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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

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

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STATUTES

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I. The Constitutional Controversy is Alive, Vibrant, and Very Much In Dispute.

A. Despite Claiming That He Has Abandoned His Postcard-Only Policy, the Sheriff's Vigorous Defense of its Constitutionality Shows That He is Wedded to It.

For nearly one-third of his brief, the Sheriff vigorously defends his Postcard-Only Policy as rational and constitutional. *See* Dkt. 114 at 22–34. He claims his policy was, and remains, important to protecting the security of his facility in light of the experience of other jails with dangerous contraband, and to reduce the expenses of running his own jail because of his limited staff and budget. *Id.* at 24-26. And he claims adopting postcard-only policies is "the trend" for jails. *Id.* at 33.

But, at the same time, the Sheriff testified: "I don't judge whether the Court got it wrong or not. What I consider is that the judge made a ruling and we're going to go with what the judge said. And I'm not fighting against it." *Id.* at 15.

His testimony under oath is hard to square with his extensive briefing to this Court in defense of the policy. In one breath, the Sheriff testifies that he is not disputing the findings and conclusions of the Court. In the next breath, the Sheriff contends that he is right and the Court is wrong. Both cannot be true. The truth is found in his request for relief: he has asked the Court to deny Plaintiff's summary judgment motion on the ground that PLN has made "**No Showing of Success on the Merits Because the Prior Postcard-Only Policy Was Constitutional under *Turner v. Safley***." (Bold and capitalization in original). *Id.* at 22. In other words, the Sheriff asks the Court to reverse course and hold that the Sheriff was right and that the policy he adopted was fully constitutional and in turn the Court's issuance of a preliminary injunction to the contrary was erroneous. And, despite this request, the Sheriff claims that even if the Court finds that the Sheriff's policy is constitutional he will nevertheless not resume following it. The Sheriff's positions are contradictory and undermine his credibility.

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B. The Sheriff Has Not Rendered PLN's Request for Declaratory Relief Moot.

1. The Constitutional Questions are Still in Dispute and Must Be Decided to Adjudicate Plaintiff's Claim for Damages.

As explained above, the Sheriff is an avid supporter, still, of his Postcard-Only Policy and asks the Court to find that the Policy comports with the Constitution. Evidently there is still a live controversy and the Sheriff wants it resolved in his favor. Despite this, he tells the Court that it should deny Plaintiff's request for declaratory relief as moot. It is not so.

PLN has a claim for damages that must be decided. To do so the Court must necessarily determine whether Defendants' Postcard-Only Policy, No-Magazines Policy, and Due Process Policy (or lack thereof), and enforcement of those policies unconstitutionally infringed the constitutional rights of PLN and other non-prisoner and prison correspondents alike who the Court has held PLN's challenge also represents.[1] The Court's determination will be a declaratory judgment.

With regard to their No-Magazines policy, Defendants claim that they "admitted error" in categorically rejecting magazines and so, declaratory relief regarding the ban is unnecessary. Dkt. 114 at 44. But Defendants have *not* admitted that they had a No-Magazines policy that violated the Constitution. Although the Sheriff admitted in his deposition that the Jail's rejection of some incoming magazines violated the First Amendment, throughout this lawsuit the Defendants have *denied* Plaintiff's allegation that the Jail banned magazines, and used the magazine ban to censor *Prison Legal News*, Dkt. 80 at ¶¶4.74 and 4.74.1. And in response to Plaintiff's allegation that Defendants' magazine ban was unconstitutionally overbroad and burdened the First Amendment rights of PLN, prisoners, and other correspondents, Dkt. 1 at ¶¶4.74.3, 4.74.4, Defendants stated only "Defendants admit that *some* of its past mail policies violated *some* of Plaintiff's constitutional rights," Dkt. 80 at ¶¶4.74.3, 4.74.4 (emphasis added). This is an extremely vague admission, if it can be called an admission at all. And, as discussed in Plaintiff's opening brief, Defendants failed to correct their unconstitutional policy for many

[1] Plaintiff seeks damages for the PLN mailings censored by the Jail and for the Jail's failure to provide PLN due process, as well as diversion of resources and frustration of mission damages.

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months, even after this litigation began. Dkt. 98 at 20. Thus, there *is* an actual controversy. Did Defendants have a No-Magazines policy or practice? And does such a policy or practice violate the First Amendment?

2. The Court Has Already Decided that the Sheriff's Policies Affect the Public Interest, and a Declaration Would Educate All Oregon Jails and the Public.

"The decision to grant declaratory relief 'should always be made with reference to the public interest,' …, recognizing that declarations can serve an important educational function for the public at large as well as for the parties to the lawsuit…." *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1112 (9th Cir. 1987) (citations omitted). In *Zolin*, the Ninth Circuit discussed its reversal of the denial of declaratory relief where "plaintiffs had been wronged and deserved to have their position vindicated even if damages were unavailable to compensate them." *Id.* And, there the "the district court had disregarded the public-education function that a declaration can serve." *Id.* In reversing, the Court explained "Because the searches were clearly unlawful, we ordered the district court to enter an appropriate declaration in plaintiffs' favor." *Id.* The Ninth Circuit further noted that declaratory relief can be beneficial because "It may even forestall future litigation." *Id.*

In its May 29, 2012 Order, the Court found that entering a preliminary injunction was in the public interest. Dkt. 64 at 24 ("A court order enjoining Defendants from enforcing the postcard-only mail policy will permit non-party members of the public to more easily communicate with inmates."). And, as pointed out in Plaintiff's motion, many jails in the state of Oregon are waiting to hear whether a postcard-only policy satisfies Constitutional muster. Dkt. 98 at 39-40. Defendants still vigorously defend their Postcard-Only Policy but do *not* want the Court to determine whether it violated the law. Wholly apart from PLN's strong interest in obtaining declaratory relief to have its position vindicated, the interests of the countless prisoners and other correspondents whose rights Defendants have violated, the public education value, and forestalling future litigation, are all compelling reasons to issue a declaratory judgment.

3. PLN Seeks Declaratory Judgment that is Specific and Appropriate.

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Additionally, the Sheriff contends that "PLN's request for a general declaratory statement that due process must be given when mail is rejected is inappropriate because of the fact-specific nature of a due process claim," and because that "would be too 'imprecise.'" Dkt. 114, at 45. He listed numerous issues that he believes are factors in due process analysis. *Id.* He is wrong for several reasons. First, PLN wants more than a general admonition. It wants a prescription for compliance, in accordance with the stipulated preliminary injunction that PLN sent to the Sheriff's lawyers before filing its motion for preliminary injunction. *See* Dkt. 9-4 at 4-7. Second, it is apparent from the "issues" he identifies that this Sheriff needs such a prescription to comply with the law. The salient issues are simple: *whenever* the Jail censors incoming or outgoing mail it must (1) promptly provide notice to the sender and addressee of what the Jail censored, from whom, why, and what the appeal rights are; and (2) actually afford the sender and addressee a reasonable appeal process conducted by persons who did not censor the materials. There is nothing fact-specific or especially complicated about these fundamental concepts to interfere with a clear order, and the Sheriff's portrayal of them as such raises alarm bells that he still does not understand what the Constitution requires no matter what language his lawyers have written into his mail policies.

The Sheriff argues that it would be "improper" for the Court to declare that the content of his website on January 13, 2012, and the March 23, 2010 Memorandum—which fail to identify any due process procedures—are constitutionally inadequate. Dkt. 114 at 45-46. He claims that "PLN has failed to provide any authority or otherwise demonstrate that the *omission* of due process procedures on these sources constitute a constitutional violation. It does not." *Id.* (emphasis added). But the Sheriff is wrong. First, the Sheriff communicated his mail policies to the public, prisoners, and his Jail staff via his website and the March 2010 Memorandum. *See* discussion, Dkt. 98 at 20. Second, more than 35 years ago, in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976), the United States Supreme Court declared that public officials could be held liable for deprivations of constitutional rights that they caused through their "acts *or omissions*."

