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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 RESPONSE TO DEFENDANTS' POST-TRIAL MEMORANDUM RE INJUNCTIVE RELIEF

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The two thousand prisoners who spend time in the Columbia County Jail each year, their families and friends, Plaintiff, and those whose interests it represents, currently enjoy their First Amendment rights to communicate for one reason—the Preliminary Injunction this Court entered on May 29, 2012. The vigor with which defendants have defended the case since that time—and their continued insistence that their policies were not only constitutional, but good ideas—demonstrate that declaratory relief and a permanent injunction are the only ways to ensure that the Columbia County Jail will continue to honor those rights.

This record does not warrant acceptance of Defendants' claim that a permanent injunction is unnecessary. The only reasons they give for this claim is that it would be inconvenient to return to their unconstitutional policies and they have not enjoyed the experience of this litigation. The casual trigger for Defendants' unconstitutional policies—a talk by an unnamed deputy county counsel at an OSSA conference—renders these reasons too slim a reed on which to deny the relief Plaintiff seeks. Moreover, the reluctant acceptance—not a philosophical embrace—of this Court's preliminary injunction that was displayed by Defendants' employees who testified at trial, belies Defendants' claim that they can be trusted to voluntarily honor these fundamental constitutional principles. Their failure to recognize the constitutional infirmities of their old ways and repudiate them mandates that a permanent injunction be issued. And it certainly militates against burdening Plaintiffs with monitoring the jail's policies and practices and filing another action if and when they are changed.

Moreover, even if the current Sheriff would be expected to act more carefully in the future, that would not guarantee that his successor will do so. The Sheriff acknowledged at trial that he cannot bind his successor. There is no reason to expect that the next Sheriff will not attend another OSSA conference, hear someone talk about the benefits of a postcard-only policy, and decide to implement it.

These circumstances undermine Defendants' argument that declaratory and injunctive relief are unnecessary. For contrary to Defendants' explicit and implicit views about the principles at stake, they are matters of great public importance. A permanent injunction is

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essential not only to ensure that the Columbia County Jail continues to honor the First Amendment rights of those within and outside that facility, but that other jails in Oregon do so as well. Denying a permanent injunction would not only illegitimately deprive PLN and the public their First Amendment rights, but would constitute a missed opportunity to educate those jails.

I. Permanent Injunction

Defendants acknowledge that the Supreme Court's 2005 *eBay* opinion governs, Dkt. 209 at 5, but they cite only to cases that predate *eBay*, *id.* at 2, 12, and n. 1, or apply a voluntary cessation standard, *id. at* 3, which does not apply because Defendants ceased violating the Constitution only when enjoined. Complying with a court order is not voluntary.

Defendants lead their brief by relying on *City of Los Angeles v. Lyons*, for the claimed proposition that like Mr. Lyons, PLN lacks standing to seek injunctive or even declaratory relief. Dkt. 209 at 7. But there is no fit here and Defendants fail to address the infirmities in their attempt to rely on *Lyons*, which PLN pointed out in its summary judgment Reply brief, Dkt. 119 at 19-20. Most obviously, the Supreme Court held that *Lyons* would have had standing for injunctive relief if he had shown that he would likely have another encounter with the police and that the police had an unconstitutional policy or practice. *Lyons*, 461 U.S. at 105-06. PLN will have future encounters with Defendants when it sends mail to its subscribers in the Columbia County Jail, and Defendants had a Postcard-Only Policy that precluded delivery of PLN's mail[1]—which Defendants still defend. So, it is disingenuous for Defendants to pretend *Lyons* and its progeny apply. PLN has standing to seek equitable relief, which the Court recognized when it granted a preliminary injunction.

Defendants claim PLN has not met any of the four elements of a permanent injunction. Dkt. 209 at 5. They are mistaken.

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[1] Without explanation, Defendants state in their brief that "under the postcard policy, plaintiff's correspondence was distributed to inmates." Dkt. 209 at 15. To the contrary, the undisputed trial evidence established that Defendants repeatedly censored PLN's enveloped mail pursuant to their Postcard-Only Policy. *See, e.g.*, Trial Exhibits 1-4, 6-7, 9-14, 16, 18-19, 24-26, 31-35, 42-55, 61 (containing sticker stating "As of April 1, 2010 The Columbia County Jail ONLY ACCEPTS POSTCARDS, This applied to ALL incoming and out going mail.")

