UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JOSEPH REILLY,

Plaintiff,

v. No. 4:14-cv-397 RH/CAS

SHERIFF OF LEON COUNTY, FLORIDA,

Defendant.

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed.R.Civ.P. 56, Plaintiff JOSEPH REILLY, on behalf of himself and a putative class of all others similarly situated ("Reilly"),[1] moves the Court for summary judgment and states as follows:

I. INTRODUCTION

The U.S. Supreme Court has recognized that prison inmates should be allowed to remain in contact and connected to their family and community during their incarceration. *See Procunier v. Martinez*, 416 U.S. 396, 412 (1974) ("the weight of professional opinion seems to be that inmate freedom to correspond with

[1] Plaintiff's Renewed Motion to Certify a Class (DE 36) and Defendant's Response (DE 38) are pending and at issue. Plaintiff requests a ruling on his motion prior to ruling on this motion so all those similarly situated will receive class wide relief.

outsiders advances rather than retards the goal of rehabilitation"); *Thornburg v. Abbott*, 490 U.S. 401, 407 (1989) ("Access [to prisons] is essential … to families and friends of prisoners who seek to sustain relationships with [inmates].") The Florida Sheriff's Association promotes it.[2] The Defendant Sheriff of Leon County ("Sheriff") plainly admits that "ties to family and friends are extremely important"[3] because it ensures inmates have a stake-hold in their community, aids with reentry, and enhances inmate management as inmates feel connected to a larger world.[4]

Yet, the Sheriff would trade this principle for a few dollars or to avoid a minor inconvenience. Inmates pay higher tolls to call home so that the Sheriff can reap a 51% commission on telephone charges.[5] He restricted inmate visitors to those on a five-person list and visits fell by 26%.[6] He banned letters, and inmates'

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[2] Florida Sheriff's Association's Florida Model Jail Standards (Jan. 2015), §9.03(a) ("General correspondence such as between the inmate, the family, and other persons should be encouraged."), available from http://www.flsheriffs.org/our_program/florida-model-jail-standards/

[3] *See* Sheriff's Inmate Handbook (DE 55-13) at 40.

[4] Coughlin Dep. (DE 55-2), 104:22–105:12.

[5] Coughlin Dep., 67:2-6 (less commission could reduce the tolls); Embarq Inmate Telephone Service Agreement (DE 55-18) at 2 (51% commission on gross charges).

[6] *See* Visitor Statistics (DE 55-23) (showing 35,091 visitors in the three months before the policy change and 26,111 in the three months following the change).

friends and family truncated their messages[7] and wrote less often.[8] The Sheriff went too far. Reilly challenges this last barrier between family and friends.

II. STATEMENT OF MATERIAL FACTS

Pursuant to the Scheduling Order (DE 24)[9], ¶ 6(a), Reilly submits the following statement of material facts in support of his Motion for Summary Judgment:

A. Postcard-Only Policy

For nearly two-hundred years, the Leon County Sheriff operated the county jail and allowed inmates to receive letters from friends and family. *See* Leon Sheriff, Our History (DE 55-24) (noting William Cameron became the first Leon County Sheriff in 1825).[10] In the years leading up to June 1, 2014, the Jail was "safe and secure" while the Sheriff delivered these letters. Admis. (DE 55-6), ¶¶ 27. Nevertheless, the Sheriff changed course on June 1, 2014, and banned

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[7] Admis. (DE 55-6), ¶ 20

[8] Sheriff's Interrog. Ans. No. 16 – *Total Mail* (April - August 2014) (DE 55-9) (number of pieces of mail fell from 110 to 90 per day once the Postcard-Only Policy was instituted).

[9] "DE" refers to the docket entry of the document filed with the Court.

[10] "A district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form." *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1293-94 (11th Cir. 2012) (quoting *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999)).

incoming non-privileged letters to the mostly pretrial population.

Between June 1, 2014,[11] and August 21, 2014, the Sheriff enforced a policy and practice that required all incoming mail sent to Jail inmates, except legal or privileged mail,[12] to be in a postcard form (hereinafter "Postcard-Only Policy"). Sheriff's SOP No. 450.K10: Mail (rev. June 1, 2014) (hereinafter "Mail SOP") (DE 55-1); Coughlin Dep. (DE 55-2), 108:13-21.[13] Accordingly, the Sheriff refused to deliver to Jail inmates incoming personal letters and all other sorts of communication and messages that could be placed in envelopes: No photocopied materials or printings from the internet (like court opinions or Florida Statutes), newspaper and magazine clippings, letter writing materials, and greeting cards. The Sheriff would not even deliver a utility bill that needed to be paid, or an A+ homework assignment. Admis. (DE 55-6), ¶ 4; Coughlin Dep., 25:13–27:7.

The Sheriff also banned all images—whether on a postcard or not—

[11] The Sheriff permitted a two-week grace period at the start of June 2014 during which he relaxed the letter ban as everyone acclimated to the Postcard-Only Policy. Coughlin Dep., 10:16-24.

[12] Correspondence between the courts, attorneys, and the government were considered "privileged mail" that could be delivered inside envelopes during the Postcard-Only Policy. Mail SOP (DE 55-1), ¶ E(2)(c); Coughlin Dep. (DE 55-2), 27:15-19.

[13] Major Brent Coughlin is the Sheriff's Jail Director, Coughlin Dep. (DE 55-2) at 7:12-15, and testified during this deposition as the Sheriff's Rule 30(b)(6) designee, *id*. at 42:10-20.

including a photograph,[14] a picture on the postcard's back (common drug-store postcards), and the correspondent's own drawing. Mail SOP, ¶ E(1)(d)(3); Admis., ¶ 5; Coughlin Dep. (DE 55-2), 21:17-19, 22:14–23:4, 23:21–24:7. The Sheriff prohibited all images because he thought it was too difficult for the staff to decide whether the images were benign or contained illicit content, like nudity or gang communications. *Id*., 24:9–25:12. Likewise, the Sheriff banned all music lyrics because some might contain illicit messages. *Id*., 13:8-17; *see also* Unauthorized Mail Return Log, ¶ 7 (DE 54-4 at 8) (providing music lyrics as one reason mail might be "unauthorized").

