*No. 13-15965*

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

PRISON LEGAL NEWS,
A PROJECT OF THE HUMAN RIGHTS DEFENSE CENTER,

*Plaintiff-Appellant,*

v.

PAUL BABEU, ET AL.,

*Defendants-Appellees.*

On Appeal from the United States District Court
for the District of Arizona
Hon. G. Murray Snow
(Case No. 2:11-cv-01761-GMS)

# AMICUS BRIEF OF FLORIDA JUSTICE INSTITUTE, INC., THE LEGAL AID SOCIETY, THE PRISON LAW OFFICE, COMMUNITIES UNITED AGAINST POLICE BRUTALITY, UPTOWN PEOPLE'S LAW CENTER, NATIONAL POLICE ACCOUNTABILITY PROJECT, WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS, PRISONERS' LEGAL SERVICES OF NEW YORK, TEXAS CIVIL RIGHTS PROJECT, FLORENCE IMMIGRANT & REFUGEE RIGHTS PROJECT, THE ARIZONA CHAPTER OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, AND THE UNIVERSITY OF CALIFORNIA DAVIS SCHOOL OF LAW'S KING HALL IMMIGRATION DETENTION PROJECT


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of Florida Justice Institute, Inc., The Legal Aid Society, The Prison Law Office, Communities United Against Police Brutality, Uptown People's Law Center, National Police Accountability Project, Washington Lawyers' Committee For Civil Rights & Urban Affairs, Prisoners' Legal Services of New York, Texas Civil Rights Project, Florence Immigrant & Refugee Rights Project, the Arizona Chapter of the American Immigration Lawyers Association, and the University of California Davis School of Law's King Hall Immigration Detention Project certifies that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

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## I. STATEMENT OF INTEREST

Amici curiae are nonprofit, public interest organizations that work on behalf of prisoners and civil detainees. Each amicus (or its members) provides legal representation, legal support services, or legal referral services to people in prisons, jails, or immigrant detention facilities.

Amici believe that it is critically important that correctional and detention facilities respect the First Amendment rights of inmates and detainees and those in the outside world who seek to communicate with them. Amici cannot achieve their purposes, including legal representation or assisting persons to represent themselves *pro se*, if they and others are unable to communicate with prisoners and detainees. Moreover, amici are committed to the goal of securing the constitutional rights of incarcerated and detained individuals. If this Court were to affirm the district court's decision, amici gravely fear that First Amendment violations at the Pinal County Jail would continue and that it would set a dangerous precedent for other facilities.

The Florida Justice Institute, Inc. ("Florida Justice Institute") is a private, not-for-profit public interest law firm founded in 1978 by leaders of the private bar to, in part, represent institutionalized persons in prisons and jails to improve conditions of confinement. It is primarily funded by the Florida Bar Foundation and attorneys' fees recovered in meritorious cases. The Florida Justice Institute accepts only those cases that either involve very significant injury to a single inmate or that, if successful, will benefit large numbers of inmates. The Florida Justice Institute frequently seeks prospective injunctive relief on behalf of its

clients, and often in the First Amendment context. The Florida Justice Institute has participated as amicus curiae in a variety of cases in both state and federal courts at the intermediate appellate and Supreme Court levels. The Florida Justice Institute is also funded by the U.S. District Court for the Southern District of Florida to operate the Court's Volunteer Lawyers' Project for *pro bono* attorneys, the greater majority of whose cases deal with conditions of confinement and the need for injunctive relief.

Founded in 1876, The Legal Aid Society in New York City is the oldest and largest private not-for-profit organization that provides legal assistance to low-income families and individuals who cannot afford to pay for counsel. Annually, The Legal Aid Society works on more than 300,000 individual legal matters for clients with civil, criminal, and juvenile rights problems, in addition to law reform representation that benefits all two million low-income children and adults in New York City. Through its Prisoners' Rights Project, The Legal Aid Society seeks to ensure that prisoners' constitutional and statutory rights are protected. The Legal Aid Society provides legal assistance for prisoners in the New York City jails and New York state prisons, and conducts litigation on behalf of clients to address prison conditions.

The Prison Law Office is a California nonprofit public interest law firm founded more than 30 years ago. It represents individual prisoners, educates the public about prison conditions, and engages in class action and other impact litigation. The Prison Law Office relies on prison and jail mail systems to communicate with clients and witnesses and to distribute its publications.