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A. PLN has Proven the Merits of its Challenge to the Postcard-Only Policy

At trial, PLN established every fact that the Court relied on in granting its preliminary injunction. PLN showed through the testimony of virtually every defense witness that the Defendants had no contraband problem and had no history of one; that any difference in the time it takes to process envelopes versus postcards is *de minimis*; that there is no evidence the preliminary injunction would interfere or has interfered with staff ability to perform their duties; that there is no evidence the injunction has caused or would cause a reduction in security; that there is no evidence the injunction has caused or would cause a ripple effect; that the Postcard-Only Policy caused widespread censorship of prisoner mail and the mail from PLN and other correspondents; and that the Policy caused a chill on protected speech and undermined the ability of prisoners and their correspondents to communicate meaningfully. In short, Defendants' policy was demonstrated to be irrational—a *sine qua non* for constitutionality. That means PLN has shown the Defendants' policy violated the first prong of the *Turner* test, without the need to consider the other three elements. *See Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005).

But Plaintiff proved that the other three elements favor PLN as well. At trial, Plaintiff established that alternative forms of communication such as telephone, visitation, and postcards are not adequate substitutes for letters contained in envelopes. None are private from strangers (as opposed to jail deputies). As a result, prisoners and their correspondents—the evidence showed—refrained from meaningful exchange of information about mental and physical health and other confidential personal matters. They refrained from communicating private identifiers and account information such as with their banks. The undisputed testimony showed that the Postcard-Only Policy reduced speech and that in doing so interfered with rehabilitation, transition back to the community, and avoiding recidivism.

On the facts of this case, analysis of the third element—effect on staff resources—is identical to that under first element since the only claimed impacts were on staff time and jail safety, neither of which were impacted at all by the Court's injunction.

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Similarly, the analysis under the fourth element shows that the Defendants adopted a policy to fix a problem they never had, that they have not offered any reason to believe they were about to face, and did so using a method that did not confer any meaningful benefit on the jail but caused substantial harm to the constitutional rights of thousands. Defendants' "response" to having no problem was therefore an exaggeration. This is illustrated by the fact that a number of well-run facilities cited by the Plaintiff do not have a postcard-only policy, *see* Trial Exhibits148-152, and that Federal ICE Detention Standards prohibit facilities that house ICE prisoners from adopting or otherwise enforcing postcard-only policies, *see* Dkt. 208 at 4 n.2. Defendants' reference to a handful of jails that have such a policy does not undermine this fact.[2]

In their post-trial brief, Defendants claim that "the evidence at trial supports the rationality of the postcard policy," Dkt. 209 at 11, and "the evidence offered at trial demonstrated that relationship existed," *id.* at 13. But Defendants point to *no* testimony or documentary evidence admitted at trial in support of these bald assertions. There was no admitted evidence that favors Defendants on any of the *Turner* factors. Defendants merely offered as evidence that they heard from others at a conference generically that adopting a postcard-only policy *could* reduce the time it takes to process mail and the risk of contraband entering the jail. In the face of all the evidence offered by Plaintiff that these assertions are not accurate, Defendants offered nothing. They did not offer testimony from anyone with knowledge and experience dealing with dangerous contraband that enveloped mail might pose a greater risk of contraband than postcards. They did not introduce studies or even calculations conducted before and after the Postcard-Only Policy was adopted, implemented, or enjoined showing the amount of contraband, if any, purported to be found in the mail, showing that time was saved or lost, showing any burden on jail resources, or relating to any other factor at issue. At trial, Defendants offered as

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[2] Defendants erroneously assert that "Plaintiff had previously claimed it was not aware of other jails or prisons that limit inmates to postcards for personal mail." Dkt. 209 at 10. That is not correct. Plaintiff stated that it is not aware of any state prison or federal correctional facility that adopted a postcard-only policy, Dkt. 8 ¶ 37, and Defendants have not identified any that do.

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evidence only the generic and conclusory view reported second-hand that someone else purportedly believed such a policy could be helpful.

In their post-trial brief, Defendants offered nothing more. They point to a recent unpublished opinion, *Althouse v. Palm Beach County Sheriff's Office*, 12-80135-CIV, 2013 WL 536072 (S.D. Fla. Feb. 12, 2013), which upheld a postcard-only policy in Florida. But in *Althouse*, the jail's bald assertions that it had a significant contraband problem appear to have gone entirely unchallenged by the plaintiff . It also appears from the opinion that the *pro se* plaintiff did not challenge the jail's naked claims that contraband was much more easily hidden in enveloped mail, that it took much more time to process enveloped mail than to process envelopes, and that the processing time significantly reduced the time that the jail staff could spend on other important matters. As a result, the opinion is of no use here.

