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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

COLUMBIA COUNTY; COLUMBIA COUNTY SHERIFF'S OFFICE; JEFF DICKERSON, individually and in his capacity as Columbia County Sheriff,

Defendants.

No. 3:12-CV-71-SI

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF

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I. INTRODUCTION

In January 2012, PLN filed this action challenging Defendants' mail policies and practices that unconstitutionally restrict correspondence to and from prisoners to postcards, prohibit delivery of magazines, and do not afford due process. Dkt. 1. Plaintiff sought damages, declaratory relief, and a preliminary and permanent injunction. *Id.* In May 2012, the Court found that "under the free speech clause of [the] First Amendment . . . Defendants' policy is likely to violate the free speech rights of both inmates and their correspondents" and preliminarily enjoined Defendants from "enforcing those portions of the inmate mail policy that restrict all incoming and outgoing inmate personal mail to postcards only." Dkt. 64 at 3.

Remarkable facts learned in the course of discovery only strengthen the bases for the Court's findings and for a Court declaration that Defendants' Postcard-Only Policy actually violated the First Amendment. And, as detailed below, Defendants' behavior learned of in discovery requires a permanent injunction to prevent future violations of free speech and to ensure the due process rights of prisoners, of PLN, and of other correspondents.

Prison Legal News seeks an order on summary judgment that:

(A) declares: (1) PLN has organizational standing to challenge Defendants' mail policies and practices; (2) Defendants' Postcard-Only, No-Magazine, and inadequate Due Process policies violated the First and Fourteenth Amendments; (3) Defendants' enforcement of those policies violated the First and Fourteenth Amendment rights of prisoners and their correspondents; (4) Defendants censored PLN's mail in violation of the First and Fourteenth Amendments, for which Defendants must pay damages to Plaintiff; and

(B) enjoins Defendants permanently from: (1) rejecting or otherwise censoring mail on the ground that (a) it is not in the form of a postcard, or (b) it is a magazine or periodical; and (2) denying due process to prisoners and their correspondents when censoring mail.

The material facts are uncontested and as a matter of law PLN has established its claims, so is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). The Court should declare Defendants' policies and practices unconstitutional, and enjoin them.

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II. FACTS

A detailed description of Defendants' censorship of Plaintiff's mail and Defendants' policies and practices that gave rise to this lawsuit is found in the Memorandum in Support of Plaintiff's Motion for Preliminary Injunction, Dkt. 15 at 2-13. The evidence supporting those facts is found at Dkts. 8 through 14. To avoid duplication, they are incorporated herein. In this memo, PLN summarizes those facts and provides an update on what has been discovered since.

Defendants admit that they have violated the Constitution dozens of times. In addition to these admitted violations of the First and Fourteenth Amendments, the Court held it is likely that Defendants violated the Constitution when they implemented the Sheriff's Postcard-Only Policy throughout the past 2½ years. Dkt. 64 at 3. The facts discovered since the Court's preliminary injunction show that the Sheriff's policy indeed violates the First Amendment. The facts also show that Defendants had a long-standing ban on magazines that they enforced to censor magazines and periodicals, that Defendants lacked an adequate Due Process Policy, and that Defendants routinely failed to provide due process and an opportunity to be heard for prisoners and their correspondents.

Section V.B. sets forth undisputed facts supporting the need for a permanent injunction.

III. STANDING

PLN is enforcing and protecting its own constitutional rights as well as the constitutional rights of prisoners and their correspondents, including but not limited to family members, friends, Lucy Lennox, and other publishers and organizations. This Court has already determined that Plaintiff has standing in its own right, and third-party or "overbreadth standing," to challenge Defendants' mail policies and practices. *See* Dkt. 64 at 10-12. Plaintiff respectfully asks the Court to hold that PLN also has organizational standing.

A plaintiff has "organizational standing" when it suffers injury by frustration of its mission and diversion of its resources, there is a causal connection between its injury and the challenged conduct, and the relief sought would redress those injuries. *See* Dkt. 46 at 19-21,

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Plaintiff's Reply In Support of Motion for Preliminary Injunction. Plaintiff has shown that it meets the elements of organizational standing, *see id.*, and incorporates that briefing herein.