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(Emphasis added). The Second Circuit cited *Estelle* in an excessive force case for this proposition, explaining: "We see no reason why an official policy cannot be inferred from the omissions of a municipality's supervisory officials, as well as from its acts." *Turpin v. Mailet*, 619 F.2d 196, 201 (2nd Cir. 1980). And the Fourth Circuit applied the *Estelle* standard to wrongful sterilization by the government: "Official policy may be established by the omissions of supervisory officials as well as from their affirmative acts." *Avery v. Burke County*, 660 F.2d 111, 114 (4th Cir. 1981) ("the conduct of the boards may be actionable if their failure to promulgate policies and regulations rose to the level of deliberate indifference…."). "It is enough that an identifiable group of people, of whom Avery is a part, is subject to constitutional deprivations through the inaction of the boards." *Id.*

For example, in *Withers v. Levine*, 615 F.2d 158 (4th Cir. 1980), the Fourth Circuit held that supervisory officials who were charged with the responsibility to make rules could be subject to liability under section 1983 if their unreasonable failure to make rules caused their employees' unconstitutional practices. This standard applies to First Amendment claims as well. *See also Rouse v. Washington State Dept. of Corr.*, C08-5620FDB, 2009 WL 1011623 (W.D. Wash. Apr. 15, 2009) ("The proper inquiry is whether the combined acts *or omissions* of state prison personnel violated plaintiffs *First Amendment rights* as outlined in the complaint.") (Emphasis added); *Arceo v. Salinas*, 2:11-CV-02396 KJN P, 2012 WL 1813523 (E.D. Cal. May 17, 2012) ("under the First Amendment, a prisoner must show that he suffered an "actual injury" as a result of the defendants' actions by explaining how the challenged official acts or omissions" caused the deprivation).

C. The Sheriff Has Failed to Prove He Has Irrevocably Eradicated His Unconstitutional Policies; Injunctive Relief is Necessary.

The Sheriff fails to meet his "heavy burden" of showing that he will never again implement his Postcard-Only Policy. The Sheriff's conduct is contrary to the hallmarks of cases where courts have found a Defendant has met its burden, which are that the Defendant repudiates its prior policies or practices acknowledging that they were illegal and takes action that presents

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a serious obstacle to returning to its old ways. 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 United States Supreme Court cautioned the lower courts in these circumstances: "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).

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*, 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."). Similarly, in a situation involving closing a public forum to speech, the Seventh Circuit concluded that a mere voluntary change in policy made after the lawsuit was filed did not satisfy the demanding mootness standard. *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 controversy.").

Court should be unmoved to find mootness by a defendant's lukewarm explanation for its cessation. In *Government of Virgin Islands*, the Third Circuit remarked that "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 into again." 363 F.3d at 284. Indeed, in rejecting mootness of a preliminary injunction appeal where the defendant stated it would stop its

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copyright infringement, the court remarked that 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 of Appeals held that "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.*

In *DeJohn v. Temple Univ.*, 537 F.3d 301, 310 (3rd Cir. 2008), a student sued Temple University claiming that its sexual harassment policy was so overbroad that it violated the First Amendment. When Temple revised its policy during litigation, the District Court nevertheless entered a permanent injunction prohibiting enforcement of Temple's old policy. The Third Circuit affirmed: "Like the timing of the contract termination and the Virgin Islands' continued defense of its contract, here Temple's timing of the policy change, as well as its continued defense of its former policy, do not meet the 'formidable' burden of demonstrating that there is no reasonable expectation that it would reimplement its former policy." *Id.* at 311.

The Sheriff cites *Smith v. University of Washington Law School*, 233 F.3d 188 (9th Cir. 2000), in support of his mootness argument but the Court held the circumstances there did not really involve voluntary cessation and the facts there reveal what is missing here to support mootness. First, the Ninth Circuit explained: "The only truly voluntary aspect is that the Law School did stop using race, ethnicity, and national origin as factors *once I-200 was passed* and the directive from the president of the University was issued." *Id.* at 1194 (emphasis added). In other words, the Court found that the Law School stopped its policy once the state legislature enacted a law prohibiting the policy for all state entities. Second, the Court remarked that "The Law School *did not wait for litigation* or internal University discipline before doing that." *Id.* (emphasis added). Both of these facts strongly distinguish this case from *Smith*, and other cases where the Courts have found voluntary cessation, as discussed below.

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1. Rather Than Taking Responsibility for Adopting a Harmful and Unconstitutional Policy, the Sheriff Defends His Postcard-Only Policy.[2]

One of the most telling red flags undermining a defendant's claim that it will not return to its old unconstitutional ways, is defense of its policy and practices as constitutional. The Sheriff shows that in spades here.

The Sheriff claims that he has accepted the Court's decision that his policy likely violated the First Amendment and that he is "moving on." *See* Dkt. 114 at 15. But his extensive briefing in support of his recent policy and behavior shows that he remains a staunch advocate of his Postcard-Only Policy. This is further illustrated by his amassing evidence from newspaper accounts and from declarations of other law enforcement officials defending their own such policies in other litigation. And the Sheriff's claimed commitment to the First Amendment is countered by his dismissive attitude towards the adverse impact that his Postcard-Only Policy has had on his prisoners and their correspondents, chilling their speech and interfering with their Constitutional rights, their communication with family and friends, and the positive effects for rehabilitation. As the Court has recognized: "Finally, and perhaps most importantly, the postcard only mail policy creates a hurdle to thoughtful and constructive written communication between an inmate and his or her unincarcerated family and friends . . . These are not insignificant considerations. The limits imposed by the IMP's postcard-only mail policy not only restrain PLN and inmates' First Amendment rights, they inhibit rehabilitation." *See* Dkt. 64 at 20-21.

The Sheriff has not "moved on" in any sense of the word. He remains a fan of his unconstitutional policy and practices that he personally adopted, implemented, and oversaw for more than two years (from March 2010 until June 2012). He has not acknowledged *any* downside or harmful impact of his policy. The sole reason his policy is not in place today is that he was compelled by the power of the United States judiciary to give it up. And he did that only

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[2] As discussed in Section C.6.(c) ("Admissions" of Liability), the Sheriff also fails to take responsibility in this lawsuit for adopting and implementing an unconstitutional No-Magazines Policy and Due Process Policy.

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after a fight; a fight to which his extensive briefing reveals he is still very much actively committed.

He (or his successor) cannot return to their old ways (his opponent in the election is an employee of his) temporarily because of the preliminary injunction. His mere word that he does not intend to return to the policy that he personally adopted and strongly favors is unreliable and cold comfort. The number of new versions of his mail policies, many of which contained mixed up, confusing, contradictory, illogical, and still unconstitutional provisions, that he has adopted since January 2012 reveal just how impermanent and unfixed his policies are. Indeed, he testified that his policies are always being reevaluated. *See* Dkt. 99-1 at 34. He probably intends that as a positive statement that he is always trying to improve them; it can just as readily mean the opposite. His history of policy-making changes did not begin this year when he was under the watchful eye of the court; instead it began two years ago, in 2010, when he adopted and ratified the unconstitutional policies and practices that harmed the Plaintiff and many others.

Moreover, the transitory nature of the Sheriff's policies, which he can and has changed at will and without anyone's approval, review, or formal process, undermines his claim that he has irrevocably eradicated his unconstitutional policies. He has the sole authority and discretion to reverse course so by definition his recent policy changes are not irrevocable. And his continued fondness for his unconstitutional policy dashes the idea that he has "eradicated" it. Indeed, it is easy to see him returning to his old policy in the event he finds a viable toehold in the future to do so, such as claiming changed circumstances (e.g., discovery of contraband) or a ruling of another district court in the Ninth Circuit.