On August 21, 2014, the Sheriff rescinded the Postcard Only Mail Policy and again allowed inmates to receive letters in envelopes. *See* Sheriff's Memorandum, *Jail Mail Procedures* (Aug. 21, 2014) (DE 54-1 at 28).

B. Limitation on Speech

The Sheriff, through his Postcard-Only Policy, impermissibly curtailed the ability of Jail inmates' correspondents, including Reilly, to express themselves and communicate with Jail inmates. Reilly Decl. (DE 55-14), ¶ 2. Not only could they not communicate through enclosures of printouts, reports, photographs, clippings,

[14] The Sheriff did allow correspondents to send some photographs to inmates, Mail SOP at ¶ E(1)(d)(2), but limited the number of photographs to the first five to reduce clutter, James Dep. (DE 55-4), 20:15-18.

and images, but even their written messages were restricted in two ways. First, postcards allow correspondents significantly less writing space than letters. Admis. (DE 55-6), ¶ 20. Accordingly, the Postcard-Only Policy prevented correspondents from fully expressing their thoughts.[15] Instead, correspondents had to express these messages in a truncated and incomplete form as there was insufficient room on the postcard to fully develop and communicate the inmates' thoughts and ideas. The postcard's abbreviated form dampened the impact and force of communication, reducing the messages to little more than a text message or Tweet. Reilly Decl., ¶ 2.

In addition, postcards exposed the content of the correspondents' communications to anyone who handled, processed, or viewed the postcards, both within the jail and before the postcards arrive at the jail. Admis. (DE 55-6), ¶ 21. Prior to the Postcard-Only Policy, correspondents could write letters to inmates that contained sensitive information, including medical, spiritual, intimate, and financial information. Admis., ¶ 22. Because these letters were enclosed in

[15] The length of the communications under the Postcard-Only Policy was significantly less. Hertz Dep. (DE 55-3), 51:15-23; James Dep. (DE 55-4), 36:10-15; Admis., ¶ 20. A typical letter to an inmate contained multiple pages. Hertz Dep., 38:10-15 (2-10 pages); James Dep., 64:24–65:2 (5-10 pages). Yet, under the Postcard-Only Policy, postcards could be no larger than 4 x 6 inches, Mail SOP, ¶ E(1)(d)(1)(a), even though the U.S. Postal Service will deliver larger postcards, U.S. Postal Service, *Sizes for Postcards* (DE 55-25) ("lettersize postage is charged" for *larger* postcards), available at http://pe.usps.com/businessmail101/mailcharacteristics/cards.htm.

envelopes and only subject to review by appropriate Jail officials, inmates and their correspondents could feel confident that this sensitive information would not be exposed for others to see, including postal carriers, line guards, and other inmates. The Postcard-Only Policy has forced correspondents to either abandon including sensitive information in their non-privileged correspondence or risk divulging confidential, sensitive information to unknown third-parties who can easily intercept these messages on postcards. Including sensitive financial information on a postcard increases the chance that the inmate or the correspondent may become a victim of identity theft or fraud. The Postcard-Only Policy either chills correspondents from writing about sensitive matters entirely, or it requires them to expose their communications to a host of strangers or unintended recipients. Reilly Decl. (DE 55-14), ¶ 2.

C. Telephone & Visitation Are Not Adequate Replacements

In many instances, telephone calls and visits—the only other ways to communicate with inmates[16]—could not replace letters. Telephone calls are expensive and can be overheard by other inmates, if available at all. Berg Decl. (DE 55-16), ¶ 19. A 15-minute local call costs $1.80-$2.25 and an-in state call, like the kind Sean Reilly would make to his family in Miami, costs $5.00-$6.25.

[16] Coughlin Dep. (DE 55-2), 42:22–43:1.

Sheriff's Interrog. Ans. No. 22 – *Telephone Rates* (DE 55-22). These rates are exorbitant, in part, because the Sheriff receives a 51% commission on gross charges. Coughlin Dep. (DE 55-2), 67:2-6; Embarq Inmate Telephone Service Agreement (DE 55-18) at 2. Indeed, he netted $528,972.61 in commissions last year. Program Detail Activity (FY 2014) (DE 55-20) at 2. If an inmate or his family lacks the financial means to pay the toll, then the inmate makes no calls or inmate calls are not accepted. Also, with a frequent demand to use the telephones, inmates commonly form a line to use them. Coughlin Dep., 55:15-25; Mack Dep. (DE 55-5), 35:22–36:8. In this way, an inmates' telephone conversation may be overheard by other waiting inmates.[17] Coughlin Dep., 56:1-20; S. Reilly Decl. (DE 55-15), ¶ 6; Berg Decl., ¶ 19. Because telephone conversations may be overheard, inmates do not discuss aspects of jail life about which they would write. S. Reilly Decl., ¶ 8; Reilly Decl., ¶ 5. This self-censorship is reasonable. Berg Decl. (DE 55-16), ¶ 24; Coughlin Dep., 106:20–107:14; Leach Dep. (DE 55-26), 86:13-16. Lastly, the Sheriff limits telephone calls for inmates in administrative confinement (protective custody) to two per week and inmates in disciplinary

[17] Indeed, if a prosecutor relies on these jailhouse telephone calls to prosecute the inmate, the calls may be accessed and listened to by the public. *See* § 119.011(3)(c)(5), Fla. Stat. (records used by the government in prosecution and disclosed to criminal defendant in discovery are public records); *see also Morris Pub. Grp., LLC v. State*, No. 1D13-5721, 2015 WL 233285 (Fla. 1st DCA Jan. 20, 2015).

confinement get no telephone access as a form of punishment. Coughlin Dep., 60:1-7, 63:13-18; Sheriff's SOP No. 450.K11: Telephone (DE 55-12), ¶E(3); Admis. (DE 55-6), ¶ 11 (telephone privilege withheld for minor infractions). Thus, an inmate cannot always call home.

