UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PRISON LEGAL NEWS
a/k/a HUMAN RIGHTS DEFENSE CENTER, a
Washington not-for-profit organization

Plaintiffs,

vs.

SHERIFF, ANTHONY M. WICKERSHAM, individually and in his official capacity; MICHELLE SANBORN, individually and in her official capacity; MACOMB COUNTY, MICHIGAN;DOES 1-10, individually and in their official capacities,

Defendants.

Case No.

Hon.

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PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

NOW COMES Plaintiff, PRISON LEGAL NEWS (PLN), a/k/a Human Rights Defense Center (hereinafter "HRDC"; "PLN"; or "Plaintiff"), by and through its attorneys, pursuant to Federal Rule of Civil Procedure 65 and respectfully moves this Court for a preliminary injunction enjoining Defendants from improperly censoring publications and correspondence mailed to prisoners at Macomb County Jail (hereinafter, "Jail") by Plaintiff and other senders pursuant to a postcard only policy. In support of this motion, Plaintiff states as follows:

1. Plaintiff publishes and distributes a monthly journal of corrections news and editorial content about the criminal justice system and important legal issues affecting prisoners. PLN also distributes approximately fifty (50) legal and self-help books, including *The Habeas Citebook: Ineffective Assistance of Counsel*, which describes the procedural and substantive complexities of Federal *habeas corpus* litigation with the goal of helping prisoners identify and/or litigate claims involving ineffective assistance of counsel. The core of PLN's mission is public education, advocacy and outreach to assist prisoners who seek legal redress for infringements of their constitutional and human rights.

2. Defendants have censored the following materials from PLN: (1) Informational brochure packets; (2) Sample copies of *Prison Legal News*; (3) 2014 annual fundraiser mailings; (4) copies of judicial decisions; (5) Monthly Subscription issues of *Prison Legal News*; and (6) individual copies of *The Habeas*

Citebook: Ineffective Assistance of Counsel. Since July 2014, Defendants have censored PLN's monthly journal, books and other correspondence on at least 245 occasions.

3. Defendants have rejected these items pursuant to an unconstitutional mail policy which requires all non-privileged mail to be in the form of a postcard, restricts magazines to just twelve (12) titles, and restricts incoming books to those ordered from Amazon Prime.

4. Defendants have failed to provide to Plaintiff constitutionally adequate notice of their censorship of PLN's written speech as well as an opportunity to challenge Defendants' censorship decisions.

5. Plaintiff has a constitutionally protected liberty interest in communicating with incarcerated individuals, a right clearly established under existing case law.

6. Injunctive relief is necessary to prevent the Defendants from continuing to interfere with Plaintiff's fundamental constitutional right to free speech and expression, equal protection and due process of law as guaranteed by the First and Fourteenth Amendments of the United States Constitution.

7. Plaintiff has been, and will continue to be, subjected to irreparable harm for which there is no adequate remedy at law unless and until this Court provides the injunctive relief requested.

8. Plaintiff submits that all essential elements for the issuance of a preliminary injunction are present in this case: 1) a threat that Plaintiff will suffer irreparable injury if the injunction is not granted; 2) a substantial likelihood or probability that Plaintiff will prevail on the merits; 3) the threatened injury to Plaintiff outweighs any threat of harm to the Defendants; and 4) granting the preliminary injunction will not disserve the public interest.

WHEREFORE, Plaintiff respectfully requests that this Court enter a preliminary injunction enjoining Defendants from unconstitutionally censoring Plaintiff's and other senders' mail, and ordering Defendants to provide all senders of censored mail with constitutionally adequate due process notice and an opportunity to challenge Defendants' censorship decisions.