IV. DECLARATORY RELIEF

Trial courts are vested with broad discretion to fashion equitable relief. In accordance with the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, the court has a "'duty to decide the appropriateness and the merits of the declaratory request irrespective of its conclusion as to the propriety of the issuance of the injunction.'" *Steffel v. Thompson*, 415 U.S. 452, 468 (1974) (quoting *Zwickler v. Koota*, 389 U.S. 241, 254 (1967)). Here, declaratory judgment is necessary.

A. Defendants' Policies Violated the United States Constitution

1. Defendants' Postcard-Only Policy for *Incoming* Mail Violated the 1st Amendment

In *Turner v. Safley*, 482 U.S. 78, 89 (1987), the Supreme Court set forth the legal standard that applies to governmental restrictions on *incoming* mail. In short, Defendants have the burden of showing that their policy is "reasonably related to legitimate penological interests" under the four *Turner* factors:

> (1) whether the regulation is rationally related to a legitimate and neutral governmental objective, (2) whether there are alternative avenues that remain open to the inmates to exercise the right, (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

Prison Legal News v. Lehman, 397 F.3d 692, 699 (9th Cir. 2005) (citing *Turner*). The first of these factors can be dispositive. *Id.* In its Memorandum and Reply brief in support of its Motion for Preliminary Injunction, Plaintiff set forth the applicable legal standards and compelling argument that the Sheriff's Postcard-Only Policy for *incoming mail* is irrational and that all four factors of the *Turner* test establish that the Policy violates the First Amendment. *See* Dkt. 15, at 14-27; Dkt. 46, at 28-32, and declarations submitted in support. Plaintiff incorporates its prior briefing and declarations rather than repeating and submitting them here.

Discovery has only reinforced the Court's preliminary injunction ruling.

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a. *Rational Relationship Factor: Defendants' Policy is Not Rationally-Related to a Legitimate Penological Objective*

In response to PLN's Preliminary Injunction motion, Defendants offered two objectives for their Postcard-Only Policy, which the Court found legitimate—"safety and security of the Jail's inmates and staff and the efficient use of the Jail's limited resources." Dkt. 64 at 16.

In its Order, the Court honed in on the key question: whether the Postcard-Only Policy is "rationally related to enhancing security and improving efficiency." *Id.* at 17. Defendants contend that the policy is rationally related to those objectives because it prevents the introduction of contraband into the jail. Dkt. 29 at 15. But the Court was unconvinced and held that "Defendants have failed to offer evidence or even an intuitive, common-sense reason why the post-card only mail policy more effectively prevents the introduction of contraband than opening and inspecting letters." Dkt. 64 at 17. And, the Court noted that while inspecting postcards is faster than inspecting a letter, it held that "[t]he speed at which a mail handling staff can inspect mail, however, does not establish a rational link between the policy and reducing contraband." *Id.* at 17-18; *see*, *also*, *id.* at 19 ("the time-savings is too modest to demonstrate a significant rational relationship between the postcard-only policy and improving the Jail's efficiency.") Indeed, discovery in this case has strongly confirmed the Court's conclusions.

(1) *The Sheriff Adopted His Postcard-Only Policy Primarily to Copy Other Sheriffs, Not to Reduce Contraband or Save Limited Resources*

When asked to explain why he adopted the policy, the Sheriff offered two reasons. The first, his primary explanation, was that he wanted to be in sync with other jails in Oregon. In his words, he adopted the policy to achieve "standardization" with what he thought other sheriffs might do. *See* Ex. I at 89:22-90:2.[1] After attending an Oregon Sheriff's Meeting in December 2009 where the idea of restricting mail to postcards was discussed, the Sheriff asked his Jail Commander, Jim Carpenter, to review the concept with this jail staff, and then decided to implement a Postcard-Only Policy. *Id.* at 80:19-81:12, 83:17-86:22. But following the crowd is

[1] All roman numeral exhibits are deposition transcripts, attached to Declaration of Jesse Wing.