Visits are burdensome for those family and friends who live or work out-of-town and private conversations can be overheard by other inmates and other visitors, if such visits are allowed at all. Visits are burdensome for out-of-town family like Plaintiff Joseph Reilly who lives in Maryland. Reilly Decl. (DE 55-14), ¶ 3; Berg Decl. (DE 55-16), ¶ 19. When they do visit, inmates are grouped together so that inmates and visitors can overhear the conversations of other inmates and visitors. Coughlin Dep. (DE 55-2), 52:9-13; Admis. (DE 55-6), ¶ 19; S. Reilly Decl. (DE 55-15), ¶ 10; Berg Decl., ¶ 19. Like telephone calls, because inmates can be overheard by other inmates during visitation, they reasonably self-censor discussions and do not discuss what they would discuss in letters. S. Reilly Decl., ¶ 10; Berg Decl., ¶ 24; Coughlin Dep., 106:20–107:14; Leach Dep. (DE 55-26), 86:13-16. Lastly, not everyone is allowed to visit. The Sheriff restricts an inmate's visitors to those on the inmate's five-person list. *Id*., 43:24–44:2; Sheriff's SOP No. 450.K12: *Visitation* (DE 55-11), ¶ E(1)(d). Inmates who have more than five friends or family must choose who should be permitted to visit. Coughlin Dep., 47:8-12. No exceptions are made for out of town visitors.

Sheriff's Inmate Handbook (DE 55-13), 40. And children under 16 cannot visit at all, including to visit their incarcerated parents. Coughlin Dep., 47:15-21; Admis., ¶ 14. Some inmates may receive fewer or no visitors as a form of punishment. *Id*., ¶¶ 16-17; Sheriff's Inmate Handbook, 40 (limited visits for inmates in special housing pods). Therefore, an inmate cannot always receive visitors.

D. No Notice or Opportunity to be Heard

While the Postcard-Only Policy was in effect, the Sheriff failed to give sufficient notice to correspondents whose letters were rejected. When the Sheriff rejected a correspondent's letter or mail, the mail would be returned with "Return to Sender" stamped on the envelope.[18] Reilly's "Return to Sender" Letter (DE 55-17); Mail SOP (DE 55-1), ¶ E(1)(d)(3); Coughlin Dep., 39:14-25. The notice did not include any information about why his letter was rejected or how to administratively challenge the Sheriff's refusal to deliver the letter. Reilly Decl. (DE 55-14), ¶ 4. Indeed, the Sheriff had no written policy to provide an opportunity to be heard on this issue. Admis. (DE 55-6), ¶ 31.

E. Sheriff's Justifications

The Sheriff offers two reasons to justify the Postcard-Only Policy: Reduce

[18] Later, the Sheriff used a more descriptive stamp, "Return to Sender, Leon County Jail Only Accepts 4 x 6 Postcards." The stamp-maker's "proof date" for this stamp was June 17, 2014. The stamp was likely approved, created, and available to the Jail officials some days afterward.

contraband and save staff time. Coughlin Dep. (DE 55-2), 90:22–91:14. However, the record shows the prison did not have a problem with contraband in the first place, and that the time saved in not having to open envelopes was de minimis. Therefore, neither of the reasons the Sheriff has proffered is credible.

In the two years before the Postcard-Only Policy, no one ever succeeded in introducing contraband into the Jail through the mail. Coughlin Dep., 80:3-8; Interrog. (DE 55-7), ¶ 13. The Sheriff's letter screening precautions worked, even if the attempts were few,[19] the posed threats were minor,[20] and threats were the type the Postcard-Only Policy would not mitigate.[21] Notably, the Sheriff has no evidence of even an *attempt* to introduce dangerous instrumentalities into the Jail

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[19] *See* Sheriff's Interrog. Ans. No. 12 – *Attempted to Mail Contraband* (June 1, 2012 – May 31, 2014) (DE 55-8) (listing 12 attempts to introduce contraband in the two year period before June 1, 2014); *see also* Lee Decl. Ex. A (DE 54-2 at 7-8). Twelve attempts over two years suggest that the public was largely compliant. Berg Decl. (DE 55-16), ¶ 25.

[20] Six of the twelve attempts in the two years before the Postcard-Only Policy involved inmates trying to communicate with another inmate ("kites"); three involved suspected marijuana or cocaine; one involved *outgoing* mail (Gibson, June 11, 2013); and two involved pornographic magazine and tobacco. *See* Sheriff's Interrog. Ans. No. 12 – *Attempted to Mail Contraband.* The Sheriff considers pornography and tobacco "nuisance contraband" that "do[es] not pose a threat to safety or security." Sheriff's SOP No. 450.F21: *Control of Contraband* (DE 55-10), at 2. The few pieces of mail that may be a kite—those returned to sender at the Jail—were obvious. Coughlin Dep., 84:6-14. And there is no reason why Jail officials could not read and intercept the kite which they did. *Id*., 84:21–85:6.

[21] In four of the twelve attempts to introduce contraband through the mail, correspondents falsely labeled envelopes "Legal Mail." Sheriff's Interrog. Ans. No. 12. Because the legal mail is an exception, the Postcard-Only Policy would not reduce these attempts as his handling of legal mail was identical under both policies. Coughlin Dep., 38:9-13, 80:14–81:2.

through the mail. Coughlin Dep., 16:19-23; Hertz Dep. (DE 55-3), 45:16-19. The Jail was just as "safe and secure" before the Postcard-Only Policy as while it was in place. Admis. (DE 55-6), ¶¶ 27; Coughlin Dep., 101:22–102:1 (security was not diminished). Staff only had to spend a bit more time processing the incoming mail to catch the six or so attempts per year. *Id*., 101:6-21.

The Postcard-Only Policy saved little time. When the Sheriff permitted letters, processing the incoming mail took two people 2-3 hours.[22] Interrog. (DE 55-7), ¶ 10. Under the Postcard-Only Policy, the staff saved about 1 hour.[23] *Id*. This is de minimis especially in comparison to the nearly 250 people the jail employs. Coughlin Decl. (DE 54-1), ¶ 3. The reason for the reduction in time was threefold: fewer pieces of mail,[24] shorter messages to review,[25] and less time to

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[22] The amount of time jail officials spent on processing incoming letters and the savings realized from the Postcard-Only Policy is unsettled. The Sheriff's interrogatory answers vary from the testimony of the two people who actually process the incoming mail, who claim alternatively longer and shorter durations.