Respectfully Submitted,

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Dated: June 30, 2015

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BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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CONTROLLING AUTHORITY

Plaintiff relies upon FED. R. CIV. P. 65(a); *Int'l Dairy Foods Ass'n v. Boggs*, 622 F.3d 628, 635 (6th Cir. 2010) (setting out the four factors to consider when determining whether a preliminary injunction should issue); *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (recognizing the First Amendment right of prisoners to receive publications and other correspondence); *Turner v. Safley*, 482 U.S. 78, 84 (1987) (articulating four factors relevant to the question of whether a regulation is reasonably related to legitimate penological interests); *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 299 (6th Cir. 2006)) (describing requirements needed to demonstrate disparate treatment from others who were similarly situated); *Martin v. Kelley*, 803 F.2d 236 (6th Cir. 1986) (requiring prison mail censorship regulation provide notice and opportunity to appeal to both inmate and sender under the Fourteenth Amendment); *Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009) (showing irreparable harm based on the denial of First Amendment rights in correctional settings), in support of its motion.

QUESTIONS PRESENTED

I. Whether Defendants violated Plaintiff's and other senders' First Amendment rights by censoring publications and correspondence mailed to prisoners at Macomb County Jail pursuant to a postcard-only mail policy?

Plaintiff answers: "Yes"

Defendants presumptively answer: "No"

II. Whether Defendants violated the Equal Protection Clause of the Fourteenth Amendment by limiting book orders through Amazon Prime only, and further limiting magazine subscriptions to twelve (12) titles, to the exclusion of Plaintiff and other publishers and book distributors?

Plaintiff answers: "Yes"

Defendants presumptively answer: "No"

III. Whether Defendants failed to provide constitutionally adequate due process notice and an opportunity to appeal to senders of correspondence in violation of the Fourteenth Amendment?

Plaintiff answers: "Yes"

Defendants presumptively answer: "No"

I. INTRODUCTION

Defendants are in violation of the free speech, due process and equal protection clauses of the First and Fourteenth Amendments to the U.S. Constitution by improperly censoring publications and correspondence mailed to prisoners at Macomb County Jail (hereinafter, "Jail") from Plaintiff, PRISON LEGAL NEWS, a/k/a Human Rights Defense Center (hereinafter "HRDC"; "PLN"; or "Plaintiff") and other senders pursuant to the Jail's mail policy.

PLN hereby moves for a preliminary injunction enjoining Defendants from continuing to enforce their illegal mail policy, and from continuing to deprive senders of censored mail of their rights to equal protection and due process of law. A preliminary injunction should be granted because PLN will succeed on the merits of this action, because the violations of PLN's constitutional rights are causing irreparable harm, because the balance of equities strongly weighs in PLN's favor, and because an injunction would be in the public interest.

II. FACTUAL BACKGROUND

Prison Legal News is a project of the non-profit Human Rights Defense Center. PLN publishes an award-winning, 72-page monthly journal entitled *Prison Legal News*. Declaration of Paul Wright in Support of Mtn. for Preliminary Injunction, filed herewith as Exhibit A ("Wright Decl."), ¶¶ 2-4, 13. The journal provides information about legal issues, including access to courts, disciplinary

hearings, prison and jail conditions, excessive force, and religious freedom. *Id.* ¶ 13.

Published continuously since 1990, *Prison Legal News* has thousands of subscribers in the United States and abroad, including prisoners, attorneys, journalists, public libraries, judges, and the general public. *Id.* ¶ 4. PLN is distributed to prisoners in more than 2,400 correctional facilities across the United States, including detainees at the Macomb County Jail, prisoners in the custody of the Michigan Department of Corrections, and the Federal Bureau of Prisons, including the ADX Supermax at Florence, Colorado, the most secure prison in the United States. *Id*. PLN also distributes approximately fifty (50) legal and self-help books, including *The Habeas Citebook: Ineffective Assistance of Counsel*, which describes the procedural and substantive complexities of Federal *habeas corpus* litigation. *Id.* ¶¶ 14-15. The core of PLN's mission is public education, advocacy and outreach to assist prisoners who seek legal redress for infringements of their constitutional and human rights. *Id.* ¶ 2.

