UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Pierce Division

Case No: 13-cv-14481

PRISON LEGAL NEWS,
a project of the HUMAN RIGHTS DEFENSE CENTER,
a not-for-profit, Washington charitable corporation;

Plaintiff,

vs.

KENNETH J. MASCARA, in his official capacity as Sheriff of St. Lucie County, Florida,

Defendant.

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff, Prison Legal News ("PLN"), hereby moves for a preliminary injunction enjoining Defendant, Kenneth J. Mascara, in his official capacity as the Sheriff of St. Lucie County ("Sheriff"), from censoring PLN's mail sent to inmates in the St. Lucie County Jail ("the Jail") pursuant to the policy prohibiting inmates from receiving any mail that is not in postcard form, including magazines and books from any source (the "Postcard Policy"). PLN also moves for an injunction requiring Defendant to provide PLN with timely and adequate notice of the rejection of its mail, as well as a meaningful opportunity to challenge the rejection.

Statement of Facts

Plaintiff Prison Legal News

Plaintiff PLN is a project of the Human Rights Defense Center ("HRDC"), a not-for-profit, Washington charitable corporation with its main office in Lake Worth, Florida. *See* Compl. (DE 1) at

¶ 8. For the past 23 years, PLN has produced, published, and distributed a monthly journal of corrections news and analysis, titled *Prison Legal News*. *Id.* at ¶¶ 20-21. PLN also publishes and distributes certain books about the criminal justice system and legal issues affecting prisoners, to prisoners, lawyers, courts, libraries, and the public throughout the country.

The purpose of PLN is to educate prisoners and the public about the destructive nature of racism, sexism, and the economic and social costs of prisons to society. *Id.* at ¶ 20. The core of PLN's mission is public education, advocacy and outreach on behalf of, and for the purpose of assisting, prisoners who seek legal redress for infringements of their constitutional and human rights. *Id.* PLN's monthly magazine, *Prison Legal News*, is comprised of writings from legal scholars, attorneys, inmates, and news wire services. *Id.* at 22. PLN has thousands of subscribers in the United States and abroad, including subscribers in prisons in all 50 state correctional systems, the federal Bureau of Prisons, and numerous county jails throughout the country. *Id.* Subscribers to *Prison Legal News* also include attorneys, judges, journalists, academics, and others. *Id.*

PLN's publications, books, and other materials are political speech and social commentary, which lie at the core of First Amendment values and are entitled to the highest protection afforded by the Constitution. PLN engages in speech on matters of public concern, such as the operations of prison facilities, prison conditions, prisoner health and safety, and prisoners' rights. *Id.* at 23.

The Postcard Policy

Defendant Kenneth J. Mascara is now, and at all material times has been, the Sheriff of St. Lucie County, Florida. *Id.* at 9. As the Sheriff, he is charged with the care and custody of inmates at the Jail. *Id.* He exercises overall responsibility for the operations of the Jail, and the training and

supervision of the Jail staff who interpret and implement the Jail's mail policy for prisoners. *Id.* He is the policymaker for the Jail policy governing mail for prisoners. *Id.*

Effective August 2, 2010, the Sheriff amended Standard Operating Procedure 810.00 (entitled Inmate Mail), to forbid Jail inmates from receiving mail correspondence in any form other than a postcard. *See* SOP 810.00, attached as Exhibit 1. Section III.A.2 of the Procedure states: "For safety and security reasons, all incoming mail, with the exception of legal mail must be in the form of a postcard and will be visually scanned by staff." Pursuant to section III.B.7, the maximum permitted size of a postcard is 4.25 inches by 6.0 inches. Pursuant to section III.B.4 of this Procedure, "Magazines, paperback or hardcover books (i.e. novels) cannot be received through the mail."

