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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 SUGGESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff submits the following suggesting findings of fact and conclusions of law:[1]

I. PARTIES

1. Plaintiff Human Rights Defense Center (HRDC) is a Washington Non-Profit Corporation. For the past 21 years, the core of HRDC's mission has been public education, prisoner education, advocacy, and outreach in support of the rights of prisoners and in furtherance of basic human rights.

2. One of the projects of HRDC is the operation of Prison Legal News, which publishes a monthly journal of the same name, maintains a website (www.prisonlegalnews.org), operates an email list, distributes books of interest to prisoners and publishes self-help, non-fiction reference books. PLN's monthly journal of corrections news and analysis is titled *Prison Legal News: Dedicated to Protecting Human Rights.*

3. Prisoners of all types from pre-trial detainees to convicts, family and friends of prisoners, and prisoner advocates, are among the intended beneficiaries of PLN's activities.

4. Since PLN's founding in 1990, it has communicated its journals, books, letters, catalogs, and brochures via mail to tens of thousands of prisoners all over the country.

5. Prison Legal News has approximately 7,000 subscribers in the United States and abroad, including prisoners, attorneys, journalists, public libraries, and judges. PLN distributes its publication to about 2,200 correctional facilities across the United States, including the Federal Bureau of Prisons, the Washington Department of Corrections, and the Oregon Department of Corrections.

6. Prison Legal News regularly receives correspondence from prisoners in correctional facilities around the country in which they ask questions and report on prison conditions.

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[1] Plaintiff reserves the right to amend or supplement these suggested findings of fact and conclusions of law before, during, or at the close of trial, to conform to the evidence admitted and the rulings of the Court.

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7. Prison Legal News engages in core protected speech and expressive conduct on matters of public concern, such as operations of prison facilities, prison conditions, prisoner health and safety, and prisoners' rights.

8. Defendant Columbia County is a municipal corporation formed under the laws of the State of Oregon. "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)).

9. Defendant Columbia County Sheriff's Office is a department of Columbia County and operates the Columbia County Jail located in St. Helens, Oregon. The Columbia County Jail facility houses federal and state convicted prisoners and pretrial detainees.

10. Defendant Jeff Dickerson is the elected Sheriff of Columbia County. He began his term as Sheriff on January 1, 2009. His current term runs from January 1, 2013 to December 31, 2016.

11. During his tenure as Sheriff, Defendant Dickerson has been and continues to be an agent of Columbia County and the Sheriff's Office. As Sheriff, he is responsible for the operations of the Columbia County Jail, and the training and supervision of the Jail staff who interpret and implement the Jail's mail policy for prisoners. He is the final policymaker for the Jail policy governing mail for prisoners.

12. Each of the acts and omissions of persons stated herein were taken under color of state law and within the scope of their official duties as employees and officers of Columbia County and the Columbia County Sheriff's Office.

II. STANDING

1. The Court has already held that PLN has standing in its own right and third-party standing. *See* Dkt. 64, at 11. The Court clarifies its holding that PLN has standing in its own right to confirm that PLN has "organizational standing" under *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), because it has asserted that it suffers injury by frustration of its mission and

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diversion of its resources, that there is a causal connection between its injury and the challenged conduct, and the relief sought would redress those injuries. *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)).

III. CENSORSHIP AND DUE PROCESS VIOLATIONS

1. Prison Legal News publishes and distributes a soft-cover monthly journal, and publishes and distributes paperback books, about the criminal justice system and legal issues affecting prisoners. PLN mailed its monthly journal, informational brochures, subscription forms, book catalogs, book offers, renewal letters, and fundraising letters to prisoners confined in the Columbia County Jail.

Monthly Publications

2. PLN's monthly journal is a 56-page publication titled *Prison Legal News: Dedicated to Protecting Human Rights* and contains various articles on corrections news and analysis, about prisoner rights, court rulings, management of prison facilities and prison conditions.

3. On or about December 8, 2010 PLN mailed a December 2010 *Prison Legal News* publication addressed to prisoner Rusty Campo at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

4. On or about January 13, 2011, PLN mailed a January 2011 *Prison Legal News* publication addressed to prisoner Rusty Campo at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

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5. On or about January 31, 2011, PLN mailed its September 2008 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Daniel Butts
Cory Dell
Jacob Francoeur
William Hess

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring each of PLN's four publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

6. On or about January 31, 2011, PLN mailed its November 2009 *Prison Legal News* publication addressed to prisoner Nicholas Bierman at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

7. On or about January 31, 2011, PLN mailed its January 2010 *Prison Legal News* publication addressed to prisoner Andrew Plumber at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

8. On or about February 1, 2011, PLN mailed its July 2009 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Ezra St. Helen
Scott Thomas

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Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring both of PLN's publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

9. On or about February 1, 2011, PLN mailed its November 2009 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Robert Beckwith
Scott Lavelle
Lloyd Myers
Alisha Vandolah
Jeffrey Vannatta

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring each of PLN's five publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

10. On or about February 3, 2011, PLN mailed its January 2010 *Prison Legal News* publication addressed to prisoner Kanaan Meyers at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

11. On or about February 3, 2011, PLN mailed its July 2009 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Troy McCarter
Shane McNutt
Robert Meader
Jason Quade

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring each of PLN's four

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publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

12. On or about February 3, 2011, PLN mailed its September 2008 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Nicholas Jones
Martin Kay

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring both of PLN's publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

13. On or about February 10, 2011, PLN mailed its February 2011 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Troy McCarter
Ezra St. Helen

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring both of PLN's publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

14. On or about March 10, 2011, PLN mailed its March 2011 *Prison Legal News* publication addressed to prisoner Ezra St. Helen at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

15. On or about April 11, 2011, PLN mailed its April 2011 *Prison Legal News* publication addressed to prisoner Troy McCarter at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News*

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publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

16. On or about May 18, 2011, PLN mailed its May 2011 *Prison Legal News* publication addressed to prisoner Ezra St. Helen at the Columbia County Jail. Although he was confined as a prisoner in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to him by PLN. By censoring PLN's publication, Defendants violated PLN's and the prisoner-addressee's clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

17. On or about June 9, 2011, PLN mailed its June 2011 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Ezra St. Helen
Martin Kay

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring both of PLN's publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

18. On or about June 30, 2011, PLN mailed its May 2008 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
George Lammi
Jeffrey Murray
Cindy Seaston

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring each of PLN's three publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

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19. On or about July 20, 2011, PLN mailed its May 2009 *Prison Legal News* publication addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name
Mark Gift
Ralph Patterson
Barry Shaft
William Temple
Robert Westmoreland

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* publication sent to each prisoner by PLN. By censoring each of PLN's five publications, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

20. For the journals that Defendants returned to Prison Legal News, Defendants: (a) placed a sticker on the mail stating: "As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out going mail"; (b) stamped the mail "INSPECTED BY COLUMBIA COUNTY JAIL" and handwrote checkmarks next to "RETURN TO SENDER" and "REFUSE/VIOLATES SECURITY"; or (c) merely stamped the mail "RETURN TO SENDER."

