . . . and it assures the court that the issues before it will be concrete and sharply presented.

Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 955-58 (1984) ("*Munson Co.*") (recognizing relaxed rules of standing in First Amendment cases, holding a fundraising organization had standing to assert rights of client charities because "the activity sought to be protected is at the heart of [plaintiff's] business....").

However, prudential standing is not jurisdictional. And, it is suspended in First Amendment overbreadth cases because of the special nature of risk to expressive rights:

> [W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the *statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expressio*n."

Munson Co., 467 U.S. at 956-57 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)) (emphasis added). The high court explained that "[f]acial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Id.* at 958; *see also Eisenstadt v. Baird*, 405 U.S. 438, 446 n. 5 (1972) (noting "in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech.").

Accordingly, for decades, courts across the country have allowed litigants to assert the rights of third parties in First Amendment cases. In *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-393 (1988), bookseller organizations and bookstores challenged a statute prohibiting display of sexually explicit materials. The booksellers argued that the statute was facially overbroad. The Supreme Court held that the booksellers had standing based on the rights of non-party *potential* book buyers, recognizing that the statute's very existence may cause

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non-parties to refrain from constitutionally protected speech. *Id.* at 392. *See also, e.g., Clark v. City of Lakewood*, 259 F.3d 996, 1010 (9th Cir. 2001) (business had standing to challenge ordinance that required managers and entertainers to be licensed, recognizing "a credible risk the Ordinance could cause self-censorship and chilling of expression."); *Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (publisher had standing to assert freedom of association rights of its readers); *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252 (5th Cir. 1995) (business had standing to challenge ordinance on behalf of its employees, recognizing "customers' First Amendment rights where the violation of those rights adversely affects the financial interests or patronage of the business."); *Enterline v. Pocono Medical Center*, 751 F.Supp.2d 782 (M.D. Pa. 2008) (newspaper had standing to assert rights of individuals who posted on its online forums).

Similarly, for the reasons that follow, PLN has third party standing.

2. PLN Brought a Facial Overbreadth Challenge to the Mail Policy

PLN has alleged that the Sheriff's mail policies are unconstitutionally overbroad. Dkt. 1 at ¶¶4.73.5 and 4.74.3. Specifically, PLN contends that instead of adopting a legitimate mail policy prohibiting just contraband, the Sheriff adopted a substantially overbroad policy prohibiting all letters and other mail contained in envelopes. *See, e.g.,* Dkt. 15 at 23.

3. The Sheriff's Postcard-Only Policy Chills Free Speech

The Sheriff asserts that prudential considerations should not be suspended because there is no "substantial abridgement [of a third party's rights] that could be addressed by a preliminary injunction." Dkt. 29 at pg. 12. The Sheriff also contends that "the postcard restriction does not chill speech." Dkt. 29 at 17. However, the plain language of the Sheriff's current policy and the experience of prisoners, and their friends and family, show otherwise.

Rather than abandon his Postcard-Only Policy, the Sheriff continues to censor and deter speech between prisoners and their friends and family, a substantial infringement on their free speech rights. *See* B. Berg Dec. ¶¶3-6; S. Berg Dec. ¶¶2-8; Mikhaylova Dec. ¶¶2-8; Popa Dec. ¶¶3-7; Williams Dec. ¶¶2-9; Dkt. 10 ¶¶3-5; Lennox (Second) Dec. ¶¶3-8.

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The chilling effect of prison censorship has been well recognized. *See, e.g., Ashker v. California Dept. of Corr.*, 350 F.3d 917, 921 (9th Cir. 2003) ("Ashker no longer asks Khalsa to attempt to order books for him because of the difficulties she has encountered in the process."); *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301, 307 (1965) ("This requirement is almost certain to have a deterrent effect… any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned"); *Virginia v. American Booksellers Assn., Inc.*, 484 U.S. 383, 393 (1988) (recognizing risk of self-censorship as constitutional injury); *Cal. Pro-Life Council Inc. v. Getman*, 328 F.3d 1088, 1094-95 (9th Cir. 2003) (same).