It appears that to persuade the Court a permanent injunction is unnecessary, the Sheriff wants credit for complying with the Court's order to stop enforcement of his unconstitutional Postcard-Only Policy. *See* Dkt. 114 at 15. But unwillingness to be in contempt of court is a weak foundation to build on. Indeed, the logical conclusion to draw is that since a preliminary

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injunction was required to stop the Sheriff's illegal conduct temporarily, a permanent injunction is required to stop him permanently.

2. Defendants Have Not Shown Any Serious Obstacle to Prevent Them From Reverting to Their Old Ways.

In contrast to *Smith*, when the state legislatuire enacted a law, Columbia County has not issued any ordinance banning Postcard-Only Policies, requiring delivery of magazines, requiring due process, or regarding any other aspect of this case. Indeed, the Defendants claim that Columbia County is not involved in any way. *See* Dkt. 114. at 6. As pointed out in Plaintiff's Opening Memorandum, Dkt. 98 at 31, the Sheriff can—and has—unilaterally changed his mail policies frequently and almost overnight, and for years kept them from public view and scrutiny. In contrast, the passage of law by the state legislature usually follows public hearings, requires the political will of numerous elected officials reaching a public agreement after the public introduction of a bill in two houses, and the signature of the governor (or a legislative override), and is recorded in published volumes available to the public.

3. Defendants Halted its Magazine Ban and Began the Process of Correcting its Lack of Due Process Policies and Practices Only After Litigation Commenced.

In contrast to *Smith*, and like the Defendants in *Government of Virgin Islands* and *Sefick, see supra,* the Sheriff *did* wait for litigation before making changes to his mail policy, despite receiving numerous complaints—for nearly two years—from prisoners challenging the constitutionality of his mail policy. *See* Dkt. 98 at 29.

The Sheriff claims that PLN's request is moot because he stopped censoring PLN's mail. *See* Dkt. 114. at 18-19. He claims that the prerequisites for preliminary versus permanent injunction are different—yet he does not explain the difference or even how any difference applies here. *Id* at 19. And, again, he only stopped censoring PLN's mail in response to this lawsuit, and only stopped censoring non-postcard mail by order of the Court.

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4. The Sheriff Did Not Voluntarily Cease His Unconstitutional Postcard-Only Policy; He Ceased Only When Ordered By the Court.

To obtain a permanent injunction, the plaintiff must demonstrate "that it *has suffered* an irreparable injury." *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391 (2006). PLN has established that fact, as well as the other three elements required. In this case, where the Defendant ceased its Postcard-Only Policy only when ordered to by the Court, Defendants cannot overcome the presumption that they would violate the Constitution in the absence of a permanent injunction. *See United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987) (there is "a presumption of irreparable harm arising from failure to enforce a federal statute intended to protect the public" and "an inference arises from Odessa's past violations that future violations are likely to occur.").

"The reason that the defendant's conduct, in choosing to voluntarily cease some wrongdoing, *is unlikely to moot the need for injunctive relief* is that the defendant could simply begin the wrongful activity again...." *F.T.C. v. Affordable Media*, 179 F.3d 1228, 1238 (9th Cir. 1999) (emphasis added). Indeed, the Ninth Circuit has explained that for the very same reason, "It is *exceedingly rare*...for a defendant's voluntary termination of allegedly wrongful activity to render an appeal moot." *LGS Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1153 (9th Cir. 2006) (emphasis added). "The standard for the voluntary cessation exception to mootness is 'whether the defendant is free to return to its illegal action at any time." *Affordable Media*, 179 F.3d a 1238) (citation omitted); *Ohlinger v. Watson*, 652 F.2d 775, 780 (9th Cir. 1980) (denying claim of mootness on the ground that "The State should not be allowed 'to defeat injunctive relief by protestations of repentance and reform.'") (Citation omitted).

Here, in the absence of a permanent injunction, Defendants would be as free to return to their illegal policies and practices as when they adopted them. Their mere say so, is insufficient evidence that they will never again violate the Constitution. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (denying mootness because "the city's repeal of the

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objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.").

In *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1126 (9th Cir. 2011), like here, "The City acknowledges that it adopted the new provision in direct response to the district court's earlier issuance of a preliminary injunction against enforcement of ECCO §§ 27.2950–51 as applied to political parties." The Ninth Circuit affirmed the district court's preliminary injunction, and noted, "These concerns are of particular force in a case like the present one, in which the 'voluntary cessation' occurred only in response to the district court's judgment." *Id.* (citation omitted).

"[A] preliminary injunction is only awarded where plaintiff has shown that he is likely to receive such a permanent injunction after trial." *Rouser v. White*, 707 F. Supp. 2d 1055, 1071 (E.D. Cal. 2010). A "plaintiff's claim for injunctive relief has not become moot because defendants could resume their conduct at any time." *Id.* "Furthermore, to the extent that defendant is actually currently in compliance with the terms of plaintiff's proposed preliminary injunction, plaintiff's burden is merely to show that the voluntary cessation does not demonstrate assurance of revival of the conduct." *Rouser v. White*, 707 F. Supp. 2d 1055, 1071 (E.D. Cal. 2010) (granting preliminary injunction under PLRA to halt likely violations of prisoner's First Amendment rights caused by policies or practices).

5. Defendants Have Failed to Carry Their "Heavy Burden" of Proving That PLN, Prisoners, and Their Correspondents Will *Not* Suffer Irreparable Harm in the Absence of a Permanent Injunction.

After acknowledging that Defendants bear the "heavy burden" of proof to make it "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *see* Dkt. 114 at 18, the Defendants ignore this obligation and instead attempt, wrongly, to shift the burden of proof to PLN by citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). But *Lyons* is not a voluntary cessation case, and the Court there did not require the Defendant to meet the heavy burden that the Sheriff bears here. Further, the *Lyons* Court explained that Lyons

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would have had standing for injunctive relief if he alleged an unconstitutional policy or practice, which is exactly what PLN has alleged, and proven:

> In order to establish an actual controversy in this case, Lyons would have had not only to allege that he would have another encounter with the police but also to make the incredible assertion either, *(1) that all police officers in Los Angeles always choke any citizen* with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation or for questioning *or, (2) that the City ordered or authorized police officers to act in such manner.*

Lyons, 461 U.S. at 105-06 (emphasis added).

And, the facts illustrate this point. *Lyons* involved a single act of unconstitutional conduct that the Court held could happen again to Lyons only through a possible chance encounter with law enforcement in which they believed he violated the law. In contrast, PLN has shown that the Sheriff and his staff had a policy and a practice of repeatedly inflicting widespread harm on the public-at-large for innocent conduct, namely on PLN, on prisoners, and on the whole range of their correspondents—all of whose rights the Court has recognized an injunction would protect. And, unlike in *Lyons,* PLN and those whose interests it represents will continue to have regular contact with Defendants since PLN will continue to communicate with prisoners in the Columbia County Jail and prisoners will continue to send written communications, as will their other correspondents. As a result, whenever the Sheriff implements such unconstitutional mail policies there is a high likelihood that he will harm PLN and countless third parties.

6. The Sheriff Discounts the Irreparable Injury That He Will Cause to PLN, Prisoners, and the Public Unless the Court Enters a Permanent Injunction.