21. In each of the thirty-six (36) instances of censorship described above, Defendants did not provide PLN due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated PLN's clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

22. In each of the thirty-six (36) instances of censorship described above, Defendants did not provide the prisoner-addressees due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated the prisoner-addressees' clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

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Informational Brochures, Subscription Order Forms, Book Catalogs

23. Prison Legal News sent informational brochures about PLN and subscription order forms, book catalogs, and book offers to prisoners at the Columbia County Jail in white standard # 10 envelopes via first-class mail.

24. **Prison Legal News Brochure and Subscription Order Form:** Prison Legal News sent certain prisoners at the Columbia County Jail an informational brochure about its organization and publications. The double-sided single-page brochure includes: a description of the topics covered in PLN's monthly journal, subscription rates, special subscription offers, and an order form; a description of three books available for purchase or included with a subscription to *Prison Legal News—Protecting your Health & Safety*, *With Liberty for Some: 500 Years of Imprisonment in America*, and *Prison Profiteers: Who Makes Money from Mass Incarceration*; and other information about PLN's bookstore.

25. **Book Catalog:** Prison Legal News sent certain prisoners at the Columbia County Jail its 2010 PLN Book List. The double-sided single-page book list includes a description of 43 books, dictionaries, and resource materials available for purchase. The books available for purchase include information about a variety of topics, including but not limited to: the basic rights of prisoners regarding health and safety; the American criminal justice system; self-representation in court; finding the right lawyer; DNA testing; issues related to imprisoned women; developing a successful re-entry plan upon release from prison; searching for a job; crime and poverty; and the mental health crisis in U.S. prisons and jails.

26. **Book Offers:** Prison Legal News sent certain prisoners at the Columbia County Jail a double-sided single-page informational brochure about two books for sale: *The Habeas Citebook: Ineffective Assistance of Counsel*, a handbook containing case citations, pleadings, and forms designed to help a prisoner seek habeas corpus relief; and *Prisoners' Guerrilla Handbook to Correspondence Programs in the United States and Canada*, a handbook on high school, vocational, paralegal, undergraduate, and graduate courses available through correspondence study.

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27. Collectively, the PLN Brochure, Book List, and Book Offer described above are referred to as "Informational Brochure Packs."

28. Prison Legal News mailed Informational Brochure Packs addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name	Date Mailed to Prisoner
Robert Beckwith	January 31, 2011
Daniel Butts	February 3, 2011
Cory Dell	February 3, 2011
Jacob Francoeur	February 3, 2011
Mark Gift	July 20, 2011
Nicholas Jones	February 3, 2011
Martin Kay	February 1, 2011
George Lammi	June 30, 2011
Scott Lavelle	January 31, 2011
Troy McCarter	February 1, 2011
Shane McNutt	January 31, 2011
Robert Meader	February 3, 2011
Kanaan Meyers	January 31, 2011 and February 4, 2011
Jeffrey Murray	June 30, 2011
Ralph Patterson	July 20, 2011
Andrew Plumber	January 31, 2011
Jason Quade	February 1, 2011
Cindy Seaston	June 30, 2011
Barry Shaft	July 20, 2011
Ezra St. Helen	February 1, 2011
William Temple	July 20, 2011
Scott Thomas	February 1, 2011
Alisha Vandolah	February 1, 2011
Jeffrey Vannatta	February 3, 2011
Robert Westmoreland	July 20, 2011

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* Informational Brochure Packs sent to each prisoner by PLN. By censoring each of PLN's twenty-six (26) Informational Brochure Packs, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

29. For the Informational Brochure Packs that Defendants returned to Prison Legal News, Defendants: (a) placed a sticker on the mail stating: "As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out going

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mail"; (b) stamped the mail "INSPECTED BY COLUMBIA COUNTY JAIL" and handwrote checkmarks next to "RETURN TO SENDER" and "REFUSE/VIOLATES SECURITY"; or (c) merely stamped the mail "RETURN TO SENDER."

30. In each of the twenty-six (26) instances of censorship described above, Defendants did not provide PLN due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated PLN's clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

31. In each of the twenty-six (26) instances of censorship described above, Defendants did not provide the prisoner-addressees due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated the prisoner-addressees' clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

Renewal Letters

32. Prison Legal News sent subscription renewal letters along with Informational Brochure Packs ("Subscription Renewal Packs") to certain prisoners at the Columbia County Jail in white standard # 10 envelopes via first-class mail.

33. Each personalized subscription renewal letter mailed to a prisoner at the Columbia County Jail included information for the prisoner-addressee that his individual subscription was nearing its end.

34. In May and June 2011, Prison Legal News mailed Subscription Renewal Packs addressed to each of the following prisoners at the Columbia County Jail:

Prisoner Name	Date Sent
William Hess	6/16/11
Martin Kay	6/16/11
Troy McCarter	6/16/11
Shane McNutt	6/16/11
Andrew Plumber	6/16/11
Jason Quade	5/21/11
Ezra St. Helen	6/16/11
Alisha Vandolah	6/16/11

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Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* Subscription Renewal Packs sent to each prisoner by PLN. By censoring each of PLN's eight (8) Subscription Renewal Packs, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

35. For the Subscription Renewal Packs that Defendants returned to Prison Legal News, Defendants: (a) placed a sticker on the mail stating: "As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and outgoing mail"; or (b) merely stamped the mail "RETURN TO SENDER."

36. In each of the eight (8) instances of censorship described above, Defendants did not provide Prison Legal News due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated PLN's clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

37. In each of the eight (8) instances of censorship described above, Defendants did not provide the prisoner-addressees due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated the prisoner-addressees' clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

Fundraising Letters and Brochures

38. Prison Legal News sent fundraising letters along with Informational Brochure Packs ("Fundraising Pack") to certain prisoners at the Columbia County Jail in white standard # 10 envelopes via standard rate nonprofit mail.

39. Each fundraising letter mailed to a prisoner at the Columbia County Jail included information for the prisoner-addressee about PLN's history, PLN's efforts to protect civil rights across the country, and its journal and books available for purchase.