When the Sheriff amended his mail policy just recently in January and February 2012, he did not publicize that magazines are now allowed—so the chilling effect to virtually all correspondents continues. The Sheriff's practices have not been consistent with the Constitution, he opposes PLN's request for injunctive relief, and his policies still violate the Constitution. These facts show that the Sheriff unconstitutionally interfered with expressive activities and continues to chill future speech.

Thus, unlike *Pitt News*, 215 F.3d 354 (3rd Cir. 2000), the Third Circuit case cited by the Sheriff, Dkt. 29 at 12, PLN has shown that third parties "are likely to have their speech chilled… and a risk they will forego their constitutionally protected rights" because of the Sheriff's mail policy. There is no question that his current policy "may cause others not before the court to refrain from constitutionally protected speech or expression"—it *has* chilled speech and will continue to do so.

4. PLN Has Satisfactorily Framed the Issues on Behalf of Non-Parties

The Supreme Court has instructed that when claims are presented vigorously and resolution of the merits would be an efficient use of judicial resources, the claims of third parties should *not* wait for another day:

> [A] decision by us to forgo consideration of the constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence. Moreover, insofar as the applicable constitutional

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> questions have been and continue to be presented vigorously and "cogently," . . . the denial of jus tertii standing in deference to a direct class suit can serve no functional purpose.

Craig v. Boren, 429 U.S. 190, 193-94 (1976) ("vendors and those in like positions have been uniformly permitted to . . . [act] as advocates of the rights of third parties who seek access to their market or function.").

In the short life of this case, Plaintiff has sought a preliminary injunction challenging the entire Postcard-Only Policy, and invited an amicus brief by the Partnership for Safety and Justice. Plaintiff has submitted postcards, letters, grievances, and declarations of several non-parties whose interests PLN is advancing here, including prisoners, and their family and friends, illustrating the need for PLN to challenge the policy. *See* Declarations of Bradley Berg (prisoner), Sharon Berg (mother of prisoner), Lucy Lennox (individual whose mail to prisoner has been censored), Natalia Mikhaylova (friend of prisoner), Oana Popa (friend of prisoner), John Weisenberger (former prisoner), and Shaughnessy Williams (prisoner), filed herewith.

PLN has framed the issues of the non-parties with great vigor. If the Sheriff has indeed corrected his previous ban on all magazines and periodicals, as he claims, then his claimed modifications of his mail policies and training of jail employees triggered by PLN's lawsuit has already improved the lives of hundreds of prisoners and their correspondents. The parties have already expended significant resources on this issue and the Court will have expended its time as well since this motion is fully briefed for consideration. So, denial of standing would be contrary to judicial economy and interfere with the interests of non-parties who could benefit from court-ordered relief now while they, or their loved ones, are still in Jail.

5. Plaintiff Meets Prudential Standing Requirements

Even if prudential standing was required, Plaintiff meets the three requirements: actual injury, special relationship, and hindrance. *See Powers v. Ohio*, 499 U.S. 400, 410-411 (1991). In *Powers*, a white criminal defendant had third-party standing to challenge the prosecutor's peremptory strike of a black juror because the defendant was injured by discriminatory jury

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empanelling, a stricken juror has a limited stake so is hindered from filing a challenge, and the defendant would vigorously do so showing a close relationship to the juror's interests.

First, a litigant must have suffered actual injury, "thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute." *Id.* at 411. PLN has shown its injury.

Second, the litigant must have a close enough relationship with the third party giving it a "sufficiently concrete interest" in the outcome of the issue in dispute, such that the litigant will be an effective advocate. *Id.* at 411. PLN has established its close relationship with prisoners and their loved ones in spades, one that is far closer than between bookstores and their customers recognized as sufficient in *American Booksellers Ass'n, Inc.*, 484 U.S. at 392-93.

Third, "there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers*, 499 U.S. at 411. "[A] party must show that some barrier or practical obstacle . . . prevents or deters the third party from asserting his or her own interest." *Benjamin v. Aroostook Medical Ctr., Inc.,* 57 F.3d 101, 106 (1st Cir. 1995).