Communities United Against Police Brutality ("Communities United") is a Minnesota organization that was created to deal with police brutality and create a climate of resistance to abuse of authority by police organizations. Communities United engages in educational and legislative advocacy efforts. It also provides support for survivors of police brutality and families of victims, including through a 24-hour crisis line that people can call to report instances of abuse. Among other things, Communities United helps victims to investigate incidents, document their cases, and secure videos and other evidence. Communities United does not represent victims who wish to pursue legal action, but refers them to local attorneys. The Hennepin County Jail has repeatedly prevented persons housed at the jail from communicating with Communities United.

The Uptown People's Law Center is a not-for-profit legal clinic founded in 1975. In addition to providing legal representation, advocacy, and education for poor and working people in Chicago, the Uptown People's Law Center also provides legal assistance to people housed in Illinois prisons in cases related to their confinement. The Uptown People's Law Center has provided direct representation to over 100 prisoners, including in several cases alleging violation of religious rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Most recently, the Uptown People's Law Center represented the plaintiff in *Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009), the circumstances of which are discussed in this brief. In *Nelson*, the Uptown People's Law Center observed that the absence of an injunction resulted in the persistence of an illegal regulation on inmates' religious practices.

The National Police Accountability Project ("NPAP") was founded in 1999 by members of the National Lawyers Guild to address misconduct by police officers, prison personnel, and other law enforcement officers. NPAP presently has more than 500 attorney members throughout the United States; these attorneys represent plaintiffs in civil actions alleging misconduct by law enforcement and corrections officers. NPAP offers training and support to its attorney and legal worker members, educates the public about police misconduct and accountability, and provides resources for nonprofit organizations and community groups involved with victims of law enforcement misconduct. NPAP also supports legislative efforts aimed at increasing accountability and appears as amicus curiae in cases, such as this one, that present issues of particular importance for lawyers who represent plaintiffs in law enforcement misconduct actions. NPAP members who litigate Section 1983 cases frequently encounter situations in which defendants rectify a situation after a plaintiff's verdict but, absent an injunction, resume unconstitutional practices once the pressure of pending litigation has passed.

The Washington Lawyers' Committee For Civil Rights & Urban Affairs is a nonprofit public interest organization. Since 1989, its Prisoners' Project has engaged in broad-based litigation, improving medical and mental health services, reducing overcrowding, protecting access to courts and the ability to participate in religious activities, and seeking to improve overall conditions at correctional facilities where Washington, D.C. inmates are held.

Prisoners' Legal Services of New York ("Prisoners' Legal Services") is a not-for-profit organization that has provided civil legal services to indigent inmates

in New York State correctional facilities for over 36 years. Prisoners' Legal Services receives over 8,000 requests for assistance annually and serves as legal counsel to inmates on a variety of claims in the state and federal courts, including claims of excessive force, deliberate indifference, and violations of due process. Prisoners' Legal Services has a significant interest in insuring that prisoners have the same opportunity as others to have their claims of constitutional wrongs adjudicated by state and federal courts. Prisoners' Legal Services has participated as amicus curiae in a variety of cases in both state and federal courts, including in *New York City Health & Hospitals Corp. v. New York State Commission of Correction*, 969 N.E.2d 765 (N.Y. 2012); *Wooley v. New York State Department of Correctional Services*, 934 N.E.2d 310 (N.Y. 2010); *Haywood v. Drown*, 556 U.S. 729 (2009); *Manning v. Goord*, No. 05–CV–850F, 2010 WL 883696 (W.D.N.Y. Mar. 8, 2010); *Blackmon v. Garza*, 484 F. App'x 866 (5th Cir. 2012); *People v. Gay*, 960 N.E.2d 1272 (Ill. App. Ct. 2011); *Perez v. Cate*, 632 F.3d 553 (9th Cir. 2011); and *Prison Legal News v. Executive Office for United States Attorneys*, 628 F.3d 1243 (10th Cir.), *cert. denied*, 132 S. Ct. 473 (2011).

The Texas Civil Rights Project is a non-profit public interest law organization with a membership base of approximately 3,000 Texans. The Texas Civil Rights Project has always had a strong interest in ensuring that individuals' civil rights and liberties under the Bill of Rights of the Texas and United States Constitutions are not abridged or modified, whether through legislation, judicial action, or improper enforcement. With its Prisoners' Rights Program, the Texas

Civil Rights Project works to improve conditions in Texas prisons and jails through both advocacy and litigation.