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not a rational justification. And it is telling that this is the Sheriff's primary reason. He adopted the challenged policy because someone running another facility thought it was a good idea, not because of his own experience running the Columbia County Jail. *Id.* at 90:3-92:12.

(2) *The Jail Did Not Have a Mail Contraband Problem*

Sheriff Dickerson's second stated reason for adopting the Postcard-Only Policy was jail security. Ex. I at 90:18-91:1. In response to Plaintiff's motion for preliminary injunction, the Sheriff listed a variety of prohibited contraband including "bodily fluids, lipstick, perfume, glue, paint, and unidentifiable substances" that can contain hazardous or illegal materials. Dkt. 32 ¶11. He said that envelopes can hide contraband such as "needles, blades, similar weapons, and handcuff keys." *Id.* at ¶¶13-14. He also told the Court that mail must be inspected for "threats of physical harm, blackmail, extortion, other criminal activity, sexually explicit material, gang-related material, and plans for escape." *Id.* at ¶12. And he asserted that postcards are "easier and quicker to inspect for contraband and prohibited content" and "the risk of contraband being present in mail from an inmate's family or friends is greater than the risk of contraband being present in mail that comes from legal or publisher sources." *Id.* at ¶¶16, 18. But the Sheriff failed to identify a single circumstance in which something harmful was actually concealed or sent to a prisoner at the Jail in an envelope, and did not describe a single event that led the Jail to adopt the Postcard-Only Policy. *Id.* There is good reason for his silence.

When questioned about whether there was a legitimate reason to believe his policy would increase security the Sheriff offered none. For example, when asked whether he has ever "seen any of the things you've described in your declaration in the Columbia County Jail" he said "No." Ex. I at 259:17-19. And, the Sheriff admitted that he has never heard of any problem with threats or contraband entering his Jail through the mail before, or after, adopting his policy:

Q. Are you aware of problems with threats being made through the mail?
A. No.
Q. Are you aware of efforts to contact people that prisoners are not allowed to have contact with through the mail?
A. No.

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Q. Are you aware of plans for escape being communicated through the mail?
A. No.
Q. So is it fair to say that you were not trying to solve a problem that you knew existed with regard to the management of security-related information? That's correct?
A. In our jail.
Q. Is that correct, in your jail?
A. I'd say yes.
Q. Okay. And you have described, I think, that you were not aware of a problem with introduction of contraband into your jail at that time; is that correct, too?
A. Yes.
Q. So you're not trying to solve a known problem at your jail regarding introduction of contraband; is that right?
A. Correct.

Ex. I at 91:12-92-12.

PLN also deposed Sergeant Cutright, the Sheriff's Office's FRCP 30(b)(6) designee on "interpretation, and implementation of the Jail's Mail Policy since January 1, 2009." Ex. 67.[2] He too testified that the Sheriff's Office adopted the Postcard-Only Policy to "standardize" their procedures and because contraband could be hidden in envelopes. Ex. II at 51:19-52:24, 54:22-55:1. But during Sergeant Cutright's 17 years at the Columbia County Jail, he has seen or heard of "contraband" entering the Jail only four times. He testified that "semen" arrived in the mail a "couple" of times, that the Jail did not test the alleged substance relying instead on letters saying semen was being transmitted. *Id.* at 53:19-54:10. Sergeant Cutright also claimed that eight years ago he found methamphetamines in the seal of an incoming envelope. *Id.* at 55:2-57:4. And finally, on one occasion an attorney sent a document to his client with a paperclip on it. *Id.* at 59:2-9. Sergeant Cutright searched for documents relating to contraband being transmitted by mail by searching for the word "contraband" in the Jail's Golden Eagle database, which contains reports from 2000 to the present. *Id.* at 57:22-58:20. He found "nothing" related to the mail. *Id.*

When considering whether to adopt a Postcard-Only Policy in December 2009, the Sheriff asked his Jail Commander, Jim Carpenter, to look into it. Ex. I at 83:17-25. Carpenter

[2] Exhibits Nos. 1 – 76 are attached to Declaration of Katherine C. Chamberlain, filed herewith.