The Sheriff further reveals that he views violating the First Amendment as a mere tort without significant consequence: he relies on *Lyons* to say that when he repeatedly violated the Constitutional rights of PLN and hundreds of prisoners and their correspondents, those harms were not "great or immediate" nor did they amount to "irreparable injury" because the public can recover damages. *See* Dkt. 114 at 21-22. The United States Supreme Court and the Ninth Circuit say otherwise. *Lyons* did not involve the First Amendment, which makes all the difference. "To say that the plaintiffs will not suffer harm because they will be able to witness

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part of Leavitt's execution is like saying that the public would not suffer harm were it allowed to read only a portion of the *New York Times*. The [] rationale ignores the rule that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Associated Press v. Otter*, 682 F.3d 821, 825-26 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

Indeed, this undermines Defendants' position that Plaintiff fails to show irreparable harm because "PLN is no longer subject to a threat of constitutional injury" and the likelihood of injury is "speculative" because Defendants' "policies and practices have been eliminated and abandoned." Dkt. 114 at 21. Defendants only halted their Postcard-Only Policy when ordered to do so by the Court. *Id.* at 8. In the Court's order granting Plaintiff's motion for preliminary injunction, it found that "PLN has established that IMP's postcard-only mail policy causes irreparable harm." Dkt. 64 at 23. It is now Defendants' burden to show that they have irrevocably eradicated their unconstitutional behavior, *see* Dkt. 98 at 27-28, which they have not shown here. In fact, as discussed below, Defendants spend 11 pages of their opposition brief trying to justify their Postcard-Only Policy and show that it is constitutional—which clearly reveals that Defendants would still be censoring mail that is not a postcard if the Court had not ordered them to stop.

7. In Its Opening Brief, Plaintiff Showed Success on the Merits; Defendants' Response Fails Show Otherwise.

The Court has already determined that Plaintiff "is likely to succeed on the merits with respect to its free speech claim. " Dkt. 64 at 22. In its opening brief and supporting materials, Plaintiff has now shown actual success on the merits of its First Amendment and Fourteenth Amendment claims. *See* Dkt. 98. And, as shown below, the argument and evidence submitted to the Court with Defendants' opposition brief add nothing to what they presented to the Court in opposition to Plaintiff's motion for preliminary injunction. Therefore, the Court should enter a permanent injunction.

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a. Unpublished District Court Decisions in Cases Where the Plaintiff Presented No Evidence or Argument Are Not Binding or Persuasive.

In support of his Postcard-Only Policy, the Sheriff relies on an unpublished magistrate's opinion rejecting a *pro se* prisoner's challenge to a jail postcard-only policy in Georgia. *See* Dkt. 114 at 20 (citing *Daniels v. Harris*, 3:11-CV-45 CAR, 2012 WL 3901646 (M.D. Ga. Aug. 8, 2012) *report and recommendation adopted*, 3:11-CV-45 CAR, 2012 WL 3901644 (M.D. Ga. Sept. 7, 2012). Prisoners are even more ill-equipped than the average free person to proceed *pro se*, and they face huge obstacles to challenging such policies while incarcerated. So it is unsurprising that the *pro se* prisoner in *Daniels* did not file any opposition to summary judgment. *Id.* at *2 ("Because Plaintiff has failed to file any response in opposition to Defendants' Motion for Summary Judgment, *the Court accepts as accurate and relies upon the assertions contained within the Defendants' evidence* submitted in support of their motion."). The complete absence of evidence and argument challenging the policy at issue renders the magistrate's unpublished opinion of little persuasive value. *See id.* at *6 ("Because Plaintiff has not presented any evidence to show that the postcard policy was an exaggerated response to legitimate concerns… Plaintiff has failed to establish that the WCJ's postcard-only mail policy violates his constitutional rights, and Plaintiff is not entitled to injunctive relief.").

Defendants also supply a magistrate's unpublished opinion, not found on Westlaw, and with nearly identical circumstances as *Daniels*. *See* Dkt. 114 at 25 (citing *Martinez v. May*, No. 2:11-cv-14039 (S.D. Fla. Apr. 25, 2012). In *May*, the court rejected *pro se* prisoners' challenge to an *outgoing* postcard-only policy. *See* Dkt. 115-13. One prisoner failed to prosecute the case at all and that the other two prisoners who continued to do so had been transferred from the jail and offered no evidence whatsoever to defend against the jail's summary judgment motion. The court's analysis in the face of no evidence submitted by the prisoners was short, generic, and essentially nothing more than accepting unrebutted claimed fears and representations of the jail officials. Here, the Court has been presented with ample evidence that

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Defendants' policy is irrational. The opinions in *Daniels* and *May* on an uncontested summary judgment record are simply not useful to the Court's analysis here.[3]

b. Defendants After-The-Fact Justifications for Their Postcard-Only Policy are Unsupported and Unpersuasive.

First, Defendants try to distinguish their own irrational policies from those that the Ninth Circuit has found unconstitutional by claiming the Sheriff's Postcard-Only Policy was "based on the fact that friends and family of inmates are more likely to pass contraband through the mail, and inmates are more likely to make threats or prohibited requests to people they know via the mail." *See* Dkt. 114 at 27. But that would have been a justification for treating mail to and from businesses differently than mail to and from friends and family, *not* for adopting the Sheriff's Postcard-Only Policy to both businesses and personal correspondents, which is what Defendants did. The Sheriff's policy that PLN challenged in January 2012 (the October 21, 2011 revision), Dkt. 91-11, made no distinction between business and personal mail. The January and February versions likewise defined "Personal Mail" as "postcards mailed to or from family, friends, organizations, *businesses*, or other unofficial entities." Dkts. 32-5 at 2, and 32-6 at 2 (emphasis added). Yet despite this explicit definition, in his brief the Sheriff now claims that "The intent of the February IMP was to apply the postcard restriction to inmate mail to and from inmates and their friends and family." *See* Dkt. 114 at 29.

Three months later, after oral argument revealed a multitude of deficiencies in his policy, including this one, the Sheriff claims he finally "clarified" the word "businesses" out of his Postcard-Only Policy. *Id.* In doing so, the Sheriff implies that he had not intended his policy to restrict to postcard correspondence to or from businesses, like PLN. But he never says this. And

[3] The Court in *Gieck v. Arpaio*, CV07-1143-PHX-NVW, 2008 WL 2604919, * 8 (D. Ariz. June 23, 2008) explained the futility of relying on such opinions, pro se or otherwise: "Plaintiff has brought his counsel a case without facts, with no proof that the jails' mail policy hurt him in any specific way. This challenge to the legality of the mail policy on its face alone fails. Judgment must be entered against Plaintiff, but it is stillborn precedent for the Defendant. A real case with real facts or a different challenge of the context and justification of the mail policy, with supporting evidence, would demand a fresh look. "

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this would be contrary to the plain wording of the definition he wrote after being sued by PLN and in the face of PLN's Motion for Preliminary Injunction. The Sheriff cannot create a question of fact by implying now that he meant the opposite of what he wrote in his policy. And further, the definition he wrote for "Personal Mail" in his May 25, 2012 version simply muddied the issue by defining that phrase to include "personal business" mail, which covered subscription renewal notices, letters, and other correspondence to and from businesses such as PLN. *See* Dkt. 92. Such "clarity" did not alleviate the Sheriff's policy violations of PLN's constitutional rights.

Second, in support of his opposition to PLN's preliminary injunction motion, the Sheriff submitted only provocative statements from Sergeant Cutright that various kinds of contraband could theoretically be enclosed in envelopes and that it takes more time to inspect an envelope than a postcard. He offered no evidence of a contraband problem and only vague estimations of time-savings. He has not done any better now, even after the Court found his prior submission insufficient to show a rationale relationship to a legitimate governmental interest. In fact, the Sheriff has offered no new evidence of a contraband problem and the evidence of alleged cost savings is worse for him than before.

In support of his opposition brief, the Sheriff offered testimony of now laid-off Sergeant Cutright and former Sergeant—now part time Deputy—Rigdon that it takes "a little longer" to inspect a letter as compared to a postcard. *See* Dkt. 114 at 28. Deputy Rigdon actually testified that the difference is a matter of seconds. *See* Dkt. 100-4 at 3.