Individuals incarcerated in jails face enormous obstacles to successfully obtaining judicial relief for constitutional violations related to the conditions of their confinement. Wright (Second) Dec. ¶33. These include: the average duration of a prisoner's stay in a county jail is less than the period of time Defendants have just to answer a complaint; the vast majority of county jail inmates are struggling to cope with other personal crises related to the disruption that incarceration has wreaked on their lives; lack of legal training; lack of financial resources; high levels of functional illiteracy; ignorance of the legal system and how to use it to vindicate constitutional rights; high rates of mental illness; and lack of English language skills all make it difficult for prisoners to successfully vindicate their rights. *Id.*

Friends and family members of prisoners who wish to vindicate their First Amendment rights to send and receive letters from prisoners also face similar obstacles, *see* Ex. 4 ¶12 to Wing Dec., with additional concerns that any attempt to vindicate their constitutional rights will lead to retaliation or negative consequences for their incarcerated loved one, Wright (Second) Dec. ¶33. Nationally, the number of lawyers with the capacity, resources, and desire to litigate

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these issues on behalf of prisoners and their families is miniscule, so for the vast majority of prisoners and their families and friends access to a lawyer to vindicate their First Amendment rights is non-existent. *Id.*

The cost and time required to litigate is often prohibitive for families suffering loss of income or child care provider because their loved one is incarcerated. And a person who initiates a lawsuit would face Defendants' challenge to their standing once the prisoner was released. The average length of stay for a prisoner at the Columbia County Jail was a mere 19 days in 2011 (Ex. 2 at 15 to Wing Dec.)—much too short to bring suit before release. Even prisoners with longer confinements in the Jail would be hard pressed to complete a vigorously contested lawsuit while incarcerated. The delay in finding a willing and knowledgeable lawyer, the ramp up time to investigate and start a lawsuit, and the risk of losing standing for injunctive relief on a low damages case when the prisoner is released, even on appeal, illustrate the formidable obstacles to prisoners or their families or friends bringing the challenge that PLN has already brought.

The Sheriff's policy is counter-productive. That it deprives hundreds of prisoners, families, friends, and others of their First Amendment rights puts into perspective the need to allow PLN to press its challenge to conclusion. These persons should not have to wait until a prisoner or family member overcomes the considerable obstacles to bring a lawsuit themselves.

6. Prisoners, Friends, and Families Seek to Exercise Their Free Speech Rights

Defendants caution the court against finding third-party standing, because third parties "may not wish to assert [their rights] or may not be able to enjoy those rights regardless of the in-court litigants' success." Dkt. 29 at pg. 12. But, Defendants cannot seriously dispute that prisoners and their correspondents desire to exercise their First Amendment rights and will enjoy doing so if the Court enters a preliminary injunction. *See* B. Berg Dec. ¶¶4-6, 13; S. Berg Dec. ¶¶4-6; Mikhaylova Dec. ¶¶3-6; Popa Dec. ¶¶3-6; Williams Dec. ¶¶3, 8; Dkt. 10 ¶¶3-5.

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III. A Preliminary Injunction Should be Entered

A. The Sheriff Fails to Undermine PLN's Showing of Success on the Merits

1. The Sheriff's Policy is Unreasonably Overbroad and Bans Protected Speech

The Sheriff boldly states that "the postcard restriction is not overbroad because speech is not limited in any way." Dkt. 29 at 16. This statement is nonsensical. He bans all outgoing mail that is not a postcard, all incoming personal and business mail that is not a postcard, and all internet-generated mail.