40. In approximately November 2011, Prison Legal News mailed Fundraising Packs addressed to prisoners William Temple and Barry Shaft at the Columbia County Jail. Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal*

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News Fundraising Packs sent to each prisoner by PLN. By censoring both of PLN's Fundraising Packs, Defendants violated PLN's and the prisoner-addressees' clearly-established free speech rights as protected by the First Amendment to the United States Constitution.

41. For the Fundraising Packs that Defendants returned to Prison Legal News, Defendants merely stamped them "RETURN TO SENDER" without stating a reason for censorship.

42. In both instances of censorship described above, Defendants did not provide Prison Legal News due process notice or an opportunity to appeal the censorship decisions. In both instances, Defendants violated PLN's clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

43. In both instances of censorship described above, Defendants did not provide the prisoner-addressees due process notice or an opportunity to appeal the censorship decisions. In both instances, Defendants violated the prisoner-addressees' clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

PLN Online Articles

44. PLN maintains a website containing information about PLN's resources. In addition to information about PLN's monthly magazine and books for sale, PLN's website contains information about breaking news and a database of articles, publications, legal briefs, and other information about state and federal issues affecting prisoners. Individuals can visit the website and view PLN's news content, or become a member of PLN and search for and print articles of interest to them—for themselves or to send to others, including prisoners who do not have access to computers or the internet.

45. Since prisoners do not generally have access to the internet, they rely on friends, family members and other supporters who are not incarcerated to download and print articles from PLN's website and mail those documents to the prisoners in jails or prisons.

46. PLN has purposely designed its website so that non-prisoners can research topics of interest and importance to prisoners, and then download, print and mail the information to

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prisoners because PLN lacks the resources to communicate this information individually to each and every prisoner who desires it.

47. PLN's website invites anyone who corresponds with prisoners to utilize the material on the website to educate prisoners. The website states: "Prisoners generally do not have internet access. We encourage the distribution of information on our website to incarcerated persons by printing it out and mailing it to them. If you are volunteering your time to research a topic for someone in prison, jail or other detention facility please feel free to print out articles and send them to the prisoner."

48. PLN operates a free email listserv, which has approximately 1,500 subscribers who receive scores of emails on a weekly basis related to detention facility news and litigation. Many of the recipients of these emails print and mail articles of interest to friends and relatives in prisons and jails.

49. Several times per week, friends or relatives contact Mr. Wright by telephone asking him to talk them through the steps of locating material on a particular topic of interest or need on PLN's website for the stated purpose of printing and mailing it to a prisoner who is their family member or friend.

50. An individual, Lucy Lennox, sent legal articles that she printed off of PLN's website to certain prisoners at the Columbia County Jail in standard #10 envelopes via U.S. Mail.

51. The legal articles mailed by Ms. Lennox to prisoners at the Columbia County Jail include a critique of prison privatization, and research findings about the goals and results of the move toward privatization. The articles also identify a correspondence school book available for sale, and include introductory descriptions of PLN's 20 "Breaking News" headlines about various topics, including but not limited to sex abuse in prison, poor forensics used to secure criminal convictions, private prison companies behind Arizona's immigration law, and the death penalty in Texas.

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52. In December 2011, Ms. Lennox mailed the PLN online articles to the following prisoners at the Columbia County Jail:

Prisoner Name	Date Sent
Steven Adams	12/15/11
Arthur Bates Jr.	12/15/11
Toni Bertasso	12/21/11
Daniel Butts	12/15/11
Robert Clement	12/15/11
Anthony Deherrera	12/22/11
Kenna Haynes	12/22/11
Scott Lavelle	12/15/11
Billy Nelson	12/15/11
Samuel Oester	12/15/11
Cindy Seastone	12/15/11
Barry Shaft	12/15/11
William Temple	12/15/11
Timothy Turner	12/20/11
Alisha Vandolah	12/15/11

Although they were confined as prisoners in the Jail at the time, Defendants rejected the *Prison Legal News* online articles sent to each of the fifteen (15) prisoners by Ms. Lennox.

53. For the PLN articles that Defendants returned to Ms. Lennox, Defendants: (a) placed a sticker on the mail stating: "As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out going mail"; (b) stamped the mail "INSPECTED BY COLUMBIA COUNTY JAIL" and handwrote checkmarks next to "RETURN TO SENDER" and "REFUSE/VIOLATES SECURITY"; (c) stamped the mail "INSPECTED BY COLUMBIA COUNTY JAIL" and handwrote checkmarks next to "RETURN TO SENDER" and "CONTRABAND"; or (d) stamped the mail "INSPECTED BY COLUMBIA COUNTY JAIL" and handwrote "no envelope mail".

54. In each of the fifteen (15) instances of censorship described above, Defendants did not provide Ms. Lennox due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated Ms. Lennox's clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

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55. In each of the fifteen (15) instances of censorship described above, Defendants did not provide the prisoner-addressees due process notice or an opportunity to appeal the censorship decisions. In each instance, Defendants violated the prisoner-addressees' clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

56. On February 7, 2012, Ms. Lennox printed multiple copies of the legal article titled "Prison Legal News Files Censorship Suit Against Florida DOC" from the Prison Legal News website to send to 11 prisoners at the Columbia County Jail. She enclosed the printed articles in separate envelopes and sent them to the following prisoners at the Columbia County Jail:

Name	Inmate No.
Steven Adams	2011002552
Toni Bertasso	2011002507
Robert Clement	2011002143
Anthony Deherrera	2011001729
Kenna Haynes	2011002213
Scott Laville	2011002501
Samuel Oester	2011002123
Barry Shaft	2011000612
William Temple	2011000529
Alisha Vandolah	2010002105
Shaughnessy Williams	2011000534

57. The Columbia County Jail rejected three of these mailings, those to Scott Lavelle, Alisha Vandolah, and Shaughnessy Williams, and returned them to Ms. Lennox unopened, on February 7 and 8, 2012. The Jail returned the envelope to me, unopened. The returned envelopes were stamped and marked "INSPECTED BY COLUMBIA COUNTY JAIL," "RETURN TO SENDER," and "CONTRABAND." Ms. Lennox received two Prohibited Mail Notices, regarding Alisha Vandolah and Shaughnessy Williams, stating that the Sheriff's Office "denied" her mail because "It is deemed personal mail and not on a postcard." Ms. Lennox did not receive a Prohibited Mail Notice regarding any other mailing that she sent.

58. In the censorship described above of Ms. Lennox's mailing to Scott Lavelle, Defendants did not provide Ms. Lennox due process notice or an opportunity to appeal the

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censorship decisions and violated her clearly-established right to due process as protected by the Fourteenth Amendment to the United States Constitution.