The poor quality of the evidence purporting to support Defendants' position is seen in their own words. On page 27 of their brief, they write: "Bryan Cutright's testimony remains the most reliable statement on the time-savings gained by adopting the postcard-only policy in 2010." *See* Dkt. 114 at 27. Yet, on the very same page, they write: "Mr. Cutright did not accurately state the number of pieces of paper indigent inmates received." *Id.* at 27 n. 7.

Defendants also claim that PLN misrepresented his testimony about comparing the time it takes to process a four-page letter with one postcard. Dkt. 114 at 27. But PLN simply quoted his

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testimony, accurately, so Defendants' objection has no basis whatsoever. *Compare* Dkt. 98 at 12 with Dkt. 99-2 at 15.

In other words, the evidence to support the Sheriff's justifications for adopting and maintaining his Postcard-Only Policy deteriorated under the scrutiny and challenge of discovery. The evidentiary record in favor of the Sheriff's policy is substantially weaker now than the record on which the Court issued its preliminary injunction finding that the policy likely violated the First Amendment. For this reason, the Court need not re-analyze the same evidence to reach the same conclusion, this time finding actual rather than likely violations.

c. Defendants Fail to Show Any Material Facts Are in Dispute

Throughout their brief, Defendants make a number of incorrect or unsupported assertions about Plaintiff's claims and the "facts" in this case. They include, but are not limited to:

Ms. Lennox's Mailings. Defendants claim that PLN's Complaint did not allege that they violated the First Amendment by censoring Ms. Lennox's "internet-generated" mailings. Dkt. 114 at 24. But that's not true. Under the heading "Ban on Speech that is Not a Postcard," PLN's Complaint states: "Defendants have used their Postcard-Only Mail Policy to censor correspondence from other… individuals. For example, Defendants rejected numerous PLN articles that Lucy Lennox printed from the PLN website and mailed to certain prisoners at the Columbia County Jail." Dkt. 1, ¶ 4.73.4.

Alternative Avenues. Without offering any evidence whatsoever, Defendants claim that "All of the family members were able to exercise the available alternative means of communications." Dkt. 114, at 31. Defendants' bald assertion cannot be credited on summary judgment, and in fact is contradicted by the evidence Plaintiff has submitted on the obstacles and difficulties that family and friends faced. *See* Dkts. 38-40, 53. Defendants have presented no evidence to inform the Court or rebut the Court's conclusion that the "postcard-only mail policy drastically restricts an inmate's ability to communicate with the outside world." Dkt. 64 at 20.

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Impact on Resources. Defendants claim that the Court should consider the impact on the Jail's resources, including the "real" "security risks inherent in envelope mail" and "the resulting impact on a small county jail when a postcard restriction on personal mail significantly reduces the chance that security disruptions occur." Dkt. 114, at 32-33. But in its Order granting the preliminary injunction, the Court concluded that "accommodating letters and periodicals is unlikely to have a 'significant ripple effect' on inmates and staff" and "the time savings afforded to the Jail by the postcard-only mail policy is modest, at best." Dkt. 64 at 21-22. And on summary judgment Defendants offer *no* new information for the Court to consider. They present no evidence of any specific financial, personnel, or other burdens the Jail allegedly faced or will face if it is permanently enjoined from going back to it its old ways.

Easy and Obvious Alternatives. In its opening brief, PLN pointed out that instead of adopting his Postcard-Only Policy, the Sheriff should have switched mail processing from the busy daytime shift to the graveyard shift. Dkt. 98 at 18. Defendants retort that they did so. Dkt. 114, at 33 ("The evidence shows this is exactly what the Sheriff's Office did.") But they did so nearly two years *after* adopting their challenged policy because of reduced staff, *id.*, not when they were considering whether to adopt a postcard-only policy or instead whether to change their mail processing in some other alternative way, if needed. This just shows that there was an easy alternative that was available to improve mail handling efficiency back in 2010. Defendants also claim that they investigated how contraband enters the facility and how to conduct the mail processing more efficiently, *id.*, but cite to no evidence in support of that proposition so it must be discarded.

"Admissions" of Liability. Defendants contend again and again that their "admissions" of liability, *see, e.g.*, Dkt. 114 at 10, 18, 21, 34, 44, make "absolutely clear" that their conduct will not be repeated in the future, *id.* at 18. But other than the Sheriff admitting in his deposition that the Jail's censorship of some specific pieces of mail violated the Constitution, Defendants have not made *any* clear admissions of liability. Instead, their Answer stated only that

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"Defendants admit that some of its past mail policies violated some of Plaintiff's constitutional rights." Dkt. 25 ¶¶ 1.1, 4.74.3-4.74.4, 5.2, 5.6. Even in their Amended Answer, Dkt. 80, filed on July 30, 2012, near the end of discovery, Defendants still repeated only the same vague "admission." They failed to specify which mail policy provisions, and which versions of those policies, violated Plaintiff's constitutional rights, and which violations were caused by these unconstitutional policies. And to date, Defendants have not admitted that any of their mail policies violated the rights of prisoners or other correspondents.

Before filing this motion, Plaintiff communicated and conferred with Defendants at length for months seeking clarity on which facts and issues were in dispute and needed to be resolved by the Court. *See* Wing Reply Dec. ¶¶2-5. Plaintiff asked Defendants to stipulate to the undisputed facts and to admit that their Postcard-Only, No-Magazines, and Due Process policies violated the Constitution. *Id.* Plaintiff provided a draft stipulation and asked Defendants to sign it, suggest changes, propose their own. But Defendants declined to do so and Plaintiff was forced to file this motion addressing all facts and legal issues. *Id.*

"Swiftness" of Response. Defendants contend that they "took immediate action," "moved swiftly," and "quickly rectified" their unconstitutional mail policies as soon as they learned of them, and "conformed [their] policy and practices to the First and Fourteenth Amendments in January, 2012." *See* Dkt. 114 at 8, 10, 41. But the undisputed facts set forth in Plaintiff's opening brief show otherwise. *See* Dkt. 98 at 28-29, 33-35. Indeed, in its Preliminary Injunction Order, the Court identified numerous problems with Defendants revised policies. *See, E.g.,* Dkt. 64 at 31.

Indigent Mail. Defendants claim they "agree that switching from two pieces of paper per week to two half-sized postcards reduced the amount of writing space available to an inmate by *one-fourth*" *See* Dkt. 114 at 28 (emphasis added). But they don't agree with PLN, because two postcards affords *only* one-fourth the writing space of two pieces of paper since prisoners were prohibited from writing content anywhere on the side of the postcard for writing the addressee's

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contact information and where there was a photograph of Oregon's first sheriff. And Defendants assert there was no limit to the number of postcards a prisoner could write. *Id.* But this ignores the obstacle faced by indigent prisoners who could not afford to buy postcards or by other prisoners or correspondents who could not afford to pay the postage to send multiple postcards.[4]

PLN's Mail Has Been Censored. The Sheriff also contends that none of PLN's mail has been censored since before the lawsuit was filed, *see* Dkt. 114 at 6, yet he admits that under his brand new policy "PLN correctly notes that an article printed from PLN's website and mailed to inmates by Lucy Lennox in February, 2012 was rejected by the Jail on the basis that it was not in postcard form," *id.* at 29. That was PLN's mail. The news articles were printed from PLN's website and PLN had asked Ms. Lennox to send the 11 mailings. *See* Dkt. 63-1. The Complaint does not list these particular mailings because the Sheriff censored them in February, *after* PLN filed its lawsuit[5] during the same time period as other evidence before the Court that is relevant to whether an injunction is necessary.