Although the Sheriff claims that his mail policy furthers security and safety concerns, his policies do not target contraband. Instead, he adopted a substantially overbroad policy prohibiting *all* speech in particular forms, including: letters between a prisoner and his pastor (B. Berg. Dec. ¶5); letters between a prisoner and his mother (S. Berg Dec. at ¶5 and7); letters between a prisoner and his friend about their families and advice (Mikhaylova Dec. ¶7-8 and Popa Dec. ¶3); letters between a prisoner and his brother who the prisoner depends on for love and support (Williams Dec. ¶3, 8); issues of *National Geographic*, *Newsweek*, and *Bloomberg Weekley* (Weisenberger ¶5-8); articles from PLN's website sent by an non-prisoner regarding prison privatization and censorship suits (Dkt. 10¶¶3-4; Lennox (Second) Dec. ¶¶3-5); book catalogs offering dictionaries and legal resources offered for sale by PLN (Dkt. 8 ¶¶15-16, Ex. NNN); informational brochures about correspondence school books offered for sale by PLN (Dkt. 8 ¶¶15-16, Ex. OOO); letters regarding PLN's history and cases in litigation (Dkt. 8 ¶28, Ex. QQQ); and journals regarding prison news and analysis (Dkt. 8 ¶17, Ex. LLL).

In contrast, the Sheriff fails to articulate any reduction in contraband, or how often he finds contraband in incoming or outgoing mail, asserting only that it "can" be included in mail. While a jail can prohibit the mailing of contraband it cannot justify censoring an entire medium of mail on the mere speculation that some unspecified amount in that medium sometimes "can" contain "contraband," undercutting the First Amendment rights of hundreds of people every year. The Sheriff's argument utterly fails regarding most of the serious forms of contraband he

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has identified since envelopes cannot successfully conceal needles, blades, handcuff keys, or prescription drug pills, escape plans, or sexually explicit material. And a person can write prohibited content such as threats of physical harm and gang-related materials on a postcard so prohibiting all letters does not further the Sheriff's stated interests.

2. The Sheriff Relies Solely on General or Conclusory Assertions to Support His Overbroad Policy

a. "Security and Safety Concerns"

The Sheriff and Sergeant Cutright list a host of items that they consider "contraband" because of what can be concealed within or behind them. Dkt. 29 ¶¶11-15; Dkt. 30 ¶¶3, 4. But they fail to identify a single circumstance in 2009, 2010, 2011, 2012—or during any year for that matter—in which something harmful was actually concealed and sent to a prisoner at the Jail in an envelope. They do not describe a single event that led the Jail to adopt the Postcard-Only Policy, or that shows their prior methods of screening for contraband were not sufficient. Nor do they demonstrate—or even contend—that the Postcard-Only Policy has furthered their interest in reducing contraband from entering the jail.

To support his Postcard-Only Policy, the Sheriff claims that contraband "can contain bio-hazards," Dkt. 29 ¶11, contaminants "can also spread quickly," *id.*, and envelopes "can hide contraband," *id.* ¶14. But "[p]rison authorities cannot rely on general or conclusory assertions to support their policies." *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990). They must "*demonstrate*" that their 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." *Id.* (emphasis added). Conjecture is not enough. *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988).

And, federal courts have rejected blanket policies censoring mail based on generalized fear of contaminants. *See, e.g., Jones v. Brown*, 461 F.3d 353, 364 (3d Cir. 2006) ("while the health and safety of inmates and staff are legitimate penological interests, if there is no information suggesting a significant risk of an anthrax attack, there is no reasonable connection

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between those interests and the policy"). Here, the Sheriff offers no evidence of an actual, let alone significant, risk. And, any contaminants that can be placed in an envelope can be placed on a postcard, so the distinction he draws regarding contaminants is erroneous. In fact, the Sheriff's statement that "a variety of drugs . . . can be hidden under a postage stamp," Dkt. 32 ¶15, does not support his argument at all since a correspondent must put a stamp on a postcard just like a letter. And since a prisoner and his correspondents must write multiple postcards to communicate what could be written in a letter, *see e.g.* Mikhaylova Dec. ¶4, Popa Dec. ¶4, Williams Dec. ¶8, the Sheriff's policy leads to *more* stamps arriving at the Jail.