59. The Prohibited Mail Notices directed Ms. Lennox to "the jail's web page at www.co.columbia.or.us/sheriff" to find information about the Jail's mail policy. When she visited the site on March 1, 2012, the website had posted a notice that the mail policy is "under review."

60. The Columbia County Jail's Postcard-Only Policy meant that no family member, no friend, nor any other concerned individual could ever utilize PLN's website to print and mail information from PLN's website or listserv to prisoners in custody in the Jail. The policy prevented prisoners from receiving free material on the PLN website about prisoners' criminal or civil legal rights, about health and safety issues in Jail, about reasonable accommodation or treatment of medical or mental health issues, about their right to effective assistance of counsel and how to represent themselves in court, or about a host of other important issues to prisoners.

61. Indeed, the Jail's policy prevented individuals from mailing to prisoners from the website PLN's article reporting the Ninth Circuit's opinion in *Clement v. California Dep't of Corr.*, 364 F.3d 1148, (9th Cir. 2004), which informed readers that "The Ninth Circuit Court of Appeals 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." The Jail's policy also prevented prisoners from receiving in the mail the amicus brief filed by Prison Legal News in *Clement* on July 1, 2003.

62. PLN hosts "legal briefs and other informational material" for purposes of downloading, printing and mailing to prisoners.

IV. DECLARATORY RELIEF

63. Trial courts are vested with broad discretion to fashion equitable relief. In accordance with the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, the court has a "'duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.'" *Steffel v. Thompson*, 415 U.S. 452, 468

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(1974) (quoting *Zwickler v. Koota*, 389 U.S. 241, 254 (1967)). Here, declaratory judgment is necessary.

First Amendment

64. The First Amendment of the United States Constitution protects a publisher's right to correspond with prisoners through the mail, *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989), which includes mailing magazines, catalogs, letters, and other subscription and non-subscription correspondence, *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001). Likewise, the First Amendment protects a prisoner's right to receive correspondence from a publisher. *Procunier v. Martinez*, 416 U.S. 396, 417-18 (1974), overruled in part on other grounds by *Thornburgh*, 490 U.S. 401; *Krug v. Lutz*, 329 F.3d 692, 696-97 (9th Cir. 2003).

A. Postcard-Only Policy

Incoming Mail

65. In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Supreme Court set forth the legal standard that applies to governmental restrictions on *incoming* mail. In short, Defendants have the burden of showing that their policy is "reasonably related to legitimate penological interests" under the four *Turner* factors:

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

Prison Legal News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005) (citing *Turner*). The first of these factors can be dispositive. *Id.*

(1) Rational Relationship Factor: Defendants' Policy is Not Rationally-Related to a Legitimate Penological Objective

66. In response to PLN's Preliminary Injunction motion, Defendants offered two objectives for their Postcard-Only Policy, which the Court found legitimate—"safety and

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security of the Jail's inmates and staff and the efficient use of the Jail's limited resources." Dkt. 64 at 16.

67. The key question for incoming mail is whether the Postcard-Only Policy is rationally related to enhancing security and improving efficiency. Defendants contend that the policy is rationally related to those objectives because it prevents the introduction of contraband into the jail. But, as the Court held in its order granting a preliminary injunction, the "Defendants have failed to offer evidence or even an intuitive, common-sense reason why the post-card only mail policy more effectively prevents the introduction of contraband than opening and inspecting letters." Dkt. 64 at 17.

68. Nothing has changed since the Court entered that order. And, while inspecting postcards is faster than inspecting a letter, "[t]he speed at which a mail handling staff can inspect mail, however, does not establish a rational link between the policy and reducing contraband." *Id.* at 17-18, 19 ("the time-savings is too modest to demonstrate a significant rational relationship between the postcard-only policy and improving the Jail's efficiency.") Indeed, the evidence presented strongly confirms these conclusions.

The Sheriff Adopted His Postcard-Only Policy Primarily to Copy Other Sheriffs, Not to Reduce Contraband or Save Limited Resources

69. When asked to explain why he adopted the policy, the Sheriff offered two reasons. The first, his primary explanation, was that he wanted to be in sync with other jails in Oregon. In his words, he adopted the policy to achieve "standardization" with what he thought other sheriffs might do. After attending an Oregon Sheriff's Meeting in December 2009 where the idea of restricting mail to postcards was discussed, the Sheriff asked his Jail Commander, Jim Carpenter, to review the concept with this jail staff, and then decided to implement a Postcard-Only Policy. He adopted the challenged policy because someone running another facility apparently thought it was a good idea, not because of his own experience running the Columbia County Jail. That is not a rational basis for adopting the policy.

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The Jail Did Not Have a Mail Contraband Problem

70. Sheriff Dickerson's second stated reason for adopting the Postcard-Only Policy was jail security. In response to Plaintiff's motion for preliminary injunction, the Sheriff listed a variety of prohibited contraband including "bodily fluids, lipstick, perfume, glue, paint, and unidentifiable substances" that can contain hazardous or illegal materials. Dkt. 32 ¶11. He said that envelopes can hide contraband such as "needles, blades, similar weapons, and handcuff keys." *Id.* at ¶¶13-14. He also told the Court that mail must be inspected for "threats of physical harm, blackmail, extortion, other criminal activity, sexually explicit material, gang-related material, and plans for escape." *Id.* at ¶12. And he asserted that postcards are "easier and quicker to inspect for contraband and prohibited content" and "the risk of contraband being present in mail from an inmate's family or friends is greater than the risk of contraband being present in mail that comes from legal or publisher sources." *Id.* at ¶¶16, 18.

71. But the Sheriff has failed to identify a single circumstance in which something harmful was actually concealed or sent to a prisoner at the Jail in an envelope, and did not describe a single event that led him to adopt the Postcard-Only Policy. When questioned about whether there was a legitimate reason to believe his policy would increase security the Sheriff offered none. And, the Sheriff admitted that he has never heard of any problem with threats or contraband entering his Jail through the mail before, or after, adopting his policy.

72. Since a rational relationship to a legitimate penalogical objective is a *sine qua non* of constitutionality under *Turner*, the Court need analyze Defendants' policy no further. *See Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) ("The first factor of these factors constitutes sine qua non." Therefore, if a regulation is not rationally related to a legitimate and neutral governmental objective, a court need not reach the remaining three factors.") (Citation omitted).

73. Nevertheless, in evaluating the other three factors, the Court finds that they all support a finding that the Sheriff's Postcard-Only Policy violates the First Amendment.