Defendants have censored the following materials from PLN: (1) Informational brochure packets; (2) Sample copies of *Prison Legal News*; (3) 2014 annual fundraiser mailings; (4) copies of judicial decisions; (5) Monthly Subscription issues of *Prison Legal News*; and (6) individual copies of *The Habeas Citebook: Ineffective Assistance of Counsel*. *Id.* ¶ 10. Altogether, since July 2014,

Defendants have censored PLN's monthly journal, books and other correspondence on at least 245 occasions. *Id.* ¶ 10.

Additionally, copies of *Prison Legal News* and *The Habeas Citebook* were never delivered to prisoners, and no notice of the censorship or opportunity to appeal was given to PLN. *Id.* ¶ 10. PLN is unaware of how or in what manner Defendants disposed of these items. *Id.* ¶ 11. Other mail was returned to PLN, at its own expense, and contained two (2) different stickers providing for an appeal of the censorship within twenty (20) days. *Id.* ¶ 12. The stickers read as follows:

- **"MAIL DENIED. Does not meet institutional criteria. Appeals may be directed in writing within 20 days to Jail Administration Mail Appeal;"**

- **"Not in form of approved postcard *NOTE. Plain White METERED POSTCARDS ONLY 5" X 7" or smaller NO IMAGES/NO STICKERS/NO STAMPS"**

On at least two (2) of the items of returned correspondence, no stickers were provided regarding an appeal process. *Id.* ¶¶ 11-12.

Defendants' illegal conduct stems from the following two (2) mail policies:

A. Postcard-Only Mail Policy

Defendants instituted a postcard-only mail policy that restricts all incoming non-privileged correspondence to metered, 5x7 white postcards. *Id.* ¶ 10, Ex. A-8. Consequently, because PLN's publications and other correspondence do not fit on postcards, Defendants have censored its mail. *Id.* ¶ 10. Restricting the speech of

PLN and other senders of censored mail to postcards only is not rationally related to a legitimate penological interest.

B. Book & Magazine Restriction

Defendants' arbitrary restriction of magazines to only twelve (12) titles does not have a rational relationship to any legitimate penological interest. Defendants only permit the following twelve (12) magazine titles: *People*, *Field & Stream*, *Newsweek*, *Outside*, *Time*, *Money*, *Reader's Digest*, *O the Oprah Magazine*, *Men's Fitness*, *Shape*, *Martha Stewart Living* and *Parenting*. *Prison Legal News* is not on the list of approved magazines. *Id.* ¶ 13, Ex. A-8. This violates PLN's First Amendment right to communicate its speech with prisoners, and its right to Equal Protection under the Fourteenth Amendment.

Equally infirm is Defendants' policy limiting book orders to those from Amazon Prime only, which denies PLN and other book distributors their Constitutional rights to free speech under First Amendment and equal protection under the Fourteenth Amendment.

III. LEGAL STANDARD

A preliminary injunction is appropriate where a plaintiff demonstrates "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." FED. R. CIV. P. 65(a);

Int'l Dairy Foods Ass'n v. Boggs, 622 F.3d 628, 635 (6th Cir. 2010).

The four considerations are not meant to be "prerequisites that must be satisfied" or "rigid and unbending requirements." *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 859 (6th Cir. 1992). Rather, the factors should be balanced and used to guide the discretion of the court. *Id.*; *Friendship Materials, Inc. v. Mich. Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982).

"Notwithstanding this balancing approach, 'when a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.' In short 'because the questions of harm to the parties and the public interest cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is ... whether the regulation at issue is likely to be found constitutional.'" *Jones v. Caruso*, 569 F.3d 258, 266 (6th Cir. 2009) (internal citation omitted).