PLN's Attempts to Send Mail to People Confined at the Jail

Monthly Publications

In late April 2012, PLN sent correspondence to subscriber inmates in the Jail. In that month, PLN individually mailed nine copies of *Prison Legal News* to subscribers who were inmates in the Jail. *See* Compl. (DE 1) at ¶ 27. Each copy of the magazine was not in an envelope; rather, each copy was pre-printed with an individual subscriber's name and address. *Id.* Defendant rejected each copy of the publication and did not deliver the publications to their intended recipients. *Id.* Each copy was returned to PLN with a United States Postal Service (USPS) "Notice of Undeliverable Periodical" sticker with the box for "Refused" checked. *Id.* In May 2012, PLN mailed twenty-three copies of *Prison Legal News*, and in June 2012 PLN sent twenty-seven copies. *Id.* at ¶¶ 28-29. Defendant rejected each copy of the publication and returned it to PLN. *Id.* Only two had a "Postcard Only Stamp" when returned to PLN, and some had a USPS "Notice of Undeliverable Periodical" sticker with the box for "Refused" checked. *Id.*

Since June of 2012 and continuing through the present, PLN has had between 10 and 15 subscribers in the Jail at any given time, and has sent each of them an individually-addressed monthly issue of *Prison Legal News* each month. *Id.* at ¶ 30. Defendant rejected nearly all of them and did not deliver them to their intended recipients. *Id.* Since June of 2012, Defendant has not returned any of those materials to PLN, nor has Defendant provided any notice to PLN concerning the rejection of its mail. *Id.* With all of the rejected materials, Defendant did not provide any further information to PLN. *Id.* at ¶ 31. At no time did Defendant provide any information to PLN on how to appeal the rejection of its mail, nor did Defendant provide PLN an opportunity to appeal the rejection of PLN's mail. *Id.*

Sample Issues

Between February 2012 and September 2012, PLN sent thirty-five sample issues of *Prison Legal News*, enclosed in standard 9 inch by 12 inch manila envelopes, to inmates in the Jail. *Id.* at ¶ 33. PLN also sent a sample issue to an inmate in the Jail on March 25, 2013. *Id.* at ¶ 34. Each was individually addressed to a specific inmate. Defendant rejected nearly all of them and did not deliver them to their intended recipients. *Id.* Fourteen of the envelopes were returned to PLN stamped "POST CARDS ONLY" and "RETURN TO SENDER," one was returned to PLN with just a USPS refusal stamp, and one was returned to PLN with a "REFUSED" and a "RETURN TO SENDER" stamp, and "No Personal Subscriptions" written by hand. *Id. at* ¶¶ 33-34. With all of these rejected materials, Defendant did not provide any further information to PLN other than what is noted above. At no time did Defendant provide any information to PLN on how to appeal the rejection of its mail, nor did Defendant provide PLN an opportunity to appeal the rejection of PLN's mail. *Id.* at ¶ 35.

Information Packets

PLN's Information Packet—sent in a standard #10 envelope—contains 1) a brochure and subscription order form; 2) PLN's book list; and 3) PLN's published books brochure. *Id.* at ¶ 36. Between February 2012 and June 2013, PLN sent forty-four Information Packets to inmates in the Jail. *Id.* at ¶ 37. Each was individually addressed to a specific inmate. Defendant rejected nearly all of them and did not deliver them to their intended recipients. *Id.* Twenty-two of the Information Packets were returned to PLN with either a "POST CARDS ONLY" stamp, a "RETURN TO SENDER" stamp, or both. *Id.* at ¶37. With all of the rejected materials, Defendant did not provide any further information to PLN other than the information indicated. At no time did Defendant provide any information to PLN on how to appeal the rejection of its mail. *Id.* at ¶ 38.

Books

The book *Protecting Your Health and Safety: A Litigation Guide For Inmates* was written by Robert E. Toone, and edited by Dan Manville. *Id.* at ¶ 39. Both are experienced attorneys. The book was originally commissioned and published by the Southern Poverty Law Center; now PLN is the book's sole distributor. The book is a thorough guide designed to assist inmates proceeding *pro se* in litigating cases about the conditions of their confinement. *Id.*

Between February 2012 and August 2013, PLN sent forty-five copies of the book *Protecting Your Health and Safety*, packaged in standard cardboard book boxes, to inmates in the Jail. *Id.* at ¶ 40. Each was individually addressed to a specific inmate. Defendant rejected each book and did not deliver them to their intended recipients. *Id.* Thirty-one books were returned to PLN marked with one or more of the following: a "RETURN TO SENDER" stamp, a USPS "Refused" stamp, a "POST CARDS ONLY" stamp, and the note "To be ordered via library." *Id.* Defendant did not provide any

further information to PLN other than the information indicated. At no time did Defendant provide any information to PLN on how to appeal the rejection of its mail. *Id.* at ¶ 41.