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(2) Alternative Avenues Factor: Prisoners and Their Correspondents Have No Reasonable Alternative Way to Exercise Their Free Speech Rights

74. Defendants contend that prisoners and their correspondents may exercise their First Amendment rights by visiting, calling, or by sending multiple postcards. Dkt. 29 at 18-19. But the Court disagrees. No reasonable alternatives exist:

As the Court stated in its preliminary injunction:

> [The] postcard-only mail policy drastically restricts an inmate's ability to communicate with the outside world. It prevents an inmate's family from sending items such as photographs, children's report cards and drawings, and copies of bills, doctor reports, and spiritual and religious tracts . . . It prevents an inmate's friends and other correspondents from sending printed copies of articles published in newspapers, magazines, or the internet. It prevents educational, community and religious organizations from sending lessons, book and periodical offers, and fundraising appeals. . . 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 inmate's First Amendment rights, they inhibit rehabilitation . . .

Dkt. 64 at 20-21.

75. The evidence presented since the preliminary injunction was entered only strengthens the Court's conclusion. Columbia County prisoners may receive visitors only twice a week, on two set days, for a maximum of 30 minutes per visit. Prisoners can make outgoing calls only during times when they are out of their cells. Outgoing local calls cost $2.35 for 15 minutes. The Jail does not permit incoming calls for prisoners except in exceptional circumstances (e.g. a prisoner's attorney needs to reach him or a death in the prisoner's family). And, sending multiple postcards is substantially more costly than sending a single letter. And notably, the resources in what the Jail calls its "law library," which is merely a library cart, are scarce.

76. So, for prisoners, PLN, and other correspondents, there are no practical alternative ways for them to communicate.

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(3) Impact Factor: Any Effect of Accommodating Right on Staff, Prisoners, and Resources is Minimal

77. Defendants contend "the unfettered ability of persons to send inmates materials in any form . . . would greatly increase the risks of contraband entering the Jail, along with the time required for screening personal mail." Dkt. 29 at 19 (emphasis added). The Court has not seen any evidence to support this contention, even after entering a preliminary injunction more than six months ago. This is consistent with the Court's conclusion 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.

78. This is also consistent with Defendants' admission that they did not have a contraband problem before adopting the Postcard-Only Policy. Going back to their prior policy has not "greatly increased" the risks of contraband entering the jail. And any alleged time-savings is much smaller than the Defendants have alleged.

(4) Easy and Obvious Alternatives Factor: There Were Easy and Obvious Alternatives, Which Defendants Failed to Even Consider, Suggesting an Exaggerated Response by Prison Officials

79. The Court has already held that an easy and obvious alternative to the Postcard-Only Policy was for the Defendants to open and inspect letters, which according to Sergeant Cutright, required only 30 to 60 additional minutes each day. Dkt. 64 at 22. The evidence presented since then only strengthens the Court's conclusion.

80. First, the time it takes to open and inspect the contents of envelopes is far less than Sergeant Cutright estimated in February 2012. Dkt. 30 ¶4.

81. Second, although Defendants claim that the mail processing takes them away from other tasks so they adopted the policy at issue, Dkt. 32 ¶25, they did not disclose to the Court that they have switched processing the mail from the middle of the day to the middle of the night when the Jail was much less busy. This did not require removing any tasks from the night

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shift, which undermines the Defendants' assertion that mail processing takes staff away from other tasks to a meaningful extent that their Postcard-Only Policy changed.

82. Third, the Jail complained that it had to remove postage stamps from every letter. Yet, the same is true of postcards and in any event, after PLN's lawsuit the Jail has now given up that policy for all mail. This choice reveals that the time-consuming process of removing stamps, unchallenged by PLN, was not that important to protect the security interests of the Jail.

83. Finally, the Sheriff never tried to determine whether, let alone how, contraband actually enters the jail so as to target any response. Indeed, the Jail did not adopt its Postcard-Only Policy to address an actual problem, because contraband was not arriving by mail. The Sheriff acknowledged that contraband can get into the Jail through outside workers, jail staff, or maintenance persons, but the Jail does not check their bags and relies on "trust" alone to prevent jail staff from bringing in contraband.

84. Thus, there were easy and obvious alternatives to a Postcard-Only Policy to achieve Defendants' purported objective to enhance security and save time. This would have been consistent with many other detention facilities that did not adopt such a policy, such as the Bureau of Prisons, the Oregon Department of Corrections, the Washington Department of Corrections, the Multnomah County Jail, and the Lane County Jail.

85. Defendants could have investigated whether, and if so how, contraband actually enters the Jail tailoring a plan to control it, moved the mail processing to the night shift, re-evaluated how they process the mail to make it more efficient, and stopped removing stamps. Or, they could have kept processing mail the same way they had since there was no problem they actually sought to solve (modified, of course, to comply with the Constitution). But Defendants did not explore any of these alternatives in lieu of adopting their policy.

86. All four *Turner* factors strongly support the conclusion that Defendants' Postcard-Only Policy as it applied to *incoming* mail violates the First Amendment, and that adopting and applying this policy to censor magazines, book catalogs, internet-generated articles, and subscription-related correspondence violated well-established law. *See, e.g.*, *Prison Legal News*

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v. Lehman, 397 F.3d 692 (9th Cir. 2005); *Clement v. California Dept. of Corr.*, 364 F.3d 1148 (9th Cir. 2004); *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001).

Outgoing Mail

87. Governmental restrictions on *outgoing* mail are analyzed under *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), *overruled in part on other grounds by Thornburgh v. Abbott,* 490 U.S. 401, 413-14 (1989) (recognizing that *Procunier* still applies to regulations concerning *outgoing* mail); *Barrett v. Belleque*, 544 F.3d 1060, 1062 (9th Cir. 2008) ("*Procunier* is controlling law in the Ninth Circuit and elsewhere as applied to claims involving outgoing prisoner mail.").

88. Under *Procunier*, a government restriction on outgoing mail is justified only if "the regulation or practice in question . . . further[s] an *important or substantial governmental interest* unrelated to the suppression of expression. . . . [and] the *limitation* of First Amendment freedoms . . . [is] *no greater than is necessary or essential* to the protection of the particular governmental interest involved." 416 U.S. at 413-14. (Emphasis added). "When a prison regulation affects outgoing mail as opposed to incoming mail, there must be a 'closer fit between the regulation and the purpose it serves.'" *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995).

89. Defendants concede that outgoing mail is less likely to contain contraband, so it takes them less time to process outgoing mail. Sergeant Cutright testified that in his 17-year tenure he has never encountered contraband being sent out of the Jail. And, when asked to identify the reasons for adopting a Postcard-Only Policy for outgoing mail, as Defendants' FRCP 30(b)(6) designee, Sergeant Cutright testified that "it wasn't even addressed" and Defendants did not even consider whether to adopt such a policy for outgoing mail, they just decided to adopt one for all inmate mail "in general."