IV. ARGUMENT

A. PLN is Likely to Succeed on the Merits of Its Claims

i. First Amendment Claims

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley*, 482 U.S. 78, 84 (1987), nor do they bar others "from exercising their own constitutional rights by reaching out to those on the 'inside,'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). *See also*

Merriweather v. Zamora, 569 F.3d 307, 316 (6th Cir. 2009); *Harbin-Bey v. Rutter*, 420 F.3d 571, 578 (6th Cir. 2005). In *Brooks v. Seiter*, the Sixth Circuit stated:

> The Supreme Court has made it clear that prison inmates retain all first amendment rights not incompatible with their status as prisoners, or with the legitimate penological objectives of the corrections system. The Court has recognized that receiving mail from an outside source, an interest in communication shared by prisoners and their correspondents, is such a first amendment right. This right is subject to restriction in the interests of prison security, but such restrictions must further legitimate penological objectives, in a manner no more restrictive than necessary.

779 F.2d 1177, 1180 (6th Cir. 1985) (internal quotations and citations omitted); *see also O'Bryan v. County of Saginaw, Mich.*, 437 F.Supp. 582, 600 (E.D. Mich. 1977), *aff'd.* 741 F.2d 283 (6th Cir. 1984) ("pretrial detainees have an unqualified right to receive any publication which is legally available to members of the public generally" and "the prohibition against prior restraints forbids defendants from curtailing a pretrial detainee's right to receive publications").

Notably, PLN's correspondence with prisoners is "core protected speech" and "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal citation omitted); *see also Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) ("[PLN's speech] is core protected speech, not commercial speech or speech whose content is objectionable on security or other grounds.").

While this case involves the free speech rights of free persons, and not of

prisoners, PLN assumes that the Court will employ the *Turner* test as a means of ensuring that any injunctive relief incorporates due deference for the exigencies of jail operation. *See Jones*, 569 F.3d at 266 (citing *Turner*, 482 U.S. at 89-91); *see also Cornwell v. Dahlberg*, 963 F.2d 912, 917 (6th Cir. 1992).

First, under *Turner*, "there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (internal citation omitted); *see also Muhammad v. Pitcher*, 35 F.3d 1081, 1084 (6th Cir. 1994). The first factor is *sine qua non*: "if a regulation is not rationally related to a legitimate and neutral penological objective, a Court need not reach the remaining three factors." *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005). Importantly, the Supreme Court did not intend for the judiciary to merely rubberstamp the decisions of prison officials. Rather, the *Turner* court explained that "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." 482 U.S. at 89-90; *see also Thornburgh*, 490 U.S. at 414 ("reasonableness standard is not toothless."); *Campbell v. Miller*, 787 F.2d 217, 227 n.17 (7th Cir. 1986) ("[D]eference to the administrative expertise and discretionary authority of correction officials must be schooled, not absolute."). Simply put, Defendants must identify specific penological interests involved and demonstrate that those specific interests are the actual bases for their

policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point. *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990). The government may not pile "conjecture upon conjecture" to justify infringement of constitutional rights. *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988).

If the second factor is reached, the Court would determine "whether there are alternative means of exercising the right that remain open," allowing "other avenues" for the "asserted right." *Turner*, 482 U.S. at 90. The third factor requires the Court to assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Fourth and finally, the Court would determine whether "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* If a ready alternative fully accommodates the claimant's rights "at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

1. The Defendants' Policy and Practice Bears No Rational Relation to Legitimate Penological Objectives

The Court first must determine whether Defendants' postcard-only policy is rationally related to a legitimate penological interest. Although security concerns can be a valid penological interest, the postcard-only policy is not rationally related

to meeting these penological objectives. John Clark, a corrections expert with 40 years of experience, including as the Warden of large federal detention facilities, has opined that "[t]his policy is contrary to widely accepted detention practices" and that "there is no valid, rational connection between a postcard-only mail policy and any security interest." Declaration of John Clark in Support of Mtn. for Preliminary Injunction, filed herewith as Exhibit B ("Clark Decl."), ¶¶ 2, 28, 13. Jails have a variety of means through which they can intercept contraband that might be sent to inmates by mail - techniques used successfully for decades. Clark Decl. ¶ 29.