The Effect of the Postcard Policy on PLN

Because of the Postcard Policy, PLN has not been able to send any correspondence to any people confined at the Jail. Thus, PLN's mission of educating the incarcerated community about their rights has been frustrated, and will continue to be frustrated in the future. Defendant's policies and actions have violated, and continue to violate, PLN's constitutional rights to communicate its message to prisoners, to recruit new supporters, readers and subscribers, and have caused PLN additional financial harm in the form of diversion of its resources, lost subscribers, and lost book purchases. *Id.* at ¶¶ 42-43. PLN currently has approximately thirteen subscribers in the Jail, and it intends to continue sending issues of *Prison Legal News*, books, Information Packets, and other materials to inmates in the Jail in the future, in an effort to further its mission. *Id.* at ¶ 44.

Argument

To prevail on a motion seeking preliminary injunctive relief, the party seeking such relief must establish that "(1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Am Civ. Liberties Union v. Miami-Dade County*, 557 F.3d 1177, 1198 (11th Cir. 2009) (citations omitted). Plaintiff satisfies each factor.

I. PLN HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

A. First Amendment Claim

It is well established that Plaintiff has a First Amendment right to correspond with a prisoners by mail. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) ("[T]here is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."); *Perry v. Sec'y, Fla. Dep't of Corr*., 664 F.3d 1359, 1367-1368 (11th Cir. 2011) ("Moreover, *Thornburgh* explained that publishers (including advertisers) have a First Amendment right to access inmates."). This principle has been applied in other First Amendment challenges brought by PLN concerning unduly restrictive prison mail policies. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) (prohibition on non-subscription bulk mail and catalogues); *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004) (prohibiting gift publications); *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) (prohibiting bulk mail). This also includes cases challenging jail mail policies that prohibited inmates from receiving correspondence from PLN. *See, e.g, Prison Legal News v. Columbia County*, 2012 WL 1936108 (D. Or. May 29, 2012) (granting preliminary injunction enjoining jail's postcard-only mail policy, then converting to permanent injunction after trial, 2013 WL 1767847 (D. Or. April 24, 2013)); *Prison Legal News v. Fulton County*, Case No. 1:07-CV-2618-CAP (N.D. Ga.) (granting preliminary injunction enjoining jail's policy of prohibiting publications through the mail, order attached as Ex. 2); *Prison Legal News v. Berkeley County Sheriff H. Wayne DeWitt*, Case No. 2:10-CV-02594-SB-BM (D. S.C.) (consent injunction entered enjoining jail mail policy that prohibited all incoming magazines and newspapers, attached as Ex. 3).[1]

1 *See also Hamilton v. Hall*, Case No. 3:10-CV-355-MCR-EMT (N.D. Fla.) (denying motion to dismiss in case involving postcard-only outgoing mail policy (790 F.Supp.2d 1368); court eventually entered consent decree enjoining the policy, noting that "the plaintiffs had a strong likelihood of success on the merits of their claims," see Order, attached as Exhibit 4, at 4); *Martinez v. Maketa*, Case No. 10-02242 (D. Colo.) (consent decree entered enjoining postcard-only outgoing mail policy, noting that "Plaintiffs suffered irreparable injury in the form of violation of their First Amendment rights," see Order, attached as Exhibit 5).

PLN's speech covers topics of great public concern and therefore "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) (citations omitted). *See also Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974) ("[T]he conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance"). Similarly, refusing to allow inmates to receive any books or publications through the mail "presents a substantial First Amendment issue." *Munson v. Gaetz*, 673 F.3d 630, 633 (7th Cir. 2012) (quotations omitted).

Accordingly, Defendant bears the burden of establishing that the Postcard Policy is "reasonably related to legitimate penological interests" under the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78, 84 (1987). The *Turner* Court identified four factors that define this inquiry:

> (1) whether there is a "valid, rational connection" between the regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether [alternatives to the regulation exist or whether] the regulation represents an "exaggerated response" to prison concerns.

Pope v. Hightower, 101 F.3d 1382, 1384 (11th Cir. 1996) (citing *Turner*, 482 U.S. at 89-91).