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was the Sheriff's Jail Commander from 2009 until he retired in June 2011. Ex. IV at 9:11-15, 8:2-9:15. He worked at the Jail for 22 years. *Id.* When asked if there was ever a problem with contraband coming through the mail during his tenure, he responded "there was talk about drugs coming in once" under a stamp or in the "glue part" of the envelope. *Id.* at 26:23-27:19.

(3) *Any Time-Saving Results from Suppressing Speech and is Too Modest*

The Sheriff's Postcard-Only Policy is logistically and financially burdensome, resulting in suppression of speech. The Policy burdens prisoners and their correspondents, forcing them to prepare and pay for multiple postcards, instead of writing one complete communication by letter.

In his deposition, Sergeant Cutright acknowledged that in telling the Court it takes less time to process postcards than letters, Dkt. 30 ¶4, he was comparing one letter to one postcard: "there's just way more [scanning] to do on a four-page letter than there is on a one-page postcard." Ex. II at 109:9-110:17. He also testified there has been "more" outgoing mail since the Postcard-Only Policy because prisoners try to fit the same message they would have written in a four-page letter on four postcards, *id.* at 112:5-11, but conceded he could only think of *one* instance, *id.* at 112:12-113:7, showing that the policy has indeed suppressed speech.

The Postcard-Only Policy places a financial burden on the prisoners and their correspondents. Contrary to Sergeant Cutright's testimony erroneously implying that a prisoner can write the same message in 4 postcards as a 4-page letter, a prisoner must write 16 postcards: the Sheriff's postcards measure 5.5 by 8.5 inches, Dkt. 32 at ¶17, or "half the size of a standard piece of paper," Dkt. 29 at 16; Ex. 1.[3] And, for indigent prisoners, the Sheriff's Postcard-Only Policy sharply cut the space on which a prisoner could communicate—from the front and back of 4 pieces of paper to the back of 2 postcards. Ex. II at 184:4-13; 22:1-10, 110:18-111:1.

The Sheriff admitted that he has significantly reduced the amount of space on which an indigent prisoner can write, Ex. I at 190:7-11, from 8 front-and-back pages to the back of 2 half-

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[3] Prisoners cannot write text to the left of the addresses because the Jail-issued postcard filled that space with a photograph of Oregon's first sheriff, armed—which one prisoner felt was not appropriate to send his young children, especially for a birthday. Ex. 27.

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pages—a reduction to one-sixteenth of the space previously available for communication. And the financial burden of purchasing multiple stamps—one for each postcard, can be significant for prisoners' friends and family as well. *See*, *e.g.*, Ex. 24. Although Sergeant Cutright initially denied that the Postcard-Only Policy makes it more expensive for prisoners to send mail, when pressed he admitted that "if they send more than one postcard" they have to buy more stamps. *See* Ex. II at 190:15-191:7. Likewise, the Sheriff admitted that it is much more expensive to send the same amount of content on postcards than in a letter. Ex. I at 192:21-193:6.

Any time-savings attributed to the Policy is too modest to be rationally related to efficiency. Defendants' initial statements are not reliable. Sergeant Cutright told the Court that "the time it took the booking deputy to inspect incoming and outgoing mail was reduced by one-third," but this was based on his claimed memory of data collected three or four years ago on little sheets of paper, that have been shredded. Ex. II at 116:17-117:18.

Sergeant Rigdon's testimony establishes the alleged "time savings" is exaggerated. He testified it takes him a "little longer" to process a single letter than a single postcard. Ex. X at 3:8-15. He identified the following actions: the processer must open the envelope, which takes a "few moments, seconds"; pull the letter out, which takes a "second or two"; and make sure there is nothing in the envelope, which takes "a few seconds." *Id.* at 3:20-5:10. They both take the same amount time to scan. *Id.* at 5:11-19. Even stretching his estimates in the light most favorable to Defendants, it could be up to an additional 10 seconds per letter.[4] That's 8.3 additional minutes to process 50 pieces of mail[5] per day (50 pieces x 10 seconds, divided by 60 seconds).