The Florence Immigrant & Refugee Rights Project ("Florence Project") provides free legal support services to *pro se* immigrants, refugees, and United States citizens detained by Immigration and Customs Enforcement ("ICE") in Arizona for immigration processing. In a normal year, about 8,500 individuals facing removal charges observe a Florence Project presentation on immigration law and procedure. Typically, the Florence Project's staff provides individualized legal support services to approximately 5,000 detained immigrants each year. The Florence Project office provides *daily* legal support services to the 300 to 600 men detained at the Pinal County Jail—the same facility whose mailroom practices are at issue in this litigation—pending the resolution of their immigration proceedings.

The Arizona Chapter of the American Immigration Lawyers Association ("the Arizona Chapter of AILA") is the local chapter of a national bar association of attorneys who practice and teach immigration law. The Arizona Chapter of AILA represents hundreds of attorneys practicing in Arizona. In turn, those attorneys represent thousands of foreign nationals in removal proceedings, including immigration detainees at the Pinal County Jail. The Arizona Chapter of AILA and its member attorneys have a direct interest in this case because the illegal mailroom practices at the Pinal County Jail impact the member attorneys' ability to represent clients detained at the facility, as well as violating the constitutional rights of those clients.

The University of California Davis School of Law's King Hall Immigration Detention Project ("KHID") provides free legal services and information to hundreds of immigrants, refugees, and U.S. citizens detained each year in Arizona and California by ICE. Through its Know-Your-Rights presentations and materials, workshops, legal representation, and targeted services, KHID assists persons who are held in detention while pursuing meritorious claims before an immigration judge, the Board of Immigration Appeals, and this Court. On a daily basis, KHID staff and law students attempt to ensure that this vulnerable population is afforded constitutional protections—including the right to receive legal materials, human rights reports, and religious literature via the mail.

Amici have obtained the consent of all parties in this appeal to the filing of this brief.

## II. RULE 29(c)(5) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici curiae Florida Justice Institute, Inc., The Legal Aid Society, The Prison Law Office, Communities United Against Police Brutality, Uptown People's Law Center, National Police Accountability Project, Washington Lawyers' Committee For Civil Rights & Urban Affairs, Prisoners' Legal Services of New York, Texas Civil Rights Project, Florence Immigrant & Refugee Rights Project, the Arizona Chapter of the American Immigration Lawyers Association, and the University of California Davis School of Law's King Hall Immigration Detention Project and their counsel hereby state that (i) no party's counsel authored this brief in whole or in part; (ii) no party or party's counsel contributed money that was intended to

fund preparing or submitting this brief; and (iii) no person other than an amicus curiae, the members of an amicus curiae, or the counsel of an amicus curiae contributed money that was intended to fund preparing or submitting this brief.

## III. ARGUMENT

This litigation involves a facility that has been flagrantly violating the First Amendment for years, blocking the delivery of publications and chilling at least one organization from even attempting to mail books to the facility. Currently, the Pinal County Jail is delivering publications sent by Prison Legal News and others under a policy that grants unfettered discretion to prison officials to permit or deny the exercise of First Amendment rights. According to the district court record, those publications are being delivered now only because of a prison official's informal and unwritten interpretation of that standardless policy. Even if such a situation presently complied with the First Amendment's requirements, the experiences of amici discussed below indicate a very real possibility that the jail may again lapse into unlawful conduct. Under the circumstances, Plaintiff Prison Legal News has shown a sufficient likelihood of future injury to warrant injunctive relief. By denying such relief, the district court failed to fulfill its role as a guardian of the civil rights guaranteed by the First Amendment.

## A. Injunctive Relief Is Vital To The Protection Of First Amendment Rights.

The federal courts exist to protect the rights of those within this nation. As Chief Justice Marshall famously declared:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. *One of the first duties of government is to afford that protection.*

*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (emphasis added). To this day, it remains "the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

Taking these considerations into account, the Supreme Court and this Court have carefully explained the standard for granting prospective injunctive relief:

- An injunction can be grounded on "'past exposure to illegal conduct,'" if accompanied by "'continuing, present adverse effects'" of that illegal conduct. *Thomas v. Cnty. of L.A.*, 978 F.2d 504, 507 (9th Cir. 1993) (brackets omitted) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)).
- In the absence of any continuing effects of previous unconstitutional conduct, injunctive relief is available where there is a "real or immediate threat that the plaintiff will be wronged again." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983). Thus, a plaintiff must show

> "*a reasonable likelihood*" or "*credible threat*" of future injury. *Bank of Lake Tahoe v. Bank of Am.*, 318 F.3d 914, 918 (9th Cir. 2003) (emphases added; internal quotation marks omitted).