In sum, the Sheriff fails to show that a contraband problem existed or that his policy addresses such a problem, and a generalized fear of contaminants is not sufficient. PLN is likely to show that the Sheriff's policy is irrational. *See* Dkt. 15 at 16-22.

b. "Volume"

Even setting aside for the moment that an unbroken series of Ninth Circuit opinions has rejected volume of mail as a justification for governmental censorship of mail to prisoners, the Sheriff's complaint about mail volume is moribund under its own weight. Sergeant Cutright contends that the Jail receives "about fifty pieces of mail per day addressed to inmates." Dkt. 30, ¶2. Out of this tiny amount of mail, 10 to 15 pieces are legal mail," *id.*, which the Jail screens "only for contraband—not content," *see* Dkt. 32-6 at 5, so jail staff "must not read its contents," *id.*, ¶12.b. So, the Jail screens a mere 35 to 40 pieces of mail addressed to prisoners per day. Common sense and experience teaches that this is a *de minimis* amount of mail. Indeed, in *PLN v. Cook*, 238 F.3d at 1151, the Ninth Circuit rejected the Oregon DOC's argument that it would be overburdened by having to deliver 15 to 30 pieces of mail.

Here, unlike in *PLN v. Cook*, the Jail is not faced with an additional 15 to 30 pieces of mail to handle. Rather, without its Postcard-Only Policy the Jail would inspect the same 35 to 40 pieces of mail, Defendants contend, they just would be letters in lieu of postcards. This is the slimmest of reeds for justifying the wholesale censorship of an entire medium of

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communication—letters.[8]

Sheriff Dickerson declares that "Postcards are easier and quicker to inspect for contraband and prohibited content than multiple sheets of paper in an envelope because contraband is easier to detect on a postcard and there is less area to inspect." Dkt. 32, ¶16. But in making this statement, the Sheriff necessarily admits that his policy deters speech—because it is only possible for there to be "less area to inspect" on a postcard if the prisoner or his correspondent communicated less on a postcard than they would have in a letter. So, if the Sheriff's staff is saving time inspecting prisoner mail it is because his policy has been decimating the amount of speech flowing between prisoners and their correspondents. *See, e.g.,* B. Berg Dec. ¶¶4-6 (prisoner deterred); Weisenberger Dec. ¶4 (prisoner's children deterred).

If the Jail received multiple postcards in place of a multiple-page letter then the Sheriff would have compared the ease and time involved in inspecting numerous postcards—including the time spent removing stamps, and checking the names and addresses on each—with inspecting a single envelope containing "multiple sheets of paper." It is telling that he didn't make that comparison. It suggests that his policy has chilled a lot of speech.

Further, the Sheriff makes the illegitimate leap from "easier and quicker" inspections to his declared outcome: "Thus, the risk of prohibited substances entering the Jail is reduced by the use of postcards for personal mail." Dkt. 32, ¶16. Even accepting that his staff can more easily and quickly scan a postcard for contraband, it follows that the staff accomplish their job faster; but it does not follow that the risk of contraband entering the facility is reduced.

Finally, the Sheriff did not dispute PLN's argument that prior to adopting his Postcard-Only Policy his staff successfully inspected the mail nor did he dispute PLN's contention that when the Jail staff comply with Constitutional due process requirements it takes more time to censor mailed envelopes than to screen and deliver them, undercutting any potential saving in time resulting from Defendants' policies. *See* Plf's Mot. (Dkt. 15), at 18-19.

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[8] And where the policy does not deter prisoners and their correspondents, it creates *more* mail to inspect. *See e.g.* Williams Dec. ¶8 ("I have had to write six postcards to convey a message to my friends and family"); Popa Dec. ¶4 ("I usually send three postcards at once.").

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3. The Sheriff Admits That Communication Promotes Rehabilitation

The Sheriff contends that his mail policy encourages prisoner rehabilitation because it allows an inmate to "obtain permission from a sergeant to send and receive letters not on a postcard when the inmate is within thirty days of completing his or her sentence." Dkt. 29 at 17. In doing so, he concedes that communication promotes rehabilitation and that restricting prisoners' communications with the outside world to postcards, as he does, impedes rehabilitation.