The Supreme Court has made clear that *Turner's* "standard is not toothless," and that courts must not blindly defer to the judgment of prison administrators. *Thornburgh*, 490 U.S. at 414; *see also Procunier v. Martinez*, 416 U.S. 396, 405-6 (1974) ("[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims."). Moreover, although prison officials are entitled to some deference, this "traditional deference does not mean that courts have abdicated their duty to protect those constitutional rights that a prisoner retains." *Fortner v. Thomas*, 983 F.2d 1024, 1029 (11th Cir. 1993) (citations omitted). All four *Turner* factors weigh in Plaintiff's favor.

1. There Is No Valid, Rational Connection Between the Postcard Policy and Its Penological Justifications.

The first *Turner* factor is two-pronged: A court must first determine whether the penological objective underlying the regulation is "legitimate and neutral," and then must decide whether the regulation is rationally related to that objective. *Thornburgh*, 490 U.S. at 414; *Turner*, 482 U.S. at 89. This first factor constitutes a *sine qua non*, meaning that if Defendant fails to demonstrate that the Postcard Policy is rationally related to the Policy's objectives, this Court need not reach the other factors. *See Lehman*, 397 F.3d at 699; *Jones v. Caruso*, 569 F.3d 258, 267 (6th Cir. 2009). Indeed, "the first factor looms especially large … [because] [i]ts rationality inquiry tends to encompass the remaining factors, and some of its criteria are apparently necessary conditions." *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) (citing *Turner*, 482 U.S. at 90).

In fact, "*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006). When putting forth their penological objectives, officials "cannot rely on general or conclusory allegations to support their policies." *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990). Rather, officials "must demonstrate both 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." *Id.* at 386 ("An evidentiary showing is required as to each point."). *See also Ramirez v. Pugh*, 379 F.3d 122, 128 (3d Cir. 2004) (courts "must first identify with particularity the specific rehabilitative goals advanced by the government to justify the restriction at issue, and then give the parties the opportunity to adduce evidence sufficient to enable a determination as to whether the connection between these goals and the restriction is rational under *Turner*."). 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." *Turner*, 482 U.S. at 89–90.

Here, there can be no valid, rational connection between a complete ban on all incoming correspondence except for postcards and any legitimate penological interest. Numerous courts have overturned similar prison mail policies which ban, in wholesale fashion, the receipt of publications by inmates or those which have imposed restrictions similar to the Postcard Policy. *See, e.g.*, *Prison Legal News v. Columbia County*, 2012 WL 1936108, *9 (D. Or. May 29, 2012) (postcard-only policy fails *Turner*'s first factor; granting preliminary injunction enjoining the policy)[2]; *Lehman*, 397 F.3d at 699-701 (ban on non-subscription bulk mail and catalogs fails *Turner*'s first factor and is unconstitutional); *Jacklovich*, 392 F.3d 420 (10th Cir. 2004) (reversing grant of summary judgment for defendant under *Turner* in case involving ban on gift subscriptions and alternative special purchase program); *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001) (ban on bulk rate, third and fourth class mail unconstitutional); *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001) (ban on standard or bulk rate mail unconstitutional); *Lindell v. Frank*, 377 F.3d 655, 660 (7th Cir. 2004) ("publisher's only rule" unconstitutional as-applied); *Kikumura v. Turner*, 28 F.3d 592 (7th Cir. 1994) (ban on all foreign language publications unconstitutional); *Clement v. Cal. Dep't of Corrections*, 220 F. Supp.2d 1098, 1110 (N.D. Cal. 2002) (ban on prisoner mail with Internet-generated information unconstitutional); *Spellman v. Hopper*, 95 F. Supp. 2d 1267 (M.D. Ala. 1999) (ban on subscription magazines and newspapers to inmates in administrative segregation unconstitutional). In fact, Plaintiff's expert—someone with over forty years' experience with corrections management—has opined that the Postcard Policy is not reasonably related to any legitimate penological interest. *See*

2 The preliminary injunction was made permanent after an extensive trial. *Prison Legal News v. Columbia County*, 2013

Berg Decl., attached as Exhibit 6, at ¶ 17. Thus, the likelihood that Defendant can supply a rational justification for such an overbroad ban on correspondence is exceedingly low, especially since the courts in the cases cited above have considered the gamut of potential rationales and have rejected all of them as unpersuasive under *Turner*.