The Sheriff cites testimony of his Undersheriff that the most recent iteration of his mail policy would allow internet-generated mail like Ms. Lennox's mailings, but in the next breath states that "the mail was properly rejected because the postcard restriction is constitutional." *See* Dkt. 114 at 29. His conclusion is directly contrary to the Ninth Circuit's opinion in *Clement* v. *California Dept.of Corr.*, 364 F.3d 1148 (9th Cir. 2004), which held that prisons cannot censor

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[4] Defendants assert that prisoners do not have a constitutional right to free postage, Dkt. 114 at 28, but there are circuit opinions to the contrary, *see, e.g., Jones v. Wittenberg*, 330 F. Supp. 707, 719 (N.D. Ohio 1971) ("Indigent prisoners shall be furnished at public expense writing materials and ordinary postage for their personal use in dispatching a maximum of five (5) letters per week."), *aff'd sub nom.*, *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972). More importantly, Defendants' position that they need not afford indigent prisoners free postage undermines their claim that their Postcard-Only Policy has no adverse impact since through that policy they denied indigent prisoners postage to mail more than two postcards, thereby dramatically undercutting PLN's ability to receive communications from those prisoners and prisoners' ability to communicate with the rest of their correspondents in the outside world.

[5] The Sheriff incorrectly suggests that PLN's Complaint does not allege First Amendment violations for his censorship of mailings sent by Ms. Lennox. *See* Dkt.114 at 24.

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materials on the ground that they are generated from the internet. As PLN has explained, the Sheriff cannot evade *Clement* through adoption of another irrational policy that subsumed nearly all internet-generated materials. The Sheriff has made no promise that in the absence of an injunction he will not return to censoring such materials. Indeed, in his opposition brief to PLN's motion for preliminary injunction, he claimed that such materials violated the so-called Publisher's Only Rule. *See* Dkt. 29 at 18. Accordingly, his latest explanation that his policy allows such materials is nothing more than a convenient re-interpretation adopted after the Court entered its preliminary injunction. The ease with which the Sheriff adopts new policies and "clarifies" or re-interprets what they mean should give the Court pause.

In their opposition brief, Defendants have failed to rebut many other arguments set forth in Plaintiff's opening Memorandum (Dkt. 98), or to articulate any genuine facts of material dispute. Despite the temptation, Plaintiff has avoided repeating those same arguments here to show that Plaintiff prevails as a matter of law and the material facts are undisputed.

In sum, Defendants claim there are disputed material facts, *see* Dkt. 114 at 20, but there is no section of their brief supporting this contention and they fail to identify any such disputes.

d. Defendants' Reliance on Hearsay, Irrelevant Evidence about Jails in Another State, and Witnesses and Evidence That They Failed to Disclose in Discovery Should Not be Considered.

In response to Plaintiff's motion for summary judgment, Defendants filed: declarations and materials from a California case regarding alleged contraband issues that occurred long ago at another jail, an Oregon Live online news article about alleged contraband sent by a prisoner at the Multnomah County Jail; and documents from the Washington County Jail that Defendants failed to produce in discovery. For the reasons stated Plaintiff's motion to strike (Section H, below), this evidence should be stricken and not considered by the Court.

D. The PLRA Does Not Apply

Defendants claim that any injunction entered by the Court is subject to the PLRA. Dkt. 114 at 20. They are mistaken. For this proposition, they cite to *Gilmore v. People of the State of*

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California, 220 F.3d 987, 992 (9th Cir. 2000). But *Gilmore* involved a collection of suits brought by prisoners about their conditions of confinement and contains a footnote citing part of the Congressional Record that is contrary to Defendants' position: "[The PLRA] amends 18 U.S.C. §3626 to require that prison conditions remedies do not go beyond the measures necessary to remedy federal rights violations and that public safety and criminal justice needs are given appropriate weight in framing such remedies. Specifically, the section places limits on the type of prospective relief *available to inmate litigants*." *Id.* at 997, n. 11 (emphasis added). Defendants cite to no cases that hold the PLRA applies to lawsuits, like this one, that are brought by non-prisoners to vindicate their own rights.

Indeed, applying the PLRA as Defendants urge would improperly extend a limitation intended for prisoners to curtail the Constitutional rights of all entities, organizations, and people who are not incarcerated. That is not the law or what Congress intended. A recent opinion of the U.S. Supreme Court supports this analysis. Last year, Justice Ginsburg wrote, "More generally, in the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321–66, Congress has placed a series of *controls on prisoner suits*, constraints designed to prevent sportive filings in federal court." *Skinner v Switzer*, 131 U.S. 1289, 1299 (2011) (emphasis added).

The PLRA simply does not apply to lawsuits brought by non-prisoners, like PLN. *Alabama Disabilities Advocacy Program v. Wood*, 584 F. Supp. 2d 1314, 1316 (M.D. Ala. 2008). In *Alabama Disabilities Advocacy Program*, a nonprofit organization sought access to youth confined in Alabama detention facilities. The court held, "ADAP [a nonprofit] seeks to enforce its own right of access under federal law and brings no claim concerning the conditions at DYS [state agency] or the lives of persons confined there. Therefore, the prospective-relief provisions of the PLRA do not apply." The Court also explained that, "*The provisions respecting prisoner suits also do not apply* because ADAP is clearly not a 'prisoner' under the statute." *Id.* (Emphasis added).

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Here, PLN—a non-prisoner—is the only Plaintiff. PLN's challenge to vindicate its own rights will hopefully inure to the benefit of prisoners as well as to countless non-prisoner correspondents (family, friends, publishers, etc.) alike. But the benefits conferred to some non-parties do not transform the character of the lawsuit from an action by a publisher with broad standing under the First Amendment to challenge a blanket censorship ban into a prisoner lawsuit about conditions of confinement. More than fifteen years has elapsed since the PLRA was enacted yet Defendants offer no precedent or analysis to suggest that the law applies to a lawsuit filed by a non-prisoner. Defendants neither pled the PLRA in their Amended Answer[6] nor raised this argument in opposition to Plaintiff's motion for preliminary injunction. The Court should evaluate whether to extend the existing injunction by the same standards under which it was granted, which were the proper standards.

PLN's position is further supported by the other permanent injunctions obtained by PLN against prisons for mail censorship that have been issued by Federal District Courts and those affirmed by the Ninth Circuit, none which applied the PLRA. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005), *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001); *PLN v. Cook*, Case No. 98-cv-1344 (D. Or. 1998) *Prison Legal News v. Lehman*, 272 F. Supp. 2d 1151 (W.D. Wa. 2003) aff'd, 397 F.3d 692 (9th Cir. 2005); *Prison Legal News v. Chelan County*, No. CV-11-337-EFS (E.D. Wa. filed September 9, 2011), Dkt. 44-1 at 46-54, *PLN v. Spokane County*, Case No. 2:11-cv-00029 (E.D. Wa. 2011), Dkt. 31-2, *PLN v. Sacramento*, 2:11-cv-00907 (E.D. Cal. 2011); and *PLN v. Schwarzenegger*, Case No. 4:07-cv-02058 (N.D. Cal. 2007).

Moreover, in addressing a different provision of the PLRA, the Ninth Circuit has rejected application of the PLRA to PLN's attorney fees. *See Prison Legal News v. Schwarzenegger*, 608

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[6] It appears that Defendants' argument may be an affirmative defense, that should have been raised in the Answer. *C.f. Jones v. Bock*, 549 U.S. 199, 216 (2007) ("failure to exhaust is an affirmative defense under the PLRA…").

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F.3d 446, 454 (9th Cir. 2010) (holding that on a First Amendment "§ 1983 suit by a plaintiff who is not a prisoner…the PLRA's limits do not apply.").