[23] The Sheriff claims a potential for more time savings as correspondents stopped sending prohibited letters. *Id*. However, rejecting letters consisted only of stamping them with "Return to Sender" and returning them to the post office. James Dep. (DE 55-4), 36:2-6. Not having to process 100 letters like this would save no more than a few minutes.

[24] The number of pieces of incoming personal mail fell after the Postcard-Only Policy was instituted. Before Jail officials processed about 2,400 mail pieces per month (110 per working day); after the policy was instituted, the number was closer to 2,000 per month (90 per working day). Sheriff's Interrog. Ans. No. 16 – *Total Mail* (April - August 2014) (DE 55-9). Furthermore, the 2,000 pieces of mail per month during the Postcard-Only Policy (as under the letter policy) represented the "total pieces of mail" – postcards and letters. Because the letters were simply sent back without having been read, the staff did not even have 2,000 postcards to

inspect letters and envelopes for contraband.[26] James Dep. (DE 55-4), 39:6–40:14. Yet, had the volume of mail and length of messages remained constant, the only time savings would have been the inspection of pages and envelopes. Hertz Dep. (DE 55-3), 57:8-16 (testifying that it takes no more time to read a message on a letter than a postcard).

Moreover, the Sheriff's attempt to conserve resources by banning letters ignores the available resources that must be spent on the inmates' overall welfare, like preserving their relationships with friends and family. In fiscal year 2014, the Sheriff received $528,972.61 in commissions from the tolls charged for inmates to call friends and family. Program Detail Activity (FY 2014) (DE 55-20) at 2. He deposited this money into the "Inmate Welfare Fund" consistent with § 951.23(9), Fla. Stat. Expenditures from this Fund must be "used only for the overall inmate welfare." *Id*.; Coughlin Dep. (DE 55-2), 67:14-19. Consistent with the mandate, the Sheriff paid Tamara James, who helped to process mail,[27] from this Fund.[28]

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process per month. James Dep. (DE 55-4), 36:2-6 (under the Postcard-Only Policy rejected letters were returned without scanning them).

[25] *See* note 15, *supra*.

[26] Jail officials inspected postcards for watermarks, items hidden within the postcard, and other indicia of contraband. Hertz Dep. (DE 55-3), 55:14-22.

[27] James Dep. (DE 55-4) at 38.

[28] Sheriff's Interrog. Ans. No. 21 – *Inmate Welfare Fund Salaries* (DE 55-21).

Yet, at the end of fiscal year 2014 (Sept. 30), the Sheriff had a net income in that fund of $248,902.68[29] to add to the previous fund balance of $378,195[30] for a total of $627,098 that could have been spent to allow inmates to receive a letter from home. But instead of spending this money on inmate welfare, the Sheriff hoarded it and then spent in on projects with no value to the inmates' welfare, like purchasing an electronic key system, KeyTrak, to speed up the guards' exchange of keys at the end of the shift, and he justified using Fund money because it "enhanced security." Coughlin Dep. (DE 55-2), 72:22–74:22.

And of course, both claimed justifications are belied by the fact that the Sheriff rescinded the Postcard Only Mail Policy after just two and a half months. Thus, by the Sheriff's own admission, each of these goals can be fully achieved without the Postcard-Only Policy.

Ultimately, the Sheriff's Postcard-Only Policy was not reasonably related to any legitimate interests. Berg Decl. (DE 55-16), ¶ 16. The policy unnecessarily limited inmate opportunities to engage in lawful and routinely accepted correspondence practices. *Id*. Furthermore, the Sheriff's Postcard-Only Policy is

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[29] *See* Program Detail Activity (FY 2014) (DE 55-20) at 22, 23, and 27 (from revenues of $1,131,879.58 (p. 22) subtract labor of $233,882.82 (p. 22), expenditures of $594,798.08 (p. 23) and labor of $54,296.00 (p. 27)).

[30] Special-Purpose Financial Statements (FY 2013) (DE 55-19) at 7.

antithetical to sound inmate governance. *Id*. at ¶ 17. Not only do restrictions on the means of maintaining family and community ties frustrate the inmates' reintegration into the community upon release, but such restrictions often lead inmates to feel isolated and humiliated, which make the inmates more difficult to control and secure. *Id*.

III. SUMMARY JUDGMENT STANDARD

"Summary judgment is appropriate where the evidence shows 'that there is no genuine issue as to any material fact and that the [movant] is entitled to a judgment as a matter of law.'" *Ellis v. England,* 432 F.3d 1321, 1325 (11th Cir. 2005) (quoting *Comer v. City of Palm Bay, Fla.*, 265 F.3d 1186, 1192 (11th Cir. 2001)). In disputing a material fact, it is insufficient for the nonmoving party "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party must produce enough evidence to enable a jury to reasonably find for the nonmoving party on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

IV. ARGUMENT

The Sheriff's Postcard-Only Policy violated Reilly and other putative class members' free speech rights to communicate with Jail inmates. Additionally,

because the Sheriff failed to provide adequate notice of why he rejected letters and an opportunity to challenge the rejection, he violated Reilly and other putative class members' right to due process.

A. Sheriff's Postcard-Only Policy Violated Reilly's Free Speech Rights (Count 1)

The right to send and receive mail generally is protected by the First Amendment to the U.S. Constitution. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427 (1993) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights.").[31] Because the case concerns mail correspondence to an inmate, the Sheriff's infringement on Reilly's right to send personal letters to his son in jail is analyzed under the *Turner* standard. *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989). Pursuant to *Turner*, the Sheriff's Postcard-Only Policy is "valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Four factors assist the court to determine the reasonableness of the regulation:

> (1) whether there is "a valid, rational connection between the regulation and the prison legitimate governmental interest;" (2) "whether there are alternative means of exercising the right;" (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources;" and (4) "the

[31] The U.S. Supreme Court has specifically recognized inmates' First Amendment right to correspond with friends and family outside a prison. *Procunier v. Martinez,* 416 U.S. 396, 408-9 (1974) (noting that both inmates and family and friends of prisoners who seek to sustain relationships with them enjoy First Amendment rights to do so).