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[4] This calculation does not take into account that the Sheriff's policy required removing stamps, Dkt. 32-6 at 11, ¶32.b.; there are more stamps on multiple postcards than on a single envelope.

[5] Sergeant Cutright estimated 50 pieces of incoming mail per day, Dkt. 30¶2, but at the site inspection, Sergeant Miller counted 37 pieces. Ex. III at 26:25-27:1; 30:6-25 (Pod A); 34:9-20 (Pod B); 35:22-36:10 (Pod C); 37:22-24 (Pod D); 38:6-10 (Pod E); 38:19-20 (Pod F); 38:24-39:5 (Pod G); 39:9-12 (no Pod H); 39:7-8, 13-20 (Pod I); 41:2-42:13 (Pod J). Sgt. Miller testified that 37 pieces is the daily average mail the Jail has received since "forever," at least during the eleven

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The Sheriff acknowledged that he was relying on Sergeant Cutright, Ex. I at 253:11-17 when he told the court that "[w]ithout the postcard mail policy, the time spent inspecting incoming and outgoing personal mail would greatly increase, reducing the time available to staff for other tasks that are just as essential . . ." Dkt. 32 ¶25. Sheriff Dickerson admitted it is possible that it took less time to process the mail because there have been fewer prisoners[6] and therefore less mail, or because the mail is now processed in the middle of the night instead of day shift when there are more distractions, or because the Postcard-Only Policy has caused there to be less mail to process. Ex. I at 253:11-255:6. The Sheriff did not do anything to investigate how long it takes to process the mail or the reason for any reduction in that time. *Id.* at 255:19-22. Significantly, the Sheriff testified that he does not know how long it takes the Jail to process the mail now, since the Court's Preliminary Injunction Order took effect, and he has not attempted to find out. Ex. VIII at 325:14-326:2. If he genuinely believed that allowing letters substantially increased the time it takes to process the mail, he would be tracking that data.

The government's failure to show a rational relationship is fatal under *Turner*, since that is *sine qua non* for constitutionality. *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005). The Court need not evaluate the remaining factors, each of which favors PLN.

(4) *The Policy Also Resulted in Censorship of Book Catalogs and News Articles from the Internet, Which Are Protected Speech*

The Sheriff's Postcard-Only Policy also swept into his unconstitutional ban speech that the Ninth Circuit has unequivocally held prison officials may not censor: catalogs and internet-generated mail. The Jail censored PLN's book catalogs and subscription flyers, which are neither magazines nor postcards, but are plainly protected against censorship by the Jail. *See Prison Legal News v. Lehman*, 397 F.3d 692, 697 (9th Cir. 2005).

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years she has worked there. *Id.* at 57:4-18. A still photograph taken of her processing the mail during the inspection shows just how little mail the jail receives. *Id.* at 13:7-19; Ex. 71.

[6] In 2010, the year the Sheriff implemented the Postcard-Only Policy, the prisoner population was 206; in May 2012 it had dropped to 130. Ex. II at 79:10-80:5.

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The Sheriff's policy permitted only "junk mail," which he defined as the third prong of the *Miller v. California*, 413 U.S. 15, 39 (1973), obscenity test: "when taken as a whole, lacks serious literary, artistic, political, educational, religious, or scientific value." Dkt. 32-6, at 1. Under that definition, PLN's book catalogs, subscription flyers, and book offers were not junk mail so were excluded by policy, in plain violation of *Prison Legal News v. Lehman*, 397 F.3d at 697. Meanwhile, the Sheriff's Inmate Manual contradicted his alleged policy by prohibiting "junk mail." Ex. 54, at 13. And contrary to the Sheriff's claim that PLN's mailings would be delivered under his policy because it allowed bulk mail, PLN mails its book catalogs via first-class mail, so the catalogs do not qualify as bulk mail. Dkts. 8 and 11. The Ninth Circuit has repeatedly ruled that distinctions based on postal rate are an irrational basis for prison censorship. *Prison Legal News v. Cook*, 238 at 1149; *PLN v. Lehman*, 397 F.3d at 700.