90. Defendants' Postcard-Only Policy for *outgoing* mail does not further an important or substantial governmental interest and is greater than necessary or essential to protect the governmental interest involved. Therefore, Defendants' policy fails under *Procunier*. In fact, because there is less of a risk to prison security and Defendants failed to even evaluate whether

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to adopt its Postcard-Only Policy as it pertains to outgoing mail let alone articulate a legitimate basis, application of that Policy to outgoing mail is even less rational than its application to incoming mail so fails the *Turner* test as well.

91. Defendants' Postcard-Only Policy as to *outgoing* mail violated the clearly-established First Amendment rights of Prison Legal News and prisoners and their correspondents, including family, friends, and other publishers.

B. Magazine Ban

92. For years, the Jail distributed Inmate Manuals to its prisoners that explicitly prohibited magazines or periodicals: "Periodicals: We do not accept any periodicals." November 18, 2010 version. Between 2009 and November 2010, while Defendants considered several modifications to their Inmate Manual, each time they affirmed their bans:

- "Publications: We do not accept magazines." (2009 version, at 14).
- "Periodicals: We do not accept any periodicals." (July 8, 2010 version, at 14).
- "Periodicals: We do not accept any periodicals." (July 23, 2010 version, at 16).
- "Publications: We do not accept magazines." (September 30, 2010 version).
- The Sheriff's Spanish-language version notified Spanish-speakers of this prohibition too: "Publicaciones periodicas: No aceptamos ninguna publicacion periodica (periodicos, revistas, etc."

93. Defendants widely communicated the same prohibition in March 2010 when Sergeant Cutright wrote a Memorandum titled "Mail Procedure Changes," which was distributed to the entire Corrections Division, to all prisoners, and was published on the Sheriff's website. The Memo stated: "Magazines are not allowed inside the facility." Jail supervisors reviewed the content before the Memo was distributed. Sergeant Cutright, who testified as the Sheriff's Office's FRCP 30(b)(6) designee on the interpretation, and implementation of the Jail's Mail Policy since January 1, 2009, described the Memo as a "summary of the mail policy," and testified that the purpose of writing the memo was to:

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> [H]ighlight some changes made to the policy in 2010. It was also written, the biggest point was so we could add this information to the internet so the public would know what the change to the policy was or what the mail policy of the Columbia County Sheriff's Office at that time was."

94. The Sheriff's Office posted a similar notice on its website on March 18, 2010, that stated "Magazines: Are not allowed inside the facility." Prior to January 19, 2012, the Sheriff's Office added additional information about its prohibition on magazines: "Publications: We do not accept magazines." So, at the time that PLN filed this action, the Sheriff's website stated in *two places* on its website, that the Jail prohibits magazines.

95. Defendants enforced this ban on magazines, as illustrated by several mail rejection notices to prisoners and by Defendants censorship numerous issues of the *Prison Legal News* journal over the course of several months. Defendants claim that effective October 2011 they adopted a Revised Policy, which is ambiguous about whether magazines are permitted. Although the Sheriff stated in his Revised Policy that the policy shall "be available to the public through the Sheriff's office website," at page 3, he never posted the policy.

96. Although Defendants claim that while they may have had a practice, but not a policy, of banning magazines these facts now show that they had a *policy* of banning magazines. "'[O]fficial policy' often refers to formal rules or understandings—often but not always committed to writing—that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986). That fairly describes the Defendants' routine and multiple instructions, in writing, to their staff and prisoners, and notices to the outside world, that all magazines were prohibited.

97. "When an official has final authority in a matter involving the selection of goals, his choices represent policy." *Wellington v. Daniels*, 717 F.2d 932, 936 (4th Cir. 1983) (citation omitted) ("Since Chief Austin is responsible for the choice and implementation of police department practices and procedures, his acts and omissions reflect government policy. Therefore, municipal liability attaches to acts or omissions performed pursuant to that policy.")

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98. The undisputed evidence establishes that the Sheriff's jail staff read and blindly followed the Sheriff's Office's directives that the Jail banned magazines, regardless of whether a document that the Sheriff points to as his formal written "policy" did not specify that magazines were banned. In other words, it is plain the Defendants' actual policy—as repeatedly written and implemented—was to ban magazines.

99. In Sergeant Cutright's 17 years with the Sheriff's Office, including many years processing the mail and supervising the mail processing, he testified that he has "never" seen a magazine arrive for an inmate at the facility. Captain Jim Carpenter, who worked for the Jail for 22 years and was the Jail Commander from 2009-2011, testified that throughout his tenure, the practice and custom of the Jail was to prohibit magazines and periodicals. He could not remember what the policy was, but it was the Jail's "procedure" to ban magazines. He testified that "As long as I worked at the jail, that I can remember, we never accepted magazines." In Captain Carpenter's 22 years at the Columbia County Jail, he has only seen one magazine at the Jail and it was rejected.

100. Corrections deputies told prisoners that magazines were not permitted. When a prisoner asked whether there are any restrictions on the number of type of magazines that can be delivered, the Jail responded "We Do Not Allow Magazines." And, as documents from prisoner files reveal, corrections deputies censored magazines because they were not permitted by the Jail. In fact, the Sheriff Office's rarely-used Mail Violation Notice form has a checkbox for "Do not accept periodicals." In short, Defendants' complete ban effectuated a complete chill on prisoners receiving magazines that was near absolute.

101. If the Sheriff is accurately reporting that the Jail's mail policy always permitted magazines then the Jail's custom and practice is to violate its written policy, as well as the Constitution. If, contrary to the Sheriff's representation, the Jail's longstanding policy was to ban magazines then his word is unreliable and the Jail's policy has been to violate the Constitution for as long as anyone can remember. Under either scenario, the undisputed facts establish that Defendants told their staff, inmates, and the public, that their mail policy prohibited

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magazines, and the Jail censored magazines. This likely suppressed most attempts to obtain magazines, and when they were sent the Jail censored them accordingly.

102. A blanket ban on magazines, the Defendants concede, violated the First Amendment. That law was clearly established long before Sheriff Dickerson became Sheriff of Columbia County at the beginning of 2009. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005); *Crofton v. Roe*, 170 F.3d 957, 960 (9th Cir. 1999).

103. Defendants' magazine ban violated the clearly established First Amendment rights of Prison Legal News and prisoners and their correspondents, including family, friends, and other publishers.

C. Lack of Procedural Due Process Protections

104. "[T]he decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards." *Procunier v. Martinez*, 416 U.S. 396, 417-418 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). Thus, the Fourteenth Amendment has repeatedly been held to require that prison officials provide notice and an opportunity to appeal their censorship decisions to prisoners and their correspondents, including publishers. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692, 701 (9th Cir. 2005); *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986); *Montcalm Pub. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996).