> existence of obvious, easy alternatives[, which] may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns."

Perry v. Sec'y, Florida Dep't of Corr., 664 F.3d 1359, 1364-65 (11th Cir. 2011) (quoting *Turner*, 482 U.S. 89-90).

The U.S. 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). With consideration of the *Turner* factors, the Sheriff's Postcard-Only Policy is not "reasonably related to a legitimate penological interest" and therefore is an unconstitutional restriction on speech.

Turner Factor 1: No Penological Goal Supports Sheriff's Postcard-Only Policy

Under the first *Turne*r factor, a jail regulation that burdens fundamental rights must advance a legitimate penological objective. *Turner v. Safley*, 482 U.S. 78, 87 (1987). This first factor constitutes a *sine qua non*, meaning that if the Sheriff fails to demonstrate that the Postcard-Only Policy is rationally related to

the Policy's objectives, this Court need not reach the other factors. *See Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005); *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).

Although Reilly as the plaintiff bears the ultimate burden of persuasion,[32] the Sheriff bears the burden of production as to how the restriction on Reilly's free speech rights advances a penological interest. *Beard v. Banks*, 548 U.S. 521, 535 (2006) ("*Turner* requires prison authorities to show …" satisfaction of *Turner* standard); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (government bears the burden of showing constitutionality of content based restrictions[33] of speech); *Frost v. Symington*, 197 F.3d 348, 356-57 (9th Cir. 1999) (discussing various burdens in applying *Turner*).

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[32] *See Am. Fed'n of State, Cnty. & Mun. Employees Council 79 v. Scott*, 717 F.3d 851, 880 (11th Cir. 2013) (citations omitted) (ruling ultimate burden of persuasion rests with plaintiff); *see also Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (same).

[33] The Postcard-Only Policy is implicitly and explicitly a content-based speech restriction. By requiring all mail communication to be in postcard form, the Sheriff has implicitly chilled all discussions of a sensitive nature that a person would not want to write openly on a postcard. The Postcard-Only Policy also explicitly bans drawings, music lyrics, photographs (over 5) and images. Mail SOP, ¶ E(1)(d)(3); Admis., ¶ 5. Because whether the

To satisfy this burden, the Sheriff must "show more than a formalistic logical connection between a regulation and a penological objective." *Beard*, 548 U.S. at 535. 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. The Sheriff fails to carry his burden.

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communication is prohibited depended on whether it contained drawings, lyrics, or images, this amounts to a content-based restriction. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (noting that the regulation is content based because "whether [the plaintiffs] may do so under [the restriction] depends on what they say").

The Sheriff's Postcard-Only Policy advances no legitimate penological interest.[34] The Sheriff proffers two interests for banning letters: Contraband reduction and staff time savings. Reduction of contraband is admittedly a legitimate penological interest. However, the letter ban does not advance it. Saving staff time is neither a legitimate penological interest nor significantly achieved by the Sheriff's policy. Additionally, the Sheriff banned all drawings, photographs, and music lyrics even on postcards because they might contain an illicit message. This is an "exaggerated response" untethered to any legitimate penological interest.

The Postcard-Only Policy did not reduce the amount of contraband coming into the Jail through the mail. None came in when the Sheriff allowed letters. Interrog. (DE 55-7), ¶ 13. He effectively intercepted all contraband inside letters. Only when the Postcard-Only Policy is compared to a theoretical "no inspection" policy might it be said to actually reduce contraband and advance security. But the Sheriff's Postcard-Only Policy must be measured "within the context of the Jail's other practices and regulations." *Prison Legal News v. Columbia Cnty.*, 942 F.

[34] Because the Sheriff operates a jail where nearly 60% of the inmates are detained pending trial, the penological interests of retribution and general deterrence cannot justify a restriction on free speech in this context. *Pesci v. Budz*, 730 F.3d 1291, 1297 (11th Cir. 2013) ("tailor[ing]" the application of *Turner* to exclude government's interests in retribution and general deterrence from the "proper foundation for the restriction of civil detainees' constitutional rights").

Supp. 2d 1068, 1083 (D. Or. 2013) ("*Columbia Cnty.*") (ruling a jail's postcard-only policy was unconstitutional). And under the letter policy, the Jail was "safe and secure" and the contraband was intercepted. Admis. (DE 55-6), ¶¶ 27. (DE 55The Postcard-Only Policy added nothing.

Simple costs savings is not a *penological* interest. *Turner's* entire rational for relaxing the typical First Amendment standards in the prison or jail context is born from the inherent conflict between the exercise of some constitutional rights and the penological purposes and needs of detention. *Turner*, 482 U.S. at 87. Indeed, "an inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Id*. at 95 (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Therefore, *Turner* requires the government to justify a speech restriction with a *penological* interest, not just a *government* interest. *Id*. at 96 (striking state prohibition of inmate marriage because the "incidents of marriage … are unaffected by the fact of confinement or the pursuit of legitimate corrections goals"); *id.*, at 89 ("regulation is valid if it is reasonably related to legitimate *penological* interests") (emphasis added), *followed by Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1515 (2012). This means that when a jailor tackles the same problems inherent to all management in any agency—like saving costs—*Turner's* relaxed standards do not apply. *See Gates v.*

Collier, 501 F.2d 1291, 1319 (5th Cir. 1974)[35] ("Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature, have been rejected by the federal courts.") (citing cases); *Mitchell v. Untreiner*, 421 F. Supp. 886, 896 (N.D. Fla. 1976) ("'[l]ack of funds is not an acceptable excuse for unconstitutional conditions of incarceration'") (citations omitted); *Morrison v. Hall*, 261 F.3d 896, 902-03 (9th Cir. 2001) (holding that the efficient use of prison staff and resources could not justify an effective ban on subscription publications); *but see Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 861 (5th Cir. 2004) ("staff and space limitations, as well as financial burdens, are valid penological interests").