Those are the principles that allow federal courts to fulfill their constitutional role of protecting individual rights. It would be as grave a mistake to withhold injunctive relief from an injured plaintiff who satisfies the standard as it would be to grant injunctive relief to one who does not.

The provision of injunctive relief assumes additional significance in the First Amendment context. "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). The experiences of amici confirm that violations of the First Amendment "cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotation marks and citation omitted). One amicus, the Florence Project, has observed that its clients' personal and legal mail is regularly searched at the Pinal County Jail. Documents that the Florence Project's *pro se* clients need to prepare their cases before the Immigration Court have been confiscated by mailroom staff. These confiscated items typically consist of family photos, letters, news articles, reports, and excerpts of books explaining conditions in the country of origin, all of which are crucial to civil detainees' ability to build a strong case for relief from deportation. As a result, many of the Florence Project's civil detainee clients have been unable to fulfill the evidentiary expectations in immigration proceedings or present a strong

defense to their own deportation. There can be no meaningful measure of monetary damages for the harm that these detainees have suffered.

Other obstacles to any meaningful recovery of damages underscore the importance of injunctive relief. In prison litigation, the defendants invariably argue that the Prison Litigation Reform Act bars damages for emotional distress in the absence of a physical injury. 42 U.S.C. § 1997e(e). Furthermore, under the district court's order in this case concerning damages (not at issue in this appeal), the monetary harm to an organization if its educational mailing is rejected by a prison or detention facility may be only the printing, staff time, and postage costs—but the harm from frustrating the organization's mission is incalculable. Finally, no retrospective litigation could encompass all the speech—from family, friends, or organizations like Read Between the Bars—that was never even attempted in the first place because of the chilling effect of unconstitutional policies. Accordingly, because no adequate relief is possible after the fact, it is crucial that courts grant prospective injunctive relief where there is a reasonable likelihood of future First Amendment injury.

### B. The Experience Of Amici And Their Members Demonstrates That Injunctive Relief Is Necessary To Protect First Amendment Rights Here.

Amici are well aware that the current practice at the Pinal County Jail does not remove the threat of future injury. Amici and their members have experienced numerous instances in which correctional facilities may temporarily fix a problem, only for the facilities to later resume violating inmates' rights. This pervasive risk

of "backsliding" means that, absent an enforceable injunction, a voluntary change in jail practices cannot be relied on to continue.

For example, amicus Florida Justice Institute represents Plaintiff Prison Legal News in litigation against the Florida Department of Corrections. In 2005, Prison Legal News sued the department over a regulation prohibiting the delivery of publications that contained certain types of advertisements, including ads for three-way calling services and pen-pal services. Prison officials then adopted a new written policy that magazines would not be rejected if such advertisements were merely "'incidental,'" rather than the focus of the publication. *Prison Legal News v. Crosby*, No. 3:04-cv-14-J-16TEM, 2005 U.S. Dist. LEXIS 48320, at *12 (M.D. Fla. July 28, 2005). The district court denied injunctive relief based in part on this change in practice. *See id.* at *33. On appeal, the Eleventh Circuit affirmed on mootness grounds. *Prison Legal News v. McDonough*, 200 F. App'x 873, 878 (11th Cir. 2006). The court announced that it had "no expectation that FDOC will resume the practice of impounding publications based on incidental advertisements." *Id.* Notwithstanding the Eleventh Circuit's confidence, *the department resumed the very same practice three years later*. A second action is now pending. *See Prison Legal News v. The Geo Grp., Inc.*, No. 4:12-cv-239-MW/CAS, 2013 U.S. Dist. LEXIS 26368, at *2-3 (N.D. Fla. Feb. 6, 2013). As this example demonstrates, the risk of backsliding is real.