Similarly, the Jail censored PLN's online news articles mailed by Lucy Lennox to prisoners at the Jail in an envelope, Dkts. 10, 34, and told the Court that the Jail would censor those same mailings again: "If Ms. Lennox were to send PLN's web article today, it would be rejected because it was not sent directly from the publisher and because it was personal mail not on a postcard." Dkt. 29 at 18. These news articles could not meaningfully have been reduced to a series of postcards, nor does the Ninth Circuit permit prison officials to censor materials because they were generated from the internet rather than mailed directly by the publisher. *Clement v. California Dept. of Corr.*, 364 F.3d 1148 (9th Cir. 2004).

b. *Alternative Avenues Factor: Prisoners and Their Correspondents Have No Reasonable Alternative Way to Exercise Their Free Speech Rights*

Defendants contend that prisoners and their correspondents may exercise their First Amendment rights by visiting, calling, or by sending multiple postcards. Dkt. 29 at 18-19. The Court rejected Defendants' position, concluding that no reasonable alternatives exist:

> [The] postcard-only mail policy drastically restricts an inmate's ability to communicate with the outside world. It prevents an inmate's family from sending items such as photographs, children's report cards and drawings, and copies of bills, doctor reports, and spiritual and religious tracts . . . It prevents an inmate's friends and other correspondents from sending printed copies of articles published

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> in newspapers, magazines, or the internet. It prevents educational, community and religious organizations from sending lessons, book and periodical offers, and fundraising appeals. . . Finally, and perhaps most importantly, the postcard-only mail policy creates a hurdle to thoughtful and constructive written communication between an inmate and his or her unincarcerated family and friends . . . These are not insignificant considerations. The limits imposed by the IMP's postcard-only mail policy not only restrain PLN and inmate's First Amendment rights, they inhibit rehabilitation . . .

Dkt. 64 at 20-21.

The evidence obtained in discovery only strengthens the Court's conclusion. Columbia County prisoners may receive visitors only twice a week, on two set days, for a maximum of 30 minutes per visit. Ex. II at 213:4-19. Prisoners can make outgoing calls only during times when they are out of their cells. *Id.* at 211:13-212:19. Outgoing local calls cost $2.35 for 15 minutes. *Id.* The Jail does not permit incoming calls for prisoners except in exceptional circumstances (e.g. a prisoner's attorney needs to reach him or a death in the prisoner's family). *Id* at 212:22-25. And, as discussed above, it is also undisputed that sending multiple postcards is substantially more costly than sending a single letter. PLN has no practical way to reach its intended audience at the Columbia County Jail except through the mail. And notably, the resources in what the Jail calls its "law library," which is merely a library cart, are scarce. Dkt. 36, ¶¶ 9, 11, 12; Exs. 72-73.

So, for prisoners, PLN, and other correspondents, there are no practical alternative ways for them to communicate. *See, also,* Dkt. 15 at 22-23; and Dkt. 46 at 33.

c. *Effect on Staff, Prisoners, and Resources Factor: the Effect, if Any, is Minimal*

Defendants contend "the unfettered ability of persons to send inmates materials in any form . . . would *greatly increase* the risks of contraband entering the Jail, along with the time required for screening personal mail." Dkt. 29 at 19 (emphasis added). The Court disagreed, concluding that "accommodating letters and periodicals is unlikely to have a 'significant ripple effect' on inmates and staff . . . [and] the time-savings afforded to the Jail by the postcard-only mail policy is modest, at best." Dkt. 64 at 21-22.

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As explained above, Defendants have admitted they did not have a contraband problem before adopting the Postcard-Only Policy, so any argument that going back will "greatly increase" the risks of contraband entering the jail is without basis. And any alleged time-savings is much smaller than the Defendants represented to the Court.

d. *Easy and Obvious Alternatives Factor: There Were Easy and Obvious Alternatives, Which Defendants Failed to Even Consider, Suggesting an Exaggerated Response by Prison Officials*

The Court has already held that an easy and obvious alternative to the Postcard-Only Policy was for the Defendants to open and inspect