The rationales that will likely be offered by Defendant are 1) preventing the introduction of contraband and 2) reducing costs. Each of these rationales has been considered and rejected as insufficient under *Turner*'s first factor. As to the prevention of contraband, Defendant has numerous policies at its disposal, such as opening and inspecting all non-privileged mail and disciplining inmates for rule violations, that are more than sufficient to address its concerns. *See* Berg Decl., Ex. 6, at ¶ 22. Nothing beyond "general or conclusory allegations" can be offered in support of this rationale. *Walker*, 917 F.2d at 386. *See Prison Legal News v. Columbia County*, 2013 WL 1767847, *12-13 (D. Or. April 24, 2013) (finding the prevention of contraband insufficient to justify a post-card only policy under *Turner's* first factor); *Morrison*, 261 F.3d at 902 ("[A]lthough the defendants presented evidence that contraband is sometimes included in bulk rate, third, and fourth class mail, the defendants have failed to present any evidence that the risk of contraband in first or second class mail is any lower than the risk of contraband in mail that is sent bulk rate, third, or fourth class"); *Cook*, 238 F.3d at 1150 (prison officials "presented no evidence supporting a rational distinction between the risk of contraband in subscription non-profit organization standard mail and first class or periodicals mail"); *Ashker v. California Dep't of Corrections*, 350 F.3d 917, 923 (9th Cir. 2003) (no rational relation between policy which required books to have an approved book label and the reduction of

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WL 1767847, *25 (D. Or. April 24, 2013).

contraband where prison officials presented "'no scenario in which the book label policy provides a measure of security not afforded by [the] routine and mandatory searches'") (citation omitted).

Similarly, the justification of reducing costs bears no rational relationship to the Postcard Policy. *See* Berg Decl., Ex. 6, at ¶ 23. In the first place, reducing costs is not a "legitimate" penological objective sufficient for this *Turner* factor because any jail policy that reduces staff workload has the potential to reduce costs. For instance, eliminating all mail correspondence would certainly not be justified under *Turner*, even though it would reduce costs. Even assuming this justification is legitimate, though, courts have found that it bears no rational connection to restrictive mail policies. *See Prison Legal News v. Columbia County*, 2013 WL 1767847, *13 (D. Or. April 24, 2013) ("The *de minimis* savings in time achieved by the postcard-only policy is too small to create a rational connection between the policy and promoting efficiency at the Jail."); *Cook*, 238 F.3d at 1151 ("We do not believe that requiring delivery of non-profit organization standard mail will unduly burden the [facility]."); *Morrison*, 261 F.3d at 903 (noting that in *Cook*, "we held that the 'efficient use of staff time' argument cannot justify an effective ban on non-profit subscription publications"); *Lehman*, 397 F.3d at 700 (ban on for-profit subscription publications not rationally related to controlling volume of mail).

Defendant cannot demonstrate more than a "formalistic logical connection" between the Postcard Policy and its objectives, and therefore it cannot withstand scrutiny under *Turner*'s first factor. *Beard*, 548 U.S. at 535. Whatever interests are asserted by Defendant to justify the Postcard Policy, Defendant has adopted an overly restrictive, overbroad, and arbitrary policy to address them. The Jail already screens all incoming mail for contraband and unlawful content. This, in itself, provides the Jail with an adequate, sufficiently tailored, and economical means of assuring the

security of its staff and inmates. *See* Berg Decl., Ex. 6, at ¶ 33. A ban on all mail other than postcards—including letters, books, and magazines—is overbroad, arbitrary, and hence unconstitutional.[3]

2. PLN Has No Alternative Means Of Exercising Its First Amendment Rights

The second *Turner* factor analyzes whether alternative means exist for PLN to exercise its First Amendment rights. Because all of PLN's mail has been censored under the Postcard Policy, and PLN has been unable to communicate its message through its books and publications, PLN has no alternative means of exercising its First Amendment rights. Indeed, PLN has a First Amendment right not simply to communicate its message to the world at large, but to communicate it to prisoners. *Thornburgh*, 490 U.S. at 408 ("[T]here is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."); *Perry*, 664 F.3d at 1367-1368. This communication with the incarcerated community is essential to PLN's core purpose.