In another example, amicus Communities United has repeatedly experienced a cycle of interference with communications at the local county jail. Communities United counsels survivors of police brutality, helps them to document the violation

of their rights, and refers them to local attorneys if they wish to pursue legal action. As one of its services, Communities United offers a 24-hour hotline for reports of law enforcement misconduct. But periodically, the county jail blocks outgoing telephone calls to the Communities United hotline. Whenever word filters back to Communities United from released inmates that its number is being blocked, the organization schedules a meeting with jail officials to protest the interference. The jail then stops blocking the number for some period. Yet each time, the jail later blocks the hotline number *again*. And so the pattern repeats.

In yet another example, amicus The Legal Aid Society's Prisoners' Rights Project is representing current and former inmates in a suit regarding the use of excessive force in New York City jails. *Nunez v. New York City*, No. 1:11-cv-05845-LTS-THK (S.D.N.Y). Five class actions and scores of individual lawsuits against New York City over more than 25 years have resulted in orders and settlement agreements that temporarily improved conditions. *See Ingles v. Toro*, 438 F. Supp. 2d 203, 206 (S.D.N.Y. 2006) (listing class actions). But correctional officials have repeatedly allowed unconstitutional practices to resume after the expiration of the orders and agreements. For instance, the *Ingles* settlement agreement required the creation of an Investigation Division Manual to govern investigations of force incidents. *Id.* at 209. But the settlement agreement terminated in November 2009. *Id.* Inmates report that the jails now routinely fail to conduct the internal investigations required by the manual. *See id.*; Amended Complaint ¶ 41, *Nunez v. New York City*, No. 1:11-cv-05845-LTS-THK (S.D.N.Y.

May 24, 2012), Dkt. 15. Thus, even changes sparked by litigation may not take lasting hold.

Likewise, amicus Prison Law Office has fought backsliding by the California prison system. In *Marin v. Rushen*, No. C-80-0012 (N.D. Cal. 1980), prisoners represented by Prison Law Office won a consent decree regarding inadequate medical care at the San Quentin prison. The Special Master ultimately certified that the care was constitutional and dismissed the case. But the improvements were not enduring. In 2005, in another action brought by the Prison Law Office on behalf of California prisoners, the district court specifically recognized "the State's failure to maintain . . . improvements made in the medical delivery system at San Quentin years ago pursuant to the litigation in *Marin v. Rushen*." *Plata v. Schwarzenegger*, No. C-01-1351, Findings of Fact and Conclusions of Law re Appointment of Receiver, at 43-44 (N.D. Cal. Oct. 3, 2005). The court added: "The Court's first-hand observation of the depths to which that institution was allowed to sink in the aftermath of careful and productive judicial intervention in *Marin* has had a profound effect on this Court." *Id.* at 44.

The undersigned counsel for amici (Leonard Feldman) has likewise witnessed backsliding in previous litigation involving the rights of inmates. In *Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996), this Court held that there were fact issues regarding whether the defendant prison officials had failed to provide reasonable accommodations to a deaf inmate as required by the Americans with Disabilities Act, the Rehabilitation Act, and state law. The case settled on remand

when the defendants agreed to adopt a comprehensive policy regarding the provision of reasonable accommodations to disabled inmates. *Duffy v. Riveland*, No. 2-92-cv-01596-BJR, Dkt. 337 (W.D. Wash. Sept. 3, 1998). The district court retained jurisdiction to enforce that settlement agreement for four years. *Id.* After that four-year period, another inmate, Buddy Cochran, filed a pleading with the district court complaining that the defendants were no longer in compliance with the settlement agreement. Motion for Order to Comply, *id.* at Dkt. 367 (July 8, 2010). This, too, shows that unlawful practices of penal institutions can and do recur in the absence of judicial enforcement.

Similarly, absent an injunction, a prison may correct its unlawful treatment as to one plaintiff, yet persist in its underlying policy. In *Nelson*, 570 F.3d 868, amicus Uptown People's Law Center represented a prisoner seeking a religious diet as a form of penance. The Seventh Circuit has now twice held—in *Nelson*, 570 F.3d at 879, and also in *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008)—that a prison violates RLUIPA if it forces a prisoner seeking a religious diet to prove that the diet is *required* by the prisoner's religion. But there is no injunction in place, because the court denied injunctive relief in both cases as moot. *See Nelson*, 570 F.3d at 882-83 (warden had ordered the chaplain to approve the plaintiff's religious diet); *Koger*, 523 F.3d at 804 (plaintiff had been released). Despite the repeated rulings that the policy is unlawful, the regulation at issue in *Nelson*—which authorizes a religious diet only if mandated by "required religious tenets"—*remains on the books and enforced*. *See* Ill. Admin. Code tit. 20, § 701.110(a)(9) ("Detainees may abstain from any foods the consumption of which

violates their required religious tenets."). Once again, the lack of injunctive relief allows unlawful practices to live on.