In contrast, in the case at bar, Defendants failed to show that contraband is much more easily hidden in envelopes. They failed to show that the methods they had used for decades to prevent contraband from entering the Jail became ineffective. And, at trial PLN undermined their assertions that it takes more time to process enveloped mail and that processing time interferes with jail staffs' other duties. *See, e.g.,* Dkt. 209 at 8. (Defendants admit that "Plaintiff was able to show that the time savings for the jail was, at best, minimal.").[3]

And, with virtually no analysis, the *Althouse* opinion concluded that alternative forms of communication—visits and telephone calls—are adequate. This is directly contrary to this Court's findings in its preliminary injunction order, Dkt. 64 at 20-21, which is strongly supported

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[3] Defendants claim the lack of time savings is merely the result of the size of the jail so should be disregarded. They are wrong. First, their policy must be rational for their jail. And second, their speculation is not logical. PLN has shown there was likely no time savings from the Postcard-Only Policy. *See* Testimony of Sergeant Lee Rigdon. But even a *de minimis* savings multiplied does not amount to significant savings for a larger institution. If the Columbia County Jail had spent five fewer seconds for each of 37 pieces of mail, then that would be a total of 3 minutes "saved." In a jail ten times the size, the savings would be 30 minutes—a *de minimis* savings even for Columbia County. And a jail ten times the size would have more staff that process the mail rendering such a savings even more insignificant.

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by the trial testimony of Nataliya Mikhayova, Brad Berg, and Patricia Mendoza. This Court is in the best position to assess the legitimacy of these Defendants' claims based on the undisputed live trial testimony in this contested litigation with argument presented by lawyers on both sides. And, in contrast to *Althouse*, where jails have faced serious challenges to their postcard-only policies, they have abandoned them. *See* Trial Exhibits 158 through 161. The *Althouse* court's opinion evaluating an uncontested declaration in a *pro* se case adds nothing to the Court's analysis here.

None of the other handful of rulings that Defendants cite as upholding postcard-only policies are persuasive either. Dkt. 209 at 8-9. Indeed, this Court has already rejected them: "Defendants cite several District Court cases from the District of Arizona addressing inmate mail policies. Only one, *Covell v. Arpaio*, 662 F. Supp. 2d 1146 (D. Az. 2009), thoroughly addresses each of the *Turner* factors," and the "the court declines to follow *Covell*."[4] Dkt. 64, at 19. Defendants offer no basis for the Court to reconsider its decision.[5]

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[4] The other cited opinions are perfunctory and meaningless as precedent: *Rogers v. Maricopa County Sheriff's Office*, CV07641PHXDGCDKD, 2008 WL 898721, *2 (D. Ariz. Mar. 31, 2008) (dismissing complaint brought under Fourteenth Amendment—not First Amendment—for failure to state a claim because "The Fourteenth Amendment does not guarantee inmates the right to receive 'all' mail."); *Jordan v. Arpaio*, CV08-856-PHX-DGCECV, 2008 WL 2262401, *2 (D. Ariz. May 30, 2008) (dismissing complaint for failure to state a claim because "Plaintiff fails, however, to allege that the policy does not serve a legitimate penological interest."); *Medley v. Arpaio*, CV08-086-PHX-MHMDKD, 2008 WL 3911138, *3-4 (D. Ariz. Aug. 21, 2008) (holding plaintiff failed to show that the Defendants' policy barred receipt of legal documents that she sought so denied "without prejudice her Motion for a Preliminary Injunction regarding Plaintiff's policy limiting to 'postcards only' all incoming mail deemed non-privileged."); *Gibbons v. Arpaio*, CV071456PHXSMMJCG, 2008 WL 4447003 (D. Ariz. Oct. 2, 2008) (holding "Plaintiff offers no argument on any of the separate *Turner* factors" and Plaintiff's affidavits did not address the "merits of the claim or the *Turner* factors" so "*Turner*'s first prong is satisfied.")

[5] It is plain that these opinions were not the product of a meaningful adversarial process in which the truth could have been expected to unfold. Two were dismissed for failure to state a claim due to pleading errors, one merely denied a preliminary injunction, and in the fourth the opinion reflects that the plaintiff failed support the merits of his claim at all. This is unsurprising since these cases were brought by prisoners *pro se*. Litigating against the government under a four-part rational basis balancing test without legal representation in the complex area of the First Amendment and section 1983 litigation would be hard enough for any lay person. It is still more

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B. PLN *Has* Suffered an Irreparable Injury for Which Money Damages are Inadequate

In the face of PLN's citations to long-standing precedent of the United States Supreme Court and the Ninth Circuit declaring that First Amendment violations constitute irreparable harm that cannot be remedied by money, Dkt. 208 at 5-6, Defendants cite no contrary authority at all. Nor could they.