Letters, book catalogs, and written communications other than postcards often contain core political and social speech or invite the reader to request such speech, as PLN's subscription brochures and book offers do. Letters facilitate the exchange of views on poor jail conditions and how to alleviate them, on legal rights, on how to address private medical, psychological, and educational needs. The Urban Institute's Justice Policy Center, *From the Classroom to the Community: Exploring the Role of Education During Incarceration and Reentry* (2009), noted the link between public safety and reading:

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

Wright Decl., Ex. A-9 at 42. The American Bar Association has also underscored the importance of mail to prisoners noting that "[m]ail is a crucial method by which prisoners maintain and build familial and community ties." Wright Decl., Ex. A-10 at 180. Even the national detention standards for U.S. Immigration and Customs Enforcement facilities state that "[f]acilities shall not limit detainees to postcards and shall allow envelope mailings." Wright Decl., Ex. A-11 at 328. The Supreme Court has also recognized that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." *Procunier v. Martinez*, 416 U.S. 396, 412–13 (1974), *overruled in part by Thornburgh*, 490 U.S. at 413–14. The lack of privacy and space available on a postcard cuts off opportunities to communicate that are already very limited for inmates. Clark Decl., ¶¶ 33-34. Such restrictions are harmful because inmates are often easier to manage in custody when they are connected with friends and family in the outside world. Clark Decl., ¶ 30. Policies that limit written communication also undermine public safety because they keep inmates from developing the relationships with the outside world they need to prepare themselves for a productive life beyond bars. Clark Decl. ¶¶ 9, 30-31.

Plaintiff has successfully enjoined postcard-only policies at other county jails. *See e,g.*, *Prison Legal News v. San Diego County, et al.*, Case No., 3:14-cv-02417-L-NLS, Dkt. No. 43 (S.D. Cal. 2015), Exhibit C; *Prison Legal News v.*

Lewis County, Case No., 14-cv-05304 (JRC), 2014 U.S. Dist. LEXIS 126856 (W.D. Wash. Sept. 10, 2014), Exhibit D; *Prison Legal News v. County of Ventura*, Case No.: cv-14-773-GHK (EX), 2014 WL 2736103 (C.D. Cal. June 16, 2014), Wright Decl., ¶¶ 22, Ex. A-7, Exhibit E; *Prison Legal News v. Columbia County* 942 F. Supp. 2d 1068 (D. Or. 2013); *Prison Legal News v. Spokane County*, Case No., 2:11-cv-029 RHW, Dkt. No. 109 (E.D. Wash. 2011), Exhibit F.

2. Defendants Have Failed to Provide Alternative Means for PLN to Exercise its First Amendment Rights

Because Defendants' postcard-only policy fails under the first *Turner* prong, this Court need not reach the remaining three prongs. The policy, however, also fails the second prong of *Turner*, which considers whether the policy allows "alternative means of exercising" the First Amendment rights at issue here. *Turner*, 482 U.S. at 90.

PLN has no other reasonable, alternative ways to ensure inmates receive this information. PLN cannot print its entire seventy-two (72) page journal, the content of its books, an entire legal decision, or the information contained in its brochures, forms, and book lists on postcards. Also, some of PLN's source material is written by prisoners. Wright Decl., ¶ 9. PLN sends recent court decisions or other jail-related information to prisoners in order for them to write articles for publication in PLN. *Id.* The postcard-only mail policy forecloses this avenue of communication by making the delivery of these source documents impossible. *Id.*

3. Accommodating PLN's First Amendment Rights Would Impose No Significant Burden on Jail Officials or Other Inmates and Will Not Deplete the Jail's Resources

Under the third *Turner* factor, Defendants must establish that accommodating PLN's First Amendment rights would negatively impact the jail, including its inmates and staff, and its resources. Requiring the Jail to inspect enveloped mail sent to inmates would not create a significant burden on jail officials. *Turner*, 482 U.S. at 90; *Thornburgh*, 490 U.S. at 418; Clark Decl., ¶ 36. Defendants would simply have to inspect and deliver PLN's correspondence in the same way that staff persons at thousands of jails and prisons do every day. *Id.* As to the impact on inmates, censoring PLN's materials only hinders rehabilitative efforts by depriving inmates of educational reading material. Clark Decl., ¶¶ 10, 14.