4. Plaintiff is Likely to Show that the Sheriff's Outgoing Mail Policy Does Not Meet the *Martinez* Standard

Sheriff fails to acknowledge let alone meet the higher *Martinez* standard to justify censoring outgoing mail. Although he mentions that there must be a "closer fit" between a regulation that affects outgoing mail and its purpose, the Sheriff seems to contend that a "rational" connection is enough. *See* Dkt. 29 at pg. 14. But the Supreme Court has held that that more is required: a policy affecting outgoing mail must "further an *important or substantial* governmental interest unrelated to the suppression of expression" *and* "the limitation of First Amendment freedoms must be *no greater than is necessary* or essential to the protection of the particular governmental interest involved. *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974), overruled in part on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989) (emphasis added). And the high Court has recognized that "outgoing personal correspondence from prisoners. . . [does] not, by its very nature, pose a serious threat to prison order and security." *Thornburgh*, 490 U.S. at 411.

The Sheriff fails to demonstrate or even articulate an important or substantial governmental interest that he seeks to protect through his ban on all outgoing mail that is not a postcard. And he fails to demonstrate that his limitation on speech is no greater than necessary to protect the governmental interest. Instead, he bundles his justifications for restricting incoming and outgoing mail together and relies solely on general or

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conclusory assertions, without stating any basis for them. PLN is likely to show that the Sheriff's restrictions on outgoing mail are unconstitutional.

5. Postcard-Only Policy Litigation

The Sheriff misread Plaintiff's brief commenting that PLN is unaware of any jails that have implemented postcard-only policies. Dkt. 29 at 19. PLN wrote that it is unaware of any "state or federal *prison*" with such a policy, Dkt. 15 at 23 (emphasis added), and Defendants have not identified any. Instead, Defendants identified some jails with postcard-only policies challenged by pro se prisoners. When PLN or the ACLU has challenged postcard-only policies, jails have agreed to a settlement or consent decree ending their postcard-only policy entirely. *See, e.g.*, Dkt. 31-2 (Spokane County, Washington); Wing Dec. Ex. 6 at pg. 9, 17-18 (Santa Rosa County, Florida); Wing Dec. Ex. 8 (Boulder County, Colorado).

B. Alternative Avenues Are Too Costly and Burdensome for PLN and other Correspondents

As discussed in PLN's Motion, Dkt. 15 at 22-23, PLN has no practical way to reach its intended audience at the Columbia County Jail except through the mail. And notably, the resources in the Jail's library are scarce. B. Berg. Dec. ¶¶ 9, 11, 12. For many friends and families of prisoners, in-person visits and phone calls are too costly and burdensome, as is reducing their communications to postcard form. *See, e.g.*, S. Berg Dec. ¶¶6-7; Mikhaylova Dec. ¶¶4-6; Popa Dec.¶¶4-7.

C. The Postcard-Only Policy is an Exaggerated Response

The Sheriff has failed explain why his former policy, permitting letters, was insufficient to control contraband, and he failed to demonstrate that "discarding the postcard restriction would have more than a de minimis cost to the Jail." Dkt. 29 at 20. Sergeant Cutright's estimation that "approximately 30 to 60 minutes" of staff time "depending on the volume of mail," Dkt. 30 ¶4, is a de minimis saving of resources and at the substantial cost of suppressing protected speech.

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D. PLN is Likely to Show the Sheriff's Due Process Procedures Are Inadequate

The Sheriff contends that his due process procedures are "clear" and already require notice and an opportunity to be heard. But his policy—with various references to notice scattered throughout—is far from clear or adequate as evidenced by Ms. Lennox's recent experience. *See* Section I(A)(4) above.

CONCLUSION

WHEREFORE, the Court should hold that PLN has direct, organizational, and third-party standing to challenge all of the Sheriff's unconstitutional mail policies, and that the Sheriff's modifications have not rendered PLN's request for injunctive relief moot.

"It is always in the public interest to prevent the violation of a party's constitutional rights." *Summartano v. First Jud. Cir. Ct., in and for Cty. of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002). The Sheriff has not remedied his unconstitutional mail policy. Therefore, Plaintiff, prisoners, and their families, friends, and other correspondents, face irreparable harm during this litigation in the absence of preliminary relief, which should be granted.

DATED March 6, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 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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