If Congress had intended to restrict the Federal Judiciary's ability to order equitable relief to free persons and entities who regularly interact with prison officials, like publishers as well as vendors of food, clothing, and other goods and services intended for consumption by prisoners, the legislation would have clearly provided for the same. It did not do so and all indications are that it did not intend to do so. The Defendants have not provided any support to the contrary. PLN's Complaint that the Defendants have repeatedly violated its rights would not reasonably be described as a proceeding with respect to "the effects of actions by government officials on the lives of persons confined in prison." The Court should not accept Defendants' barebones invitation to so reframe PLN's lawsuit.

E. PLN Has Organizational Standing.[7]

Defendants' entire argument against finding that PLN has organizational standing is confined to a single sentence that claims PLN has not shown that it has been harmed since May 2012. *See* Dkt. 114 at 17. Since PLN's lawsuit covers censorship and denial of due process going back more than two years to 2010, Defendants' position amounts to a concession that PLN in fact has organizational standing for the full breadth of its claims. And events occurring in recent months are irrelevant because "[s]tanding is determined by the facts that exist at the time the complaint is filed." *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001)(citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 569 n. 4 (1992)).

F. Sheriff Has Admitted Disposing of Evidence in Violation of His Established Legal Obligations.

The Sheriff admits that he discarded "an edited version" of his January 2012 mail policy adopted in response to PLN's lawsuit on the grounds that he normally does not keep drafts of

[7] Plaintiff's claim for diversion of resources damages and frustration of mission damages is contingent on the Court finding that Plaintiff has organizational standing.

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policies. Dkt. 114 at 42. This draft, which he says was edited by his staff and by a lawyer of another county, was highly relevant and discoverable.

Promptly after learning that litigation has been initiated, lawyers have an obligation to inform their client to place a litigation hold on all potential evidence, and in turn the client is required to take reasonable steps to preserve all potential evidence, which includes ceasing normal or routine practices of discarding documents.

"The obligation to preserve evidence arises when [a] party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *accord Fujitsu Ltd. v. Fed. Exp. Corp.,* 247 F.3d 423, 436 (2d Cir. 2001). "The duty to preserve attaches at the time that litigation is reasonably anticipated." *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 289 (S.D.N.Y. 2009) (citing *Zubulake*, 220 F.R.D. at 216). "[T]his commonly occurs at the time a complaint is filed," but can be earlier than that. *McClendon*, 262 F.R.D. at 289.

"When the duty to preserve attaches, a litigant 'must suspend [her] routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. '" *Id.* (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 430 (S.D.N.Y. 2004). "This step, however, is only the beginning of a party's discovery obligations" since "Once a 'litigation hold' is in place, a party and her counsel must make certain that all sources of potentially relevant information are identified and placed 'on hold' ...." *McClendon*, 262 F.R.D. at 289 (quoting *Zubulake,* 229 F.R.D. 422).

Here, the Sheriff blows past his legal responsibilities to retain evidence and then unapologetically chalks it up to following his claimed routine practice, without any seeming recognition that he violated the law. Dkt. 114 at 42. Likewise, Defense counsel is silent on what, if any, litigation hold instructions they gave to Defendants, or when. *Id.*

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Since the Sheriff destroyed the documents it is impossible for Plaintiff to assess what relevant evidence they may have revealed. The lack of seriousness with which he took his obligation then and his attitude towards it now just reinforces the theme that he is not much concerned with following the rules or holding himself accountable.

G. Columbia County is Liable.

"A county is a 'person' subject to liability under § 1983 if its official policies cause the constitutional violation at issue." *Biberdorf v. Oregon*, 243 F. Supp. 2d 1145, 1154 (D. Or. 2002) (citing *Brewster v. Shasta County,* 275 F.3d 803, 805 (9th Cir. 2002) (citation omitted)). Likewise, a county may be held liable for the conduct of its Sheriff, which is an officer of the county. *See* ORS 204.005(1); *see, e.g.*, *Keller v. Washington County*, CIV.06 692 ST, 2007 WL 1170634, * 17 (D. Or. Apr. 10, 2007) ("Washington County is a public body (ORS 30.260(4)(b)), the Sheriff is an officer of the county (ORS 204.005(1)), and Miller is an employee of the Sheriff. Therefore, the OTCA applies to Keller's false imprisonment and negligence claims against Washington County.")

Defendants claim that the Sheriff is not an agent of Columbia County so his behavior cannot lead to liability for Columbia County. *See* Dkt. 114 at 15. For this point, they cite to Oregon law stating that he is an elected official and has the power to hire and fire employees. *Id.* And they cite to conclusory statements by the Sheriff. *Id.* But this establishes nothing. Defendants do not cite to any precedent supporting their assertion, let alone that sets forth the standards or proper analysis.

The Governor of Oregon is an elected official and he has the power to hire and fire and is subject to the spending power of the Oregon legislature, but he is an agent of the State. And, the President of the United States is an elected official with the power to hire and fire and is subject to the budgets enacted by Congress, yet he is likewise an agent of the Federal government. So, on what line of authority do Defendants claim the slim facts that they offer render the Sheriff *not*

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an agent of the County for which he serves as an executive with policy-making authority over the Columbia County Jail? Defendants do not bother to explain.

In *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Supreme Court explained that municipal liability (including counties) flows from the actions of the local government's policy-maker on the issue:

> Authority to make municipal policy may be granted directly by a legislative enactment or may be delegated by an official who possesses such authority, and of course, *whether an official had final policymaking authority is a question of state law*. However, like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances. *To hold a municipality liable for actions ordered by such officers exercising their policymaking authority is no more an application of the theory of respondeat superior than was holding the municipalities liable for the decisions of the City Councils* in *Owen* and *Newport.*

Id. at 483 (Emphasis added). In *Pembaur*, the Supreme Court held that "In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county, and the county may therefore be held liable under § 1983." *Id.* at 485.

A sheriff does not act for himself; he is either an agent of his local government or of the state. *See, e.g., Brewster v. Shasta County*, 275 F.3d 803, 806 (9th Cir. 2001) ("The question in *Streit* was whether a California sheriff, in administering the county's policy for release from county jails, acted for the county or the state). As explained above, under Oregon law the Sheriff is a "county" officer and Oregon law provides that the county he works for establishes his wages. *See* ORS 204.116(1) ("the governing body of each county shall fix the compensation of its own members and of every other county officer…."). The Sheriff's discovery responses show that Columbia County pays his wages. Exhibit A to Reply Declaration of Jesse Wing.

The unconstitutional conduct at issue occurred at the *Columbia County* Jail, which is paid for by *Columbia County* taxpayers with funds allocated by *the Columbia County* Board of Commissioners. *See* Dkt. 114 at 15. State law provides for the election of a Sheriff *of Columbia*

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County, who is paid by *Columbia County*, to arrest and detain persons on behalf of *Columbia County* in its Jail. The Sheriff is the policy-maker—not for his jail—but for the Jail of *Columbia County*. He is plainly a County agent for the purposes of liability of the County for his unconstitutional policies and practices. Defendants have not shown otherwise.

H. Motion to Strike

PLN moves to strike the following submissions by Defendants as violative of FRCP 56.[8]

1. Declarations and Materials Submitted in a California State Case are Hearsay and Irrelevant, and Defendants Did Not Disclose These Witnesses or Documents in Discovery.

Conceding that Columbia County has no contraband problem and that the Sheriff's time savings are exceedingly meager, the Sheriff has apparently gone in search of contraband problems elsewhere. He found them asserted in declarations submitted in litigation in California by law enforcement officials in defense of their own policies. Defendants improperly submitted their declarations here as Dkt. 115-12, and they should be stricken in their entirety.