ii. Defendants' Postcard Policy is an Exaggerated Response to Perceived Security Concerns

Under the fourth factor, the Court must examine whether "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90. If a ready alternative fully accommodates PLN's rights at *de minimis* cost to penological interests, this serves as evidence that the regulation does not satisfy the reasonable relationship standard. *Id.* at 91. Moreover, "the policies followed at other well-run institutions [are] relevant to a determination of the need for a

particular type of restriction." *Procunier*, 416 U.S. at 414 n.14.

Even if PLN's correspondence presented a genuine threat to institutional security or staff time management – which it does not – a ready solution exists. As noted above, jail staff could remove the correspondence from its envelope, review its contents for contraband, and deliver it to its intended recipient. *See* Clark Decl. ¶ 29; *Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068, 1083 (D. Or. 2013) (relevant comparison is not to compare Defendants' policy to a "no inspection" mail policy, but to compare it to situation in which Jail staff inspect incoming mail). This alternative fully addresses PLN's First Amendment rights at little to no cost to Defendants' penological interests in safety.

iii. Defendants' Policy Restricting Book Orders and Limiting Magazines to Twelve (12) Titles, excluding *Prison Legal News*, Violates the Equal Protection Clause

Defendants' mail policy limits magazines to twelve (12) select titles, and does not allow book orders from any publisher or book distributor other than Amazon Prime. Wright Decl. ¶ 13. This differential treatment deprives Plaintiff, book distributors and other publishers equal protection under the law. The Equal Protection Clause provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., AMEND. XIV, § 1. "To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately 'as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right,

targets a suspect class, or has no rational basis.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286, 299 (6th Cir. 2006)).

PLN distributes books and magazines to over 2,400 correctional facilities around the country. Wright Decl. ¶ 4. In the past 25 plus years of publishing, Plaintiff is not aware of any incidents where *Prison Legal News* or any of the books that it distributes has threatened the security and good order of a jail or prison in the Unites States. *Id.* at 7. PLN's books provide information on legal and educational issues, as well as health care, and do not threaten the security of jails and prisons across the U.S. where they are regularly delivered. *Id.* at 14. Indeed, any claim that censoring Plaintiff's magazine and its books have made a qualitative difference in jail security is not supported by fact or reason. As in any jail, all magazines, books and other correspondence are reviewed for unauthorized content and for any security issues. Indeed, the Jail currently accepts and ostensibly reviews twelve (12) assorted magazines for any security threats. Any minimal effect on staff time does not justify restrictions on access to PLN's magazine or its First Amendment rights. *See Lehman*, 397 F.3d at 700 (rejecting regulation designed to reduce volume of mail). Additionally, the Jails can set reasonable limits on how much property a prisoner can possess in his or her cell to address any purported security concerns caused by possession of such materials.

Further, any claim that the content of *Prison Legal News* or the books it sends to prisoners are a threat to jail security similarly fails. When a state entity discriminates between speakers based on the views expressed by each, it is "censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 97-98 (1972) (quoting *Cox v. Louisiana*, 379 U.S. 536, 580 (1965)). When Defendants selectively enforce their policies to discriminate against speakers like Plaintiff, it violates the rights of PLN and other senders to free speech and equal protection.

iv. Defendants have Violated the Due Process Clause by Failing to Provide PLN with Adequate Notice and an Opportunity to Challenge Defendants' Censorship

A publisher's right to communicate with prisoners is rooted not only in the First Amendment, but also protected by the Fourteenth Amendment as:

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

Procunier, 416 U.S. at 417-18. In *Martin v. Kelley,* the Sixth Circuit held that a prison mail censorship regulation must provide that notice and opportunity to appeal to both the inmate and the sender because:

> Without notifying the free citizen of the impending rejection, he would not be able to challenge the decision which may infringe his

> right to free speech . . . [and] since the inmate-recipient would not have seen the contents of the withheld letter, he may require the aid of the author to meaningfully challenge the rejection decision.