Any suggested alternatives must be feasible and effective. *See Lindell*, 377 F.3d at 659. However, because PLN's entire mission has been thwarted by the Postcard Policy, no such alternatives exist. *See Jacklovich*, 392 F.3d at 431 ("[W]e agree that the ability to listen to the radio or watch television is not an adequate substitute for reading newspapers and magazines") (citation omitted); *Allen v. Coughlin*, 64 F.3d 77, 80 (2d Cir. 1995) (record does not establish that subscriptions to periodicals or interlibrary loans are "effective" alternative means to receipt of news clippings under *Turner*). Thus, this factor weighs in PLN's favor.

3. Accommodating PLN's Rights Will Have Little Impact on Jail Staff and Resources

3 Because the first factor is a *sine qua none*, failing *Turner*'s first factor means the policy is unconstitutional. However, PLN will address the remaining factor in an abundance of caution.

The third *Turner* factor addresses the impact that accommodating PLN's rights will have on jail staff and resources. Allowing PLN's correspondence will have little, if any, impact. *See* Berg Decl., Ex. 6, at ¶¶ 22-23. The Jail allowed inmates to receive letters and publications for years before the Postcard Policy was adpted, without an impossible strain on its resources. *See Prison Legal News v. Columbia County*, 2013 WL 1767847, *15 (D. Or. April 24, 2013) (in a case involving a post-card only policy, finding this *Turner* factor weighed in PLN's favor). Moreover, PLN has subscribers in every state correctional system, the Federal Bureau of Prisons, and hundreds of county jails across the country, and none (except for a small handful) have censored PLN's correspondence with a postcard-only mail policy. Compl. (DE 1) at ¶ 22. *See Jacklovich*, 392 F.3d at 432 (in evaluating this *Turner* factor, finding relevant the practices of other correctional agencies). And yet PLN's expressive activity has not adversely affected any legitimate penological concern at these numerous facilities.

Moreover, any impact on resources is clearly outweighed by the tremendous benefit to inmates and the facility that is achieved by robust correspondence with the outside world. *See* Berg Decl., Ex. 6, at ¶¶ 23 & 28; *Clement*, 220 F. Supp. 2d at 1110 ("[A]ny negative impact on prison resources created by a supposed increase in prison mail may be outweighed by the penological benefits of inmate correspondence with the outside world."). Finally, because <u>any</u> accommodation of rights has the potential to increase demands on staff, this reasoning would be present in any First Amendment case, and should therefore be rejected. *See Morrison*, 261 F.3d at 903 (holding that the efficient use of prison staff and resources could not justify an effective ban on subscription publications). Thus, this factor weighs in PLN's favor.

4. <u>Numerous Alternatives to the Postcard Policy Exist, and the Policy is an Exaggerated Response to Penological Concerns</u>

Defendant has numerous easy and obvious alternatives to address the concerns behind the Postcard Policy. *See* Berg Decl., Ex. 6, at ¶¶ 15, 22. Where a "claimant can point to an alternative that fully accommodates the [claimant's] rights at de minimis cost to valid penological interest, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Turner*, 482 U.S. at 91. The most obvious alternative is that the Jail can simply return to the system that was in place for years before it adopted the Postcard Policy: open and inspect all incoming mail, something it has been doing presumably since it housed its very first inmate. The Jail also has numerous other security methods in place such as metal detectors, drug sniffing dogs, random cell searches and other disciplinary tools that fully accommodate their security interests in preventing contraband. *See Prison Legal News v. Columbia County*, 2013 WL 1767847, *15 (D. Or. April 24, 2013) (finding this factor weighed in PLN's favor because the jail previously inspected envelopes, and other facilities permitted inmates to receive letters and publications).

Moreover, even assuming that there have been isolated incidents of contraband in the mail, banning all mail except postcards is the epitome of an exaggerated response. Rather than implement more targeted security policies, Defendant instead chose to ban all letters, books, and magazines. This wholesale ban is exactly the irrationally overbroad policy that the *Turner* test was designed to prevent. *See* Berg Decl., Ex. 6, at ¶ 15. Finally, the fact that hundreds of other jails and correctional facilities around the country admit PLN's correspondence without incident strongly indicates that this factor favors PLN. *See Martinez*, 416 U.S. at 414 n. 14 ("[T]he policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.").