First, by submitting declarations from witnesses who Defendants never disclosed in discovery, the Sheriff violated the discovery rules. Defendants never identified these witnesses as lay witnesses in their Initial Disclosures or at any other point in discovery. Wing Reply Declaration, ¶ 6. And Defendants did not offer these witnesses as experts presenting testimony about this litigation, provide qualifications or argument that they are experts, answer discovery requested by Plaintiff about expert witnesses, or comply with any of the requirements of Rule 26 mandatory disclosures about experts. *Id.*

Second, the declarations are not probative of any facts at issue before the court, and not admissible as required by FRCP 56(c)(2). Sergeant David's declaration merely authenticates **a jail policy that Defendants did not attach**, and which is irrelevant here. *See* Dkt. 115-12 at 3-

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[8] Pursuant to CR 7-1 Plaintiff's counsel attempted to confer with Defense counsel to resolve this dispute before filing this motion to strike. *See* Wing Reply Dec., ¶9.

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4. The declaration of Tracy Martinez, an administrative assistant, claims that **over twenty years ago** he saw some narcotics in incoming mail under postage stamps, saw "suspicious blank paper," and that paperclips and staples can be made into keys or weapons. *Id.* at 5-6. Hearsay testimony about events that occurred twenty years ago in California is useless. And, as Plaintiff has pointed out, more postage stamps are needed to mail several postcards than a single letter so the Postcard-Only Policy *increased* the risk of such contraband. Moreover, the Sheriff has given up removing postage stamps, *see* Dkt. 99-3 at 12 and Dkt. 114 at 12, and the Inmate Manual that he issues to prisoners contains staples, *see* Dkt. 99-3 at 8, so the Sheriff has ignored the alleged import of the testimony he offers to the Court.

Similarly, the declaration of Jerry Hernandez describes some contraband that he claims to have seen **26 years ago**. Dkt. 115-12 at 7-9. Yet, the only weapon he describes finding was hidden in the body of a postcard. How this helps Defendants is a mystery.[9] *Id.* Then Defendants offer a six-page declaration in which the declarant's name and signature have been completely redacted, as have large portions of the testimony. *Id.* at 10-15. Unsworn declarations violate Rule 56 and it is impossible to assess the legitimacy of statements of an unknown witness. Indeed, there is no reason to think that even Defendants know who this witness is. The witness claims to have been taught how to hide contraband in envelopes but then reveals that jail staff can easily uncover the contraband by tearing a corner of the envelope. That is an easy and available alternative to censoring all letters.

The declaration of Aaron Wilkinson, which is also redacted, states that he found contraband in envelopes—not when inspecting them upon arrival through the mail—but instead upon finding them in a prisoner's cell. *Id.* at 16-18. This raises the obvious question of whether the contraband was transported by envelope or just hidden there once inside the cell, and

[9] Defendants' reliance on the experiences of jail staff in another state, from long ago, just to make the point that prisoners sometimes try to smuggle contraband is akin to offering as evidence a DVD of the movie the *Shawshank Redemption*. Contraband can conceivably be smuggled into a jail, but that possibility alone does not justify infringing the Constitutional rights of prisoners and their correspondents, or make Defendants' restrictive mail policy rational.

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Wilkinson's declaration draws from this that jails should not allow prisoners to send "sealed" mail *from* within the jail to another prisoner within the jail. This has nothing to do with the policies at issue before the Court. The last declaration, of Jeffrey Held, is from a lawyer who testifies that he personally looked up the word "letter" in several dictionaries and believes the definitions do not include transport via envelope. *Id.* at 19-22. How this is useful to Defendants is unclear. Finally, he reports a third-hand account that the Attorney General of California has found narcotics in prisoner mail. Such irrelevant and double hearsay cannot be permitted here.

These declarants are not occurrence or percipient witnesses—their declarations do not describe any policies, censorship, or anything else about the Columbia County Jail, PLN, or the facts of this case. Their statements all relate to unspecified events that occurred in another state under unknown conditions, many of them extremely stale. And, except for the most generic proposition that correspondents sometimes try to send contraband to prisoners via the mail—which is not in dispute—none of the declarations are probative of the issues before this Court.

In sum, under FRCP 56(c)(2), PLN moves to strike these documents (Dkt. 115-12 in its entirety) and all argument about these documents, on grounds of hearsay, FRE 802, that the events described therein are stale and irrelevant, that unknown content has been redacted that could cast doubt on that which remains, that one declaration is missing a name and signature in violation of FRCP 56(c)(4), that one declaration is mere lawyer argument, FRE 602, and because Defendants failed to identify these witnesses or their knowledge until well after the discovery deadline in violation of the discovery rules, FRCP 26(a). *See* Wing Reply Dec. ¶ 6.

2. The *Oregon Live News* Article is Hearsay, and There is No Showing the Author Has Personal Knowledge.

Again, in an effort to find contraband problems elsewhere that have not been found at Columbia County, the Sheriff offers a newspaper article stating that a prisoner housed in Multnomah County was under investigation for mailing six letters containing white powder. Dkt. 115-11. To begin with, the news article is double hearsay so the Court should strike it. The Sheriff offers the article as evidence of the truth of the matter reported in the article but it fails to

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meet any hearsay exception. *See* FRE 802, FRCP 56(c)(2). Moreover, Defendants fail to explain that this article states that substance was not in fact toxic. Defendants point out that the Multnomah County Jail "does not limit any inmate mail to postcards," *see* Dkt. 114 at 26, but one purported recipient of the letter was a prosecutor at the courthouse and even Columbia County did not prohibit prisoners from sending a letter to such public officials, *see* Dkt. 91-11 at 2.

And Defendants fail to explain why Multnomah could not have easily prevented the prisoner's hoax by inspecting his mail as the jail officials are authorized to do. Instead, Defendants focus on the ability of a prisoner to create harmless white powder and mail it in an envelope as a hoax. But that kind of overblown argument could be used to undermine all communications with the outside world. For example, without warning, a prisoner can make threats over the telephone or in person but that does not justify prohibiting all telephone calls or in-person visits. And gang members can write symbols or codes on postcards just as well as in letters or hide something under a stamp on either form of correspondence.

In short, Defendants' reliance on the allegations in the news article reveals their ongoing belief in and commitment to exaggerated responses to security concerns.

PLN moves to strike Defendants' submission of Dkt. 115-11, the newspaper article alleging that a person confined in the Multnomah County Jail mailed a non-toxic substance to public officials. The article is impermissible hearsay, FRE 802, the events described therein are irrelevant, FRE 402, Defendants fail to establish that the author possesses personal knowledge as required by FRCP 56(c)(4), and this article was not produced in discovery as required by FRCP 26. *See* Wing Reply Dec. ¶ 7.

3. Throughout Discovery Defendants Possessed Washington County's "Transitions to Postcards for Inmate Mail" CD But Failed to Produce It to Plaintiff Until Long After Discovery Ended.

Lastly, PLN moves the strike Defendants' submission of Dkt. 115-6, which are documents from a CD entitled "Transitions to Postcards for Inmate Mail" purportedly authored

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by Washington County. Defendants possessed these documents throughout the lawsuit but failed to produce them until well after the discovery deadline, in violation of the discovery rules. Wing Reply Dec. ¶8.

I. Balance of the Hardships and the Public Interest

The Court has already recognized that if Defendants implement their Postcard-Only Policy "The Constitutional hardship is far greater than the modest impact on Defendants' time and resources. Dkt. 64 at 23. Since the Court issued its opinion, Defendants have failed to articulate any hardship whatsoever that it has experienced from ceasing its Policy.

Similarly, the analysis conducted by the Court in its Preliminary Injunction on the public interest factor, and the Court's finding that its favors entering an injunction, has not changed either. And, since PLN has established actual success on the merits and the Sheriff claims there is a trend among jails to adopt postcard-only policies, entry of injunctive relief serves the important function advancing the public interest in enforcement of the First Amendment.

IV. CONCLUSION

PLN respectfully requests that the Court please grant its motion for summary judgment and award to PLN declaratory and injunctive relief on all issues, and strike from the record Defendants' improperly submitted evidence.

DATED this 2nd day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 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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