803 F.2d 236, 244 (6th Cir. 1986). The Constitution requires prison officials to afford notice and an opportunity to appeal their censorship decisions. *See, e.g.*, *Procunier*, 416 U.S. at 418-19 (requiring "that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of that letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence.").

Defendants failed to provide constitutionally mandated due process to publishers and other senders of prisoner mail. Books and monthly subscriptions of *Prison Legal News* were never provided to prisoners, and no notice of the censorship or opportunity to appeal was afforded to PLN. Wright Decl. ¶ 10. As discussed *supra*, other correspondence was returned to PLN, at its own expense, and contained two (2) different stickers providing for an appeal of the censorship, while others contained no sticker at all.

Such inconsistencies and the complete failure to provide adequate and timely notice underscore Defendants' inability to conform their behavior to constitutionally mandated requirements, requiring an injunction. Indeed, by returning censored items to the sender without a hearing the Jail no longer has the

material to review if any sender or prisoner were to contest the rejection. Also, providing notice and an opportunity to be heard is important because it allows publishers to investigate and to challenge violations of their First Amendment rights, as well as to assist subscribers in filing challenges to such violations within the correctional grievance system. *See Montcalm Publ. Corp. v. Beck*, 80 F.3d 105, 108-109 (4th Cir. 1996) (stating that notice to the prisoner alone is insufficient because "[a]n inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication").

Correctional facilities in other jurisdictions provide due process to senders and prisoners when refusing to deliver publications and other correspondence. The Federal Bureau of Prisons has an explicit policy requiring it to notify prisoners and publishers, identifying the specific articles or materials rejected and allowing independent review of a warden's rejection decision. *See Thornburgh*, 490 U.S. at 406. This policy was upheld by the United States Supreme Court and acts as a model for other correctional facilities. *Id.*

B. PLN Will Suffer Irreparable Harm in the Absence of Injunctive Relief

The Supreme Court has held that "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).

Courts have repeatedly found irreparable harm based on the denial of First

Amendment rights in correctional settings. *See, e.g., Jones v. Caruso*, 569 F.3d 258, 277-279 (6th Cir. 2009) (affirming grant of preliminary injunction against prison publication policy) (quoting *Elrod*, 427 U.S. at 373); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1078-79 (6th Cir. 1994) ("[V]iolations of [F]irst [A]mendment rights constitute *per se* irreparable injury.") (internal citation omitted); *Newsome v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("[E]ven minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."); *Lehman*, 397 F.3d at 699-700; *Cook*, 238 F.3d at 1151; *Mann v. Smith*, 796 F.2d 79, 82-83 (5th Cir. 1986); *Kincaid v. Rusk*, 670 F.2d 737, 744 (7th Cir. 1982). By demonstrating a likelihood of success on the merits of its First Amendment claim, PLN has also demonstrated irreparable harm.

To meet its mission, PLN must deliver its publications and correspondence to inmates quickly, by covering recent events and judicial decisions that—if delivery is delayed—may be stale upon arrival or may no longer be relevant to an inmate whose legal filing deadline has passed. *See CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) ("[I]ndefinite delay of [a] broadcast will cause irreparable harm to the news media that is intolerable under the First Amendment."). If PLN loses the opportunity to deliver its materials to an inmate, it has lost the window of opportunity in which to communicate with that inmate at a time when the

information will be most useful and effective. Furthermore, if Defendants are not ordered to provide notice of the materials they are refusing to deliver, PLN will not know which materials are allowed to enter Defendants' facilities and which materials are rejected.