105. Defendants concede that they failed to afford PLN due process notice and an opportunity to be heard when they censored sixty-five (65) mailings to prisoners. This violated the Fourteenth Amendment, which was clearly established well before 2009. *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).

106. After this lawsuit was filed, Defendants provided PLN with a Mail Policy dated October 21, 2011, which had never been publicly available or provided to prisoners. This policy failed to require constitutionally adequate due process to prisoners and their correspondents. While it required the Jail to provide the prisoner-addressee notice when the Jail censored

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incoming mail (which the Jail routinely failed to do), the policy failed to require any notice to or opportunity to appeal for the publisher or other sender of incoming mail, or to the prisoner or intended recipient of rejected outgoing mail.

107. After PLN filed its lawsuit, Defendants revised their mail policies on January 26 and February 10, 2012. As noted by the Court previously, the notice provisions in these policies were "not a model of clarity" and the due process provisions did "not expressly apply to outgoing mail." Dkt. 64 at 25. Indeed, the due process provisions were scattered and confusing, and the Corrections staff continued to fail to provide adequate due process when censoring inmate mail, including failing to provide due process notice to Lucy Lennox for several mailings that she sent to prisoners that the Jail censored in February 2012.

108. Where, as here, unconstitutional conduct results from the absence of adequate policies that absence violates the Constitution. *Withers v. Levine*, 615 F.2d 158 (4th Cir. 1980) (supervisory officials responsible to make rules may be subject to section 1983 liability where failure to make rules causes their employees' unconstitutional practices); *Dimarzo v. Cahill*, 575 F.2d 15, 17-18 (1st Cir. 1978). "It is true that an official policy can be inferred from a municipality's omissions as well as from its acts." *Wellington v. Daniels*, 717 F.2d 932, 935-36 (4th Cir. 1983) (citing, among others, *Turpin v. Mailet*, 619 F.2d 196, 202 (2d Cir.1980)); *see also Green v. Baca*, 306 F. Supp. 2d 903, 918 (C.D. Cal. 2004) (noting that law enforcement may be liable for having "an unconstitutional lack of policies" that lead to unconstitutional conduct).

109. For these reasons, the following mail policies violated the Fourteenth Amendment: (1) Defendants' publicly available mail policy posted on its website on January 13, 2012, which failed to provide for any due process rights; (2) the March 23, 2010 Memo sent to all Corrections Staff and posted in the prisoner dayrooms of each Jail pod, which failed to provide for any due process rights; (3) Defendants' October 21, 2011 mail policy, which failed to require any notice or opportunity to appeal to the sender of incoming mail or to the prisoner or intended recipient of rejected outgoing mail; and (4) Defendants' January 26, 2012, and

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February 10, 2012, mail policies, which failed to require the Jail to provide due process to prisoners and intended-recipients of outgoing mail.

110. Defendants' custom and practice of not providing due process notice or an opportunity for the mail sender, intended recipient, or prisoner to appeal the Jail's censorship decisions violated the Due Process Clause of the Fourteenth Amendment.

111. Defendants' inadequate policy and their practices and customs resulted in the deprivation of Prison Legal News's and the prisoner-addressees' due process rights when Defendants censored PLN's monthly journal, informational brochures, subscription forms, book catalogs, book offers, renewal letters, fundraising letters, and online articles without affording PLN and the prisoner-addressees notice and an opportunity to challenge the censorship decisions.

112. Likewise, Defendants' policy resulted in the deprivation of Lucy Lennox's and the prisoner-addressees' due process rights when Defendants censored Ms. Lennox's mailings of PLN on-line articles.

113. Defendants violated PLN's clearly-established First and Fourteenth Amendm,ent rights for which Defendants are liable for damages.

V. PERMANENT INJUNCTION

114. To obtain a permanent injunction, "A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange*, L.L.C., 547 U.S. 388, 391 (2006).

115. PLN has shown that it *has suffered* "an irreparable injury" and therefore a permanent injunction would be warranted if PLN satisfies the other three elements. "[A]n alleged constitutional infringement will often alone constitute irreparable harm." *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (internal citation omitted). And,

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"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976); *Associated Press v. Otter*, 682 F.3d 821, 825-26 (9th Cir. 2012). This likewise satisfies the second element, that money damages are inadequate.

116. On the third element, the Defendants cannot show any harm since as a direct result of PLN's lawsuit they have now given up their ban on magazines and adopted much improved due process policies. And, as a result of the Court's preliminary injunction, the Defendants were ordered to cease enforcement of their Postcard-Only Policy, and they claim that they will not re-adopt that policy regardless of how the Court rules.

117. The public would not be disserved by entry of a permanent injunction. An injunction would have a neutral effect on the public in general but would advance the public interest by enforcing free speech and due process of many prisoners and their correspondents, including publishers.

118. Defendants have contended that their so-called "voluntary cessation" of their unconstitutional policies and practices have rendered PLN's request for equitable relief moot. That is not correct. First, the current test articulated by the United States Supreme Court in *eBay Inc.,* provides that a plaintiff is not required to show risk of future harm but instead may obtain a permanent injunction by showing that it "has suffered" irreparable harm already. 547 U.S. at 391. Defendants are not able to render prior irreparable harm moot by changing their behavior or policies, voluntarily or not.

119. But even if Defendants' cessation could moot PLN's request for permanent injunctive relief, it does not do so here.

120. The Defendants bear "'[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.") To do so, the Defendants must meet a very high threshold:

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> [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).

121. In this case, Defendants refused to cease their Postcard-Only Policy until ordered to do so by the Court. That is not properly labeled voluntary cessation. In *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1126 (9th Cir. 2011), as 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." In affirming the district court's preliminary injunction, the Ninth Circuit 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).

122. Further, several months after the Court's entry of the preliminary injunction against that Policy, on summary judgment Defendants vigorously defended their Postcard-Only Policy as constitutional and beneficial, and could see no risk of harm to anyone. Defendants have not, and 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.").

123. Similarly, a permanent injunction is warranted by Defendants' magazine ban and failure to afford due process. The Sheriff has repeatedly changed his policies even during the course of this litigation, has the authority to do so by himself without any process or consultation, and his successor could do so even if he does not. "The reason that the defendant's conduct, in choosing to voluntarily cease some wrongdoing, *is unlikely to moot the need for*

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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). 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).