Many factors may be responsible for the pattern of backsliding that amici and their counsel have observed, including high turnover among staff at correctional and detention facilities and changes resulting from the election of new political leaders. *See* Kevin I. Minor et al., *Understanding Staff Perceptions of Turnover in Corrections*, 4 Prof. Issues in Crim. Just., no. 2, 2009, at 43, 44 ("While average annual turnover can be as high as 45% in corrections, the best estimate seems to be in the range of 12% to 25%." (citations omitted)); InMaricopa.com, *Babeu names PCSO chiefs* (Dec. 17, 2008), http://www.inmaricopa.com/Article/2008/12/17/babeu-names-pcso-chiefs (reporting sheriff-elect Defendant Babeu's declaration that "'Many changes are coming to the Sheriff's Office'" and announcing his appointment of Defendant Kimble, the official on whose policy interpretation the district court relied). But regardless of the possible causes, the phenomenon is well-known among public interest organizations that work with correctional and detention facilities. In light of such experiences, amici believe that the current informal practice of the Pinal County Jail cannot be relied on to show that the jail has mended its unconstitutional ways.

### C. Amici Fear The Consequences If The Ninth Circuit Were To Approve The Denial Of Injunctive Relief On This Record.

Contrary to the district court's conclusion, the record establishes that injunctive relief is appropriate and needed in this case. For the following reasons,

the district court clearly erred in concluding that Plaintiff Prison Legal News had failed to show a sufficient threat of future injury. ER 11.

1. Pursuant to its formal policies, the Pinal County Jail had been systematically violating the First Amendment for years by refusing to deliver (1) all newspapers and magazines and (2) any publications not sent by "recognized" or "authorized" sources. ER 74-75, 302-03, 416. As the Supreme Court has noted, "[o]f course" the commission of past wrongs is relevant to the likelihood of future injury. *O'Shea*, 414 U.S. at 496; *see also Kolender v. Lawson*, 461 U.S. 352, 355 n.3 (1983) (noting that 15 incidents in less than two years shows "'credible threat'" of recurrence). Furthermore, the record below establishes that the jail's policies have continuing, adverse effects on free speech. The district court record includes a declaration by a member of Read Between the Bars that, in 2010, the organization adopted a policy against attempting to mail books to the Pinal County Jail, due to the high cost of return postage on rejected mailings. Dkt. 148-3, ¶ 4. Before being provided with a copy of Defendant Kimble's declaration, Read Between the Bars was *unaware* that anything had changed at the jail to permit it to resume its mailings to Pinal County Jail. Dkt. 148-3, ¶¶ 3-4. Where speakers continue to self-censor as a result of the jail's previous policies, such chilling constitutes the "continuing, present adverse effects" that show a real and immediate threat of future injury. *See O'Shea*, 414 U.S. at 495-96; *Thomas*, 978 F.2d at 507. Thus, the jail's history and the shadow cast by it warrant injunctive relief.

2. The jail's policy is *still* unconstitutional. The district court correctly held that a policy that allows publications only from "recognized" and "approved" organizations—*without specifying the criteria for recognition or approval*—suffers from "the vagueness that the First Amendment condemns." ER 7. Indeed, the First Amendment forbids the Pinal County Jail from granting unbridled discretion to its officials. As the Supreme Court explained in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988):

> [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship. This danger is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.

Furthermore, "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the discretion and power are never actually abused." *Id.* at 757. As a result of the twin dangers of content or viewpoint discrimination and chilling, a government "may not condition . . . speech on obtaining a license or permit from a government official in that official's boundless discretion." *Id.* at 764 (emphasis omitted). Thus, in the decades since *Plain Dealer*, "no court has held that a standardless policy passes muster." *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1065 (9th Cir. 2012).

In violation of this well-established doctrine, the Pinal County Jail's current policy grants unbridled discretion to jail staff. The written policy allows publications only from a "'recognized publisher, distributor, or authorized

retailer,'" without *any* criteria governing which entities are recognized or authorized. ER 56. In other words, the district court denied injunctive relief *despite the unconstitutionality of the jail's present policy*.