C. The Balance of Equities Tips in PLN's Favor

Here, the irreparable harm suffered by PLN is concrete, severe, and ongoing. In contrast, any potential injuries to the Defendants are minimal and speculative. No great cost or expenditure of time is required to lift the policies to allow PLN to communicate with prisoners and afford constitutionally required due process. Accordingly, the balance of equities tips in PLN's favor given the irreparable harm suffered by PLN if a preliminary injunction does not issue. As the Sixth Circuit stated in *Déjà vu of Nashville, Inc. v. Metro Gov't. of Nashville and Davidson County, Tenn.*, 274 F.3d 377, 400 (6th Cir. 2002): "If the Plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment."

D. Granting A Preliminary Injunction Serves the Public Interest

The First Amendment furthers a compelling public interest. "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Once again, "the determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits

of the First Amendment challenge because it is always in the public interest to prevent the violation of a party's constitutional rights." *Connection Distr. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (internal citations omitted). *See also Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (Courts have "consistently recognized the 'significant public interest' in upholding free speech principles," quoting *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002)); *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech."). This inquiry "primarily addresses impact on non-parties rather than parties." *Sammartano*, 303 F.3d at 974. The public has an important interest in protecting the "marketplace of ideas" wherever it may be found, and in the continued vitality of the Bill of Rights. This speaks to the hunger for expressive freedom that Justice Thurgood Marshall described in *Procunier*, 416 U.S. at 428 (Marshall, J., concurring) ("When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions …. It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.").

E. The Postcard Policy and the Publication Restrictions Should be Enjoined in Full

Defendants' postcard-only policy and unfair magazine restriction should be enjoined in full, not just as to PLN, because it has third party standing to assert the rights of other organizations and individuals who correspond with prisoners at the Jail. "Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society--to prevent the statute from chilling the First Amendment rights of other parties not before the court." *Secretary of State of Md. v. Joseph H Munson Co., Inc.*, 467 U.S. 947, 958 (1984); *see also e.g., Eisenstadt v. Baird*, 405 U.S. 438, 445 n.5 (1972) (noting "in First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech."); *Virginia v. Amer. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-393 (1988) (finding that booksellers had standing based on the rights of non-party potential book buyers); *Connection Distr. Co.*, 154 F.3d at 295 (holding that publisher had standing to assert freedom of association rights of its readers).

The Supreme Court has instructed that when claims are presented vigorously and resolution of the merits would be an efficient use of judicial resources, the claims of third parties should not wait for another day. *Craig v. Boren*, 429 U.S. 190, 193-94 (1976) ("[A] decision by us to forgo consideration of the

constitutional merits in order to await the initiation of a new challenge to the statute by injured third parties would be impermissibly to foster repetitive and time-consuming litigation under the guise of caution and prudence."). The parties and the Court here are expending significant resources on the issue of the constitutionality of the jail's mail policies, so an injunction limited to correspondence from PLN would be contrary to judicial economy and interfere with the interests of non-parties who could benefit from court-ordered relief now, while the inmates they wish to correspond with are still in the Jail.

F. The Bond Requirement Should Be Waived

Under Federal Rule of Civil Procedure 65(c), district courts have discretion to determine the amount of the bond accompanying a preliminary injunction, and this includes the authority to set no bond or only a nominal bond. *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005) ("The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review.") (quoting *Cal. ex. rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985)); *Ctr. For Food Safety v. Vilsack*, 753 F. Supp. 2d 1051, 1061–62 (N.D. Cal. 2010) (waiving bond requirement for small non-profit organization suing government entity because bond would effectively deny access to judicial review).

Waiving the bond requirement is appropriate here because PLN is a project of a small non-profit organization of fifteen employees that would be unable to post anything more than a nominal bond. Wright Decl. ¶ 24. A bond requirement would effectively deny access to judicial review for PLN, which is especially harmful because PLN is alleging violations of its fundamental rights under the Constitution. *See Complete Angler, LLC v. City of Clearwater*, 607 F. Supp. 2d 1326, 1335 (M.D. Fla. 2009) ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right.").

V. CONCLUSION

For the foregoing reasons, PLN respectfully requests that the Court enter an Order granting Plaintiff's Motion for a Preliminary Injunction and providing for other relief as is appropriate.

Respectfully Submitted,

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