Thus, all four *Turner* factors weigh in PLN's favor, and therefore PLN has demonstrated a substantial likelihood of success on the merits of its First Amendment claim.[4]

B. The Due Process Claim

PLN also has a substantial likelihood of success on the merits of its Due Process claim. A procedural due process violation requires the plaintiff to demonstrate the deprivation of a protected liberty or property interest, and that the procedures surrounding the deprivation were inadequate. *See Arrington v. Helms*, 438 F.3d 1336, 1347-48 (11th Cir. 2006). The Supreme Court has already determined that that "[t]he 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." *Martinez*, 416 U.S. at 417. *See also Perry*, 664 F.3d at 1367-68. The Supreme Court has also determined that Due Process requires three minimal procedural safeguards each time a single piece of mail is intercepted by a correctional facility: 1) The inmate must be notified, 2) the sender must be notified, and 3) both parties must be given a reasonable opportunity to protest the decision to a prison official other than the person who originally disapproved the correspondence. *Martinez*, 416 U.S at 418-419.

Numerous courts have determined that the *Martinez* protections apply to the type of correspondence at issue here, including the very same publication (*Prison Legal News*). *See Jacklovich*, 392 F.3d at 433-34; ("[P]ublishers [including PLN] are entitled to notice and an

4 One case in this district has found the postcard only policy of the Palm Beach County jail satisfies *Turner*. *Althouse v. Palm Beach County Sheriff's Office*, 2013 WL 536072, Case No. 12–CV-80135–CIV (S.D. Fla. Feb. 12, 2013). *Althouse* should not be followed for several reasons. First, its conclusion was rejected by the court in *Prison Legal News v. Columbia County*, 2013 WL 1767847, *16-17 (D. Or. April 24, 2013), after a thorough analysis. Second, it was brought by a *pro se* litigant who could not adequately marshal the evidence and argument necessary to defeat the defendant's arguments. In contrast, the decision in *Columbia County* was reached after a trial with counsel, and contains a much more complete analysis of the *Turner* factors. Finally, PLN is a publisher, unlike Mr. Althouse, and it is attempting to communicate its message primarily through books, magazines, and information packets. The import of the censorship of

opportunity to be heard when their publications are disapproved for receipt by inmate-subscribers") (citations omitted); *Cook*, 238 F.3d at 1152-53 (holding that PLN was entitled to individualized notice each time its publication was censored); *Lehman*, 397 F.3d at 701 (same); *Montcalm Publishing Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996) (holding that rejection notices must be delivered to the publishers); *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986) ("[W]e hold that the mail censorship regulation is insufficient because it fails to require that notice and an opportunity to protest the decision be given to the author of the rejected letter.").

The Jail's policies are deficient in that they do not provide for notice to the sender of <u>any</u> rejected mail, nor do they provide for an appeals process. This alone violates the Due Process Clause. Moreover, simply returning the rejected correspondence to PLN with a USPS "Return to Sender" stamp, or sometimes a "Post Card Only" stamp, falls woefully short of complying with the requirements of Due Process. Adequate notice means notice that is "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Arrington*, 438 F.3d at 1349-50 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 339 (1950)). Moreover, "[t]he notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Id.* (citations omitted). The stamps on the rejected materials provide no information as to why the piece of correspondence was rejected, nor do they inform PLN of their right to appeal the decision, or explain how to do so. In many cases it is impossible to tell whether a piece of mail was rejected because of a postal issue, it violated a rule of the Jail, it was rejected by the inmate, or some other issue. The vague stamps provide no additional guidance.

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these items was not addressed in *Althouse*.

It would impose no hardship on the Jail to provide written notice, as these procedures are used in numerous jails and prisons across the country. *See* Berg Decl., Ex. 6, at ¶ 25. Adequate notice is not a merely triviality; in fact it is critical to "preventing the chilling of speech" and preserving the First Amendment interests that are at stake. *Martin*, 803 F.2d at 243-44. For these reasons, PLN has established a substantial likelihood of success on its Due Process claim.