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

125. The Sheriff's conduct does not alleviate this concern. Prisoners wrote numerous grievances, and complained orally, that the Jail's Postcard-Only Policy was harmful to them and their correspondents outside the jail, and that it was unconstitutional. The complaints began "the day the policy changed." But the Sheriff persisted in his policy. The Sheriff admitted that he read the Inmate Manual when he first took office "cover to cover" but saw nothing "that needed to be changed" even though the manual explicitly banned magazines and failed to afford due process rights. He did not correct the manual for three years, until nearly six months after PLN filed its lawsuit during which time the Jail continued to issue the manual with its unconstitutional provisions to prisoners.

126. And the trainings on his new policies adopted in response to PLN's lawsuit appear to have been poorly planned and implemented. He did not attend them, problems with implementation continued at least after the first training, and the training was primarily reading the entire lengthy mail policies out loud, rather than focusing on the specific changes prompted by the Jails' unconstitutional behavior. One indication that the trainings were insufficient is that

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Sergeant Cutright, who led the first training and was a designee of the Defendants to testify about their mail policies, testified in his deposition that he could not identify what the First Amendment was.

127. After purporting to initiate an investigation into how the unconstitutional policies and practices came about, the Sheriff stopped early on. He chose not to ask witnesses who likely knew the answers and he did not impose discipline on any employees. And although Undersheriff Moyer has been the Jail Commander in charge of implementation of the mail policies since mid-2011, at the time of his deposition he had never read them or the summary of those policies in the Inmate Manual routinely issued to incoming prisoners.

128. The evidence does not support Defendants' position. Accordingly, even if voluntary cessation precedent applied, Defendants have failed to carry their heavy burden to prove that PLN, prisoners, and their correspondents will not suffer constitutional violations in the absence of a permanent injunction.

The PLRA Does Not Apply

129. For the first time, on summary judgment after discovery was closed, Defendants raised what appears to be an affirmative defense that any injunction entered by the court is subject to the Prison Litigation Reform Act. *C.f. Jones v. Bock*, 549 U.S. 199, 216 (2007) ("failure to exhaust is an affirmative defense under the PLRA…."). The court disagrees. The PLRA does not apply to lawsuits brought by non-prisoners, like PLN. For example, in *Alabama Disabilities Advocacy Program v. Wood*, 584 F. Supp. 2d 1314, 1316 (M.D. Ala. 2008), 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. See also Skinner v Switzer*, 131 U.S. 1289, 1299 (2011) ("More generally, in the Prison Litigation Reform Act of 1995 (PLRA), 110 Stat. 1321–

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66, Congress has placed a series of *controls on prisoner suits*, constraints designed to prevent sportive filings in federal court.") (Emphasis added).[2]

130. Further, while not dispositive, the conclusion that the PLRA does not apply to non-prisoner lawsuits is further supported by numerous other permanent injunctions against prisons and jails for censorship and due process issued by Federal District Courts and 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); *cf. Prison Legal News v. Schwarzenegger*, 608 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.").

131. The Court finds that the permanent injunction it is entering meets the standard of *ebay Inc.,* is consistent with the District Court and Ninth Circuit rulings enjoining unconstitutional censorship and violations of due process by prisons and jails cited above, and is narrowly drawn, extends no further than necessary to correct Defendants' repeated violation of the First and Fourteenth Amendments, and is the least intrusive means necessary to correct these violations.

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[2] For this proposition, they cite to *Gilmore v. People of the State of California*, 220 F.3d 987, 992 (9th Cir. 2000). But *Gilmore* involved a collection of suits brought by prisoners and contains a footnote 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).

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132. ACCORDINGLY, the COURT HEREBY ORDERS that:

Declaration

133. By adopting and enforcing a Postcard-Only Policy, Defendants the Columbia County Sheriff Jeffrey Dickerson, the Columbia County Sheriff's office, and Columbia County violated the First Amendment and violated PLN's rights to free speech and expression, and the rights of the prisoners and their other correspondents.

134. By adopting and enforcing a ban on magazines and periodicals, Defendants the Columbia County Sheriff Jeffrey Dickerson, the Columbia County Sheriff's office, and Columbia County violated the First Amendment and PLN's rights to free speech and expression, and the rights of the prisoners and their other correspondents.

135. Each of PLN's sixty-five (65) news journals, subscription materials, book offers, book catalogs, renewal letters, fundraising letters, and other mail to prisoners, Trial Exhibits 1 through 65, that Defendants censored are speech protected by the First Amendment. Each of the eighteen (18) mailings of PLN news articles that Lucy Lennox printed from PLN's website that Defendants censored, Trial Exhibits 71 through 87 and 89, are speech protected by the First Amendment.

136. By censoring each of PLN's sixty-five (65) news journals, subscription materials, book offers, book catalogs, renewal letters, fundraising letters, and other mail to prisoners, Defendants the Columbia County Sheriff Jeffrey Dickerson, the Columbia County Sheriff's Department, and Columbia County violated the First Amendment and violated PLN's rights to free speech and expression and the rights of the prisoners to who PLN sent those censored mailings.

137. Defendants Sheriff Dickerson, the Columbia County Sheriff's Department, and Columbia County violated the Fourteenth Amendment Due Process Clause by: (1) failing to adopt and enforce provisions in their mail policies that afford the sender and intended recipient of mail due process rights to: (a) adequate written notice when Defendants censor their mail; and (b) an opportunity to challenge the censorship decision.

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138. By censoring each of PLN's sixty-five (65) news journals, subscription materials, book offers, book catalogs, renewal letters, fundraising letters, and other mail to prisoners without affording PLN and the prisoners to whom these mailings were sent due process notice or an opportunity to challenge the censorship decisions, Defendants violated the due process rights of Prison Legal News and those prisoners.

Injunction

Defendants the Columbia County Sheriff, the Columbia County Sheriff's office, and Columbia County are permanently enjoined:

(1) from censoring or rejecting mail on the ground that it is not in the form of a postcard;

(2) from censoring or rejecting mail on the ground that it is a magazine or periodical; and

(3) from denying due process to prisoners or their correspondents when rejecting mail. Specifically, for each piece of mail that Defendants censor or reject, the Defendants must give written notice to the sender and addressee of the following:

(a) The identity of the mail censored or rejected, described in sufficient detail that the mail can be matched to the mail rejection notices sent the sender and addressee.

(b) Each specific reason the mail was censored or rejected, described sufficiently that the sender can cure or challenge the Jail's decision;

(c) The identity and basic substance of any mail policy on which the Defendants rely as a justification for the censorship or rejection; and

(d) The sender or addressee's rights to appeal the censorship or rejection, including the identity of the official to whom an appeal may be submitted, any requirements of what must be contained in an appeal, any deadlines or timeframes for appeal, and a reasonable timeframe by which the Defendants will issue a decision on the appeal to the appellant.

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DATED this 31st day of December, 2012.

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/s/ Jesse Wing
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CERTIFICATE OF SERVICE

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

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