The Sheriff's mail staff realized only modest, overall staff time savings—roughly one hour per day—with the Postcard-Only Policy. Interrog. (DE 55-7), ¶ 10. This time cannot justify burdening a fundamental right for four reasons. First, the time is too little to meaningfully advance Jail efficiency. *See Columbia*

[35] *See Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*) (adopting as binding precedent for the Eleventh Circuit all decisions of the Fifth Circuit handed down prior to close of business on September 30, 1981).

Cnty., 942 F. Supp. 2d at 1084 ("The *de minimis* savings in time[36] achieved by the postcard-only policy is too small to create a rational connection between the policy and promoting efficiency at the Jail"). Second, most of the savings were realized because staff had less and shortened mail to scan—time the Sheriff has no interest in saving because he wants to appear to encourage numerous and long correspondence. Coughlin Dep. (DE 55-2), 91:24–92:7; Coughlin Decl. (DE 54-1), ¶ 5. Therefore, only the small fraction of time actually spent handling and inspecting the letters[37] could justify, in the Sheriff's view, the Postcard-Only Policy. Third, any time saved by mail processing staff would not advance a penological interest because the mail staff members were civilians, not correction officers, who would simply assist others working in the visitation lobby with their extra time. James Dep. (DE 55-4), 37:14–38:3, 43:4-10. Fourth, the Sheriff must spend some money on inmate welfare.[38] Because Tamara James is paid from the

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[36] The *Columbia County* court received evidence that the time savings amounted to "30 to 60 minutes each day." *Prison Legal News v. Columbia Cnty.*, No. 3:12-cv-71, 2012 WL 1936108, at *10 (D. Or. May 29, 2012).

[37] Doubtlessly, time to physically inspect the letter and envelope is minor in comparison to the time involved in scanning typical multi-page letters. *See* note 15, *supra*.

[38] Because the telephone tolls burden free speech, the government cannot profit from it. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943) (striking a soliciting license fee that was in excess of any "apportioned," "nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question" because the excess amounted to an unconstitutional tax and an improper restraint). Therefore, the Sheriff's telephone commissions must be spent on inmate welfare and not on general expenditures. *See* § 951.23(9), Fla. Stat.

Inmate Welfare Fund, her time must be spent on matters "used only for the overall inmate welfare." *See* § 951.23(9), Fla. Stat. Even if relieved of her mail processing duties, the Sheriff is not free to direct her as he pleases. The salary that he pays her and the unspent $627,098 that remains in the Fund must be spent on inmate welfare, not electronic key locking systems. The Sheriff should first spend the Inmate Welfare Fund before complaining about the costs of providing for the inmates. Therefore, delivering letters to inmates does not unduly burden the Sheriff as he proffers.

The Sheriff's prohibition on drawings, photographs, and music lyrics on postcards advances no legitimate penological interest. The Sheriff may have a legitimate interest in preventing conspiring criminals from communicating through drawings or lyrics. But a person is no better able to conceal an illicit message in drawings or lyrics than well-crafted prose, and the Sheriff has offered no evidence to the contrary. Berg Decl. (DE 55-16), ¶¶ 22, 23. The Sheriff should be able to readily identify illicit messages in drawings and only ban those postcards. A blanket prohibition is overboard.

Ultimately, the Sheriff's Postcard-Only Policy is "not reasonably related to any legitimate penological interest." Berg Decl. (DE 55-16), ¶ 16. The Sheriff rescinded the Policy after only two and a half months, thus, by the Sheriff's own

admission, the Policy is not necessary to further the Sheriff's asserted goals. Even the Sheriff's own expert has disavowed the need for a Postcard-Only Policy, admitting that a jailor could reasonably conclude that a postcard-only policy was "unneeded." *See* Leach Dep. at 61:5-13. The Postcard-Only Policy discourages correspondence, inhibits communication, and impairs rehabilitation and reentry. Berg Decl., ¶¶ 16, 20 Furthermore, it is "antithetical to sound inmate governance" as it often leads inmates to feel isolated and humiliated, which needlessly complicates the safe and secure management of the facility." *Id*., ¶ 17.

Turner Factor 2: Alternative Means to Communicate are Insufficient

The second factor of the *Turner* test "is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner,* 482 U.S. at 90. This factor weights in favor of Reilly.

The Postcard-Only Policy erects an absolute barrier to some communication and bars much content. Unincarcerated correspondents cannot share a doctor's report, a religious lesson, or a child's report card, whose original format carry intangible benefits. They cannot send printed court opinions, photographs (over five), newspaper clippings, or letter writing material. They cannot share music lyrics or child's drawing—even on a postcard.

The policy also prevents thoughtful, personal, and constructive written communications between an inmate and his family and friends. It silences correspondents' from sharing sensitive and personal information like health, finances, religion, and intimate emotions who reasonably do not want to write such on a postcard open for someone other than the intended recipient inmate to read. It truncates thoughtful messages to only those that could fit on the postcard's 4" x 6" size. The postcard's abbreviated form dampened the impact and force of communication.

Any suggested alternatives must be feasible and effective. *See Lindell v. Frank*, 377 F.3d 655, 659 (7th Cir. 2004). But telephones and visits are no replacement. With both, inmates can be overheard and would reasonably decline to discuss personal topics. With both, the Sheriff can deny communication to punish the inmate. Also, telephone calls can be expensive—in part to generate commissions for the Sheriff—and visits are limited and especially burdensome for out-of-town family like Reilly. Therefore, letter correspondence remains the most practical and effective way for many inmates to stay in touch with their friends and family.[39]

[39] *See* Prison Policy Initiative, Postcard Only Mail Policies in Jail (Feb. 2013), available from http://www.prisonpolicy.org/postcards/

Turner Factor 3: Allowing Letters Will Not Unduly Impact Jail[40]

The third *Turner* factor "is the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. Allowing letters, like the Sheriff has already chosen to do in August 2014 when he rescinded the Postcard-Only Policy, will not increase contraband or save a meaningful amount of time. Indeed, the Sheriff's decision to no longer band the sending of non-privileged mail in envelopes is an admission that allowing letters has no meaningful impact on security and staff time. For if it did, the Sheriff would not have rescinded the Postcard-Only Policy. Even the Sheriff's own expert admitted that, if he were running a jail, he would "probably not do a postcard-only policy." Leach Dep. at 74:10-11.