II. PLN WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION

"[I]t is well established that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271-1272 (11th Cir. 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Defendant continues to enforce a wholesale ban on letters, books, and magazines, which is resulting in the censorship of all of PLN's communications with Jail inmates. This categorical ban on an entire class of speech is "of a nature that [can] not be cured by the award of monetary damages." *KH Outdoor*, 458 F.3d at 1272. Moreover, absent an injunction, Defendant will continue to violate the Due Process Clause by failing to provide adequate notice and opportunity for appeal to the senders of rejected mail. PLN has suffered, and will continue to suffer, irreparable harm in this respect.

III. THE BALANCE OF HARDSHIPS WEIGHS HEAVILY IN PLN'S FAVOR.

PLN has already suffered a significant violation of its constitutional rights by having all of its materials and communications banned from the Jail. As PLN has established above, the Jail already had in place a process by which it could efficiently and effectively screen incoming mail without censoring materials and communications from PLN. PLN, in contrast, has no effective alternative means of exercising its First Amendment rights to communicate with the inmates at the Jail. *See id.* ("As for the third requirement for injunctive relief, the threatened [First Amendment] injury to the

plaintiff clearly outweighs whatever damage the injunction may cause the city. As noted, even a temporary infringement of First Amendment rights constitutes a serious and substantial injury, and the city has no legitimate interest in enforcing an unconstitutional ordinance."); *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F.Supp.2d 1326, 1335 (M.D. Fla. 2009) ("Moreover, as Defendant has no interest in enforcing a regulation which is unconstitutional as to Plaintiffs, the balance of equities tips in favor of Plaintiffs' interest in preventing infringement of their First Amendment rights."). Similarly, it imposes little hardship on the Jail to provide adequate notice and a meaningful appeals process. Accordingly, the balance of hardships favors PLN.

IV. AN INJUNCTION WOULD FURTHER THE PUBLIC INTEREST

"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." *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) (citations omitted). This principle carries particular significance where Defendant has suppressed and continues to suppress the kind of speech– "expression on public issues" – that the Supreme Court has consistently found to "rest[] on the highest rung of the hierarchy of the First Amendment." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citation and quotation omitted). *See also KH Outdoor*, 458 F.3d at 1272 ("For similar reasons, the injunction plainly is not adverse to the public interest. The public has no interest in enforcing an unconstitutional ordinance."); *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004) ("[T]here can be no irreparable harm to a municipality when it is prevented from enforcing an unconstitutional statute because it is always in the public interest to protect First Amendment liberties" (internal quotation marks omitted)). Similarly, the public has a strong interest in having its government agencies comply with the requirements of Due Process.

V. PLN SHOULD NOT BE REQUIRED TO POST BOND

This Court has the discretion to issue a preliminary injunction without requiring Plaintiff to post bond. *See Popular Bank of Florida v. Banco Popular de Puerto Rico*, 180 F.R.D. 461, 463 (S.D. Fla. 1998) ("[F]ederal courts have come to recognize that the district court possesses discretion over whether to require the posting of security."); *People of State of Cal. v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985); *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 539 (6th Cir. 1978). Exercise of that discretion is particularly appropriate where, as here, an action is brought by a small nonprofit, or where issues of public concern or important constitutional rights are involved. *See Complete Angler*, 607 F.Supp.2d at 1335-36 ("Waiving the bond requirement is particularly appropriate where a plaintiff alleges the infringement of a fundamental constitutional right."); *Tahoe Regional Planning*, 766 F.2d at 1325 (nonprofit organization). Accordingly, PLN respectfully requests that it not be required to post bond.

Conclusion

PLN's First and Fourteenth Amendment rights are currently being violated, and will continue to be violated absent intervention from this Court. Thus, PLN respectfully requests that this Court enter a preliminary injunction declaring that the Postcard Policy is unconstitutional and enjoining Defendant from censoring PLN's correspondence. PLN also respectfully requests that this Court enter an injunction requiring Defendant to provide timely and adequate notice—which would include, at a minimum, the reason for the rejection and instructions on how to appeal—each time PLN's correspondence is intercepted. Finally, PLN respectfully requests that it not be required to post bond.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed on December 17, 2013, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case, including all opposing counsel. Service to all other persons was made by the method indicated in the service list below

By: *s/ Dante P. Trevisani*
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