"The Supreme Court has made clear that '[t]he loss of First Amendment freedoms, for even minimal periods of time, *unquestionably constitutes* irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added). There is nothing equivocal about the Supreme Court's admonition: a showing that the First Amendment is violated establishes irreparable harm. And the Ninth Circuit has heeded this plain principle. *See, e.g.*, *Sammartano v. First Judicial Dist. Court, in & for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). The undisputed facts at trial show that Defendants repeatedly censored PLN's mail—an irreparable injury that PLN has already suffered as a matter of law.

Defendants attempt to derail the straightforward analysis of this prong by arguing that PLN did not take steps to notify the Sheriff that his Postcard-Only Policy was unconstitutional. But this allegation isn't relevant, and Defendants fail to cite any precedent to the contrary. A government official's suppression of free speech and free press communicated through the United States mail does not become reparable at law depending on whether the plaintiff tried to stop the suppression in advance. Defendants' failure to mitigate damages defense simply has no place in the irreparable harm analysis under the First Amendment.

Furthermore, it is undisputable that before PLN filed its lawsuit, Defendants deliberately rejected numerous prisoner complaints that the policy was unconstitutional, the Sheriff testified at trial that he was certain his policy was constitutional, he refused to forgo his policy until the

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difficult for a person incarcerated, who cannot easily access legal resources or the internet, and likely cannot obtain discovery on issues of security in the jail in which they are confined.

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Court enjoined it, and since then Defendants have fought in favor of their policy tooth and nail for the past year. There are no other steps PLN could have taken to "stop the harm from occurring."

Similarly, Defendants claim that PLN "has failed to show the likelihood of future harm, and, thus, an award in equity is not warranted." Dkt. 209 at 29. But this is not PLN's burden to show. Likelihood of future harm is not a component of the *eBay* standard. And even under voluntary cessation law, it is *Defendants*, not Plaintiff, who bear the "heavy burden" to show that they have "irrevocably eradicated" their unconstitutional policies. *See* Dkt. 208 at 13-17. Defendants have not, and cannot meet that burden. *Id.*

C. Balance of the Hardships Favors PLN

Defendants claim that PLN "has failed to show the likelihood of future harm, and, thus, an award in equity is not warranted." Dkt. 209, at 29. But this is a standing concept, not properly resurrected as a factor in balancing hardships. Consistent with its evaluation of this factor on PLN's motion for preliminary injunction, the Court should evaluate the hardship of enjoining the policy versus allowing Defendants to enforce it.

And Defendants wrongly claim that PLN has the burden to show likelihood of future harm. This is not a component of the *eBay* standard and Defendants offer no cites to the contrary. Under voluntary cessation law, which is the only precedent Defendant tries to fall back on, it is *Defendants*' who bear a "heavy burden" to show that they have "irrevocably eradicated" their unconstitutional policies. *See* Dkt. 208 at 13-17. Defendants did not voluntarily cease their Postcard-Only Policy and they have not, and cannot meet their heavy burden.

On the merits of this factor, the Court held in its Preliminary Injunction that the harm to PLN caused by the Postcard-Only Policy tips the equities in PLN's favor. The evidence of harm established at trial confirmed the Court's conclusion. And Defendants have failed to identify any way in which a permanent injunction would constitute even an inconvenience let alone a hardship on them. When granting the Preliminary Injunction, the Court held that it was insufficient evidence of a hardship that "Defendants face the possibility of spending 30 to 60

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additional minutes each day opening and inspecting letters." Dkt. 64 at 23. At trial, PLN showed that any impact was far less; it was negligible at best. Since then, Defendants were ordered to halt their policy and claim they are in compliance with the Court's existing injunction. That means they face no hardship whatsoever.

D. A Permanent Injunction is in the Public Interest

As to this prong too, Defendants state their position in a variety of ways but they all boil down to the same argument that an injunction should not issue because PLN cannot show a threat of immediate harm. But the only reason a violation will not occur is because the Defendants are subject to the court's order, which should be converted from a preliminary to permanent injunction.

More importantly, however, is that Defendants' argument is irrelevant to the public interest analysis. As the Court explained in its Preliminary Injunction, "The public interest inquiry primarily addresses [the] impact on non-parties rather than parties." Dkt. 64 at 23-24 (quoting *Sammartano v. First Judicial Dist. Court, in & for County of Carson City*, 303 F.3d 959, 974 (9th Cir. 2002)). The Court then held that this factor: "favors PLN. 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." Dkt. 64 at 24. That remains true today.

As the Ninth Circuit has declared, "it is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano*, 303 F.3d at 974.

E. Magazine Ban and Due Process

In their opening brief, Defendants hardly mention their magazine ban and their failure to afford due process. Accordingly, PLN relies on its opening brief articulating the reasons that the Court should enter declaratory and injunctive relief on both of these claims.

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DATED this 5th day of March, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2013, 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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