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. *Clement v. California Dep't of Corr.*, 220 F. Supp. 2d 1098, 1110 (N.D. Cal. 2002) ("[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."), *aff'd*, 364 F.3d 1148 (9th Cir.

[40] By agreement of the parties, Reilly's brief exceeds the 25 page limit.

2004). Finally, because any 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, the third *Turner* factor suggests that the Postcard-Only Policy is not rationally related to legitimate penological goals. *Columbia Cnty.*, 942 F. Supp. 2d at 1086.

Turner Factor 4: Postcard-Only Policy Alternatives

The "obvious, easy alternative" to the Postcard-Only Policy is to do what the Sheriff is already doing and has done for the entire history of the jail with the exception of two and half months: allow letters. Before implementing the Postcard-Only Policy and again today, the Sheriff opened and inspected envelopes and their contents. Given that opening envelopes and inspecting their contents effectively prevents the introduction of contraband into the Jail and requires only a *de minimis* amount of additional time, it is an easy and obvious alternative to which the Sheriff has already reverted.

The inmate mail policies in other correctional institutions also support this conclusion. Many jails and all prisons[41] in the United States deliver letters to inmates, which underscores that it can be done without compromising security or efficiency. These policies provide further evidence that opening envelopes and inspecting their contents is an easy and obvious alternative to the Jail's postcard-only policy. *See Holt v. Hobbs*, No. 13-6827, 2015 WL 232143, at *11 (U.S. Jan.

[41] 28 C.F.R. § 540.14; **Ala**. Admin. Reg. 448, available at http://www.doc.state.al.us/docs/AdminRegs/AR448.pdf; **Alaska** Dep't of Corr. Policies & Procedures, No. 810.03, http://www.correct.state.ak.us/corrections/pnp/pdf/810.03.pdf; **Ariz**. Dep't of Corr. Order Manual, § 914.05, available at http://www.azcorrections.gov/Policies/900/0914.pdf; **Ark**. Admin. Code 004.00.2-860; **Cal**. Code Regs. tit. 15, § 3138(a); **Colo**. Dep't of Corr. Admin. Reg. No. 300-38, available at http://www.doc.state.co.us/sites/default/files/ar/0300_38_1.pdf; **Conn**. Agencies Regs. § 18-81-31(d); **Del**. Dep't of Corr. Policy Manual, No. 4.0, available at http://www.doc.delaware.gov/pdfs/policies/policy_4-0.pdf; **Fla**. Admin. Code 33-210.101; **Ga.** Comp. R. & Regs. R. 125-3-3-.02; **Haw**. Dep't of Public Safety Corr. Admin. Policy No. 15.02, available at http://hawaii.gov/psd/policies-and-procedures/P-P/3-COR/CORR%20%20P-P%20FINAL/CHAPTER%2015/COR.15.02.pdf; **Idaho** Dep't of Corr. Standard Operating Procedure No. 402.02.01.001, available at http://www.idoc.idaho.gov/policy/int4020201001.pdf; **Ill**. Admin. Code tit. 20, § 525.130; **Ind**. Code § 11-11-3-5; **Iowa** Admin. Code r. 201-20.4; **Kan**. Admin. Regs. 44-12-601; 501 **Ky**. Admin. Regs. 6:020 (adopting Ky. Dep't of Corr. Policies & Procedure, No. 16.2, available at http://www.corrections.ky.gov/NR/rdonlyres/E20E4AEA-9C73-4E28-9CA4-0F02EF3881B9/181101/162.pdf); **La**. Admin Code. tit. 22, pt. I, § 313; **Me**. Dep't of Corr. Policy No. 21.2, available at http://www.maine.gov/corrections/PublicInterest/documents/21.2-PRISONERMAIL12-1-09R.doc; Code Me. R. 03-201 Ch. 1, § II.a (jail policies); **Md**. Pub. Saf. & Corr. 12.02.20.04; 103 **Mass**. Regs. Code 481.09; **Mich**. Admin. Code r. 791.6603; **Minn**. R. 2911.3300; **Miss**. Dep't of Corr. Standard Operating Pro. No. 31-01-01; **Mo.** Dep't of Corr. Family & Friends Handbook, available at http://doc.mo.gov/documents/FFWeb.pdf; **Mont**. Dep't of Corr. Policy No. 3.3.6, available at http://www.cor.mt.gov/content/Resources/Policy/Chapter3/3-3-6.pdf; **Neb**. Admin. R. & Regs. Tit. 68, Ch. 3, § 009; **Neb**. Admin. R. & Regs. Tit. 81, Ch. 9, § 002 (jail standards); **Nev**. Dep't of Corr. Policy No. 750, available at http://www.doc.nv.gov/ar/pdf/AR750.pdf; **N.H.** Code Admin. R. Cor 301.05; **N.J.** Admin. Code tit. 10A, 10A:18-2.25; **N.M**. Dep't of Corr. Policy No. 151200, available at http://corrections.state.nm.us/policies/current/CD-151200.pdf; **N.Y.** Comp. Codes R. & Regs. tit. 7, § 720.3; **N.C**. Admin. Code tit. 5, r. 2D.0307; **N.D.** Dep't of Corr. & Rehabilitation, Inmate Handbook, § 3, available at http://www.nd.gov/docr/adult/docs/INMATE_HANDBOOK_2010.pdf; **Ohio** Admin. CoDE 5420-9-18; **Okla**. Dep't of Corr. Operation Policy No. 030117, available at http://www.doc.state.ok.us/Offtech/op030117.pdf; **Or**. Admin. r. 291-131-0020; 37 **Pa**. Code § 93.2;R.I. Admin. Code 17-1-18:III; **S.C.** - no authority found (telephone call to Dep't of Corr. on Mar. 31, 2011, confirmed inmates can send and receive letters); **S.D.** Admin. R. 17:50:10:02; **Tenn**. Dep't of Corr. Admin. Policy No. 507.02, available at http://www.tn.gov/correction/pdf/507-02.pdf; Tenn. Comp. R. & Regs. 1400-01-.11 (jail standards); **Tex**. Dep't of Crim. Justice Policy No. BP-03.91, available at http://www.tdcj.state.tx.us/policy/BP0391r2_fnl.pdf; Tex. Admin. Code tit. 37, § 291.2 (jail standards); **Utah** Admin. R. 251-705; **Vt.** Admin. Code 12-8-21:965; 6 **Va.** Admin. Code 15-31-320; **Wash**. Admin. Code 137-48-040; Wash. Dep't of Corr. Policy No. 450.100, available from http://www.doc.wa.gov/policies/default.aspx; **W. Va**. Code St. R. § 90-7-3; W. Va. Div. of Corr. Policy No. 503.00; **Wis**. Admin. Code s DOC 309.04; **Wyo**. Dep't of Corr. Policy No. 5.401, available from http://corrections.wy.gov/policies/index.html.