3. The district court erred by relying on Defendant Kimble's new, unwritten interpretation of the jail's policy. ER 7-9. As the Supreme Court cautions, "the doctrine forbidding unbridled discretion" does not allow courts to "presume[] the [official] will act in good faith and adhere to standards absent from the ordinance's face." *Plain Dealer*, 486 U.S. at 770. Rather, the First Amendment requires that a limiting standard "be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." *Id*.

Here, Kimble's interpretation does not satisfy the *Plain Dealer* test. It is not incorporated into the text of the policy, but is only an unwritten practice of recent vintage. His interpretation is not binding; Kimble does not claim that he himself intends to adhere to his interpretation in the future, much less that his successors would be bound to do so. ER 56-59. And far from being "a well-understood and uniformly applied practice . . . that has virtually the force of a judicial construction," *Plain Dealer*, 486 U.S. at 770 n.11, the new practice is neither well-understood nor consistently applied. Kimble admits that for months "*after* the implementation and *training*," the jail continued to reject some publications that complied with his interpretation of the policy. ER 58 (emphases added).

Moreover, the Pinal County Jail's website still does not inform the public that publications from an organization whose identity can be independently

verified are permissible. As of the date of this filing, the website states that all incoming mail "will be screened and may be permitted," including "[p]ublications directly from a publisher, distributor, or authorized retailer." Pinal County Sheriff's Office, *Frequently Asked Questions: How do I send mail to an inmate?*, http://pinalcountyaz.gov/Sheriff/AD/Pages/FAQ.aspx (last visited June 17, 2013). As a result, organizations whose speech was chilled by the jail's former practice are unlikely to understand that they are now "authorized" to speak. *See* Dkt. 148-3, ¶¶ 3-4. Thus, Defendant Kimble's informal interpretation cannot save the jail's policy, and the current constitutional violation amply proves the threat of further injury.

4. Even if the new policy were facially constitutional, the record shows that, in practice, it does not ensure lawful conduct by mailroom personnel. Defendant Kimble admitted that the jail blocked publications mailed by Bookman's, Read Between the Bars, and the Prison Library Project *after training* on the new policy. ER 58. These instances establish that there is, indeed, a reasonable likelihood of future injury. Kimble's assurances that he subsequently initiated additional training—after training already proved ineffective—do not demonstrate otherwise. ER 58. As a result, Plaintiff Prison Legal News has shown a credible threat of future injury.

5. The status quo at the Pinal County Jail is not necessarily secure. Defendant Kimble did not declare any intent to adhere to his current interpretation, nor to continue the additional training for mailroom staff. ER 56-59. Moreover, nothing in the district court's orders in this case would compel the institution to

continue interpreting the new policy in the manner that Kimble currently does. For this reason, and for the reasons set forth above, there is a real and immediate threat of future injury here.

* * *

In sum, the consequences of refusing injunctive relief here are extremely troubling. If, after years of unconstitutional conduct, correctional and detention facilities can evade injunctive relief merely by an official's informal, personal interpretation of policy—without any commitment to sustain either the interpretation or the training required to enforce it—then even meritorious litigation will fail to achieve durable protection of First Amendment rights. Rather, inmates, detainees, and amici will be left to suffer through the vagaries of changing institutional practices, as discussed above. Like many nonprofit organizations, amici have limited resources and cannot afford to conduct the repeated rounds of litigation that the district court's decision invites. Nor, as a matter of judicial economy, would repeated suits be a wise use of the courts' resources. Moreover, such litigation could not adequately remedy the irreparable injury of First Amendment violations. Thus, where there is a reasonable likelihood of future injury, as there is here, injunctive relief should issue. Amici urge the Court to correct this error.

## IV. CONCLUSION

For all of the foregoing reasons, amici respectfully request that the Court reverse the district court's denial of injunctive relief.

DATED: June 17, 2013

Respectfully submitted,

By: */s/Leonard J. Feldman*

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## CERTIFICATE OF COMPLIANCE WITH RULES 29(d) AND 32(a)

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 5363 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rules of Appellate Procedure 29(c) and 32(a)(5) and the type style requirements of Federal Rules of Appellate Procedure 29(c) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word in 14-point Times New Roman.

Dated: June 17, 2013. By: */s/Leonard J. Feldman*
Leonard J. Feldman

## CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed June 17, 2013 at Seattle, Washington.

*/s/Leonard J. Feldman*
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