20, 2015) (observing that successful practices at other institutions is relevant to the reasonableness of a prison or jail's own restrictions) (citing *Procunier v. Martinez*, 416 U.S. 396, 414, n. 14 (1974)).

The Sheriff also has numerous other security methods currently unused, but at its disposal. He could have, but did not, use a metal detectors and drug sniffing dogs. Interrog. (DE 55-7), ¶ 23; Leach Dep. (DE 55-26), 74:10-18; Berg Decl. (DE 16), ¶ 25. He could have only banned greeting cards, which are a better vessel to hide contraband. Coughlin Dep. (DE 55-2), 99:3-16. He could have prohibited returning undeliverable mail to the inmate sender to prevent kites—half of the contraband mail intercepted in the two years before the Postcard-Only Policy. *Id.* at 77:11-17. These alternatives would fully address his security interests in preventing the contraband. *See also* Leach Dep. at 61:5-13 (allowing letters is a reasonable option for prison administrators).

Banning all mail except postcards is the epitome of an exaggerated response. This wholesale ban is exactly the irrationally overbroad policy that the *Turner* test was designed to prevent. And again, the fact the Sheriff has now rescinded the Postcard-Only Policy underscores it was an exaggerated response to a non-existent problem.

B. Sheriff's Postcard-Only Policy Violated Due Process (Count 2)

The Fourteenth Amendment to the United States Constitution prohibits the Sheriff from "depriv[ing] any person of life, liberty, or property, without due process of law." *Id*., § 1. The Sheriff violates this constitutional safeguard when (1) he deprives a person of a liberty interest and (2) without sufficient process. *Ross v. Clayton County, Ga.*, 173 F.3d 1305, 1307 (11th Cir. 1999) ("There are two questions in the analysis of a procedural due process claim. Did the plaintiff have a property interest of which he was deprived by state action? If so, did the plaintiff receive sufficient process regarding that deprivation?"); *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003) ("In this circuit, a § 1983 claim alleging a denial of procedural due process requires proof of three elements: (1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process.") (citation omitted). The Sheriff deprived Reilly and other class members of a liberty interest by rejecting letters without sufficient process.

Reilly and other putative class members have a liberty interest in corresponding with Jail inmates by mail.

> 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."

Procunier v. Martinez, 416 U.S. 396, 418, (1974). *See also Perry v. Sec'y, Florida Dep't of Corr.*, 664 F.3d 1359, 1367-68 (11th Cir. 2011).

The Fourteenth Amendment's mandate that the government provide procedural due process requires at a minimum (i) notice and (ii) an opportunity to be heard. *Grayden*, 345 F.3d at 1232 ("There can be no doubt that, at a minimum, the Due Process Clause requires notice and the opportunity to be heard incident to the deprivation of life, liberty or property at the hands of the government.") (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). In the prison or jail context, procedural due process specifically requires "the author of the letter be given "reasonable opportunity to protest that decision." *Perry*, 664 F.3d at 1368 n. 2 (citing *Martinez*, 416 U.S. at 418-19).

Here, the Sheriff's process of rejecting letters was insufficient in two respects. First, the Sheriff did not provide adequate notice to the sender, like Reilly and other putative class members, as to why his letter was returned. Second, the Sheriff did not provide the sender with an opportunity to appeal and protest the decision.

During June and into July, the Sheriff notified correspondents, like Reilly, that their letters were rejected by returning them stamped "Return to Sender." Reilly's "Return to Sender" Letter (DE 55-17). This did not provide reasonable

notice of why the Sheriff rejected the letters. Notice must be "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." *Mullane*, 339 U.S. at 314. Yet, the stamped "Return to Sender" on the rejected materials provide no information as to why the piece of correspondence was rejected, nor do they inform the correspondents 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 , it was rejected by the inmate, or some other reason. The vague stamps provide no additional guidance. *See also Kapps v. Wing*, 404 F.3d 105, 124 (2d Cir. 2005) ("Claimants cannot know *whether* a challenge to an agency's action is warranted, much less formulate an effective challenge, if they are not provided with sufficient information to understand the basis for the agency's action." (emphasis in original)); *Greenfield v. Villager Indus., Inc*., 483 F.2d 824, 834 (3d Cir. 1973) ("As a consequence, just as a hearing which does not afford a meaningful opportunity to be heard may be as fatal to due process as a denial of any hearing at all, so too constitutionally mandated notice which is inadequate under the circumstances may be as fatal to due process as no notice at all.").

It would have imposed 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. (DE 55-16), ¶ 28. Adequate notice is not a mere triviality; it is critical to "preventing the chilling of speech" and preserving the First Amendment interests that are at stake. *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986). Furthermore, had Reilly and other correspondents received sufficient notice, the Sheriff had no written policy to provide an opportunity to be heard on this issue. Admis. (DE 55-6), ¶ 31.

For these reasons, the Sheriff violated Reilly and other putative class members' due process rights by failing to notify them why their letters were rejected and how to challenge the rejection.

V. CONCLUSION

Based on the foregoing arguments and authorities, Reilly respectfully requests that this Court enter summary judgment on his and the putative class and declare that the Sheriff's Postcard-Only Inmate Mail Policy violated the First and Fourteenth Amendments to the U.S. Constitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today 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 any opposing counsel that have appeared.

Dated: Feb. 10, 2015

Respectfully Submitted,

s/Benjamin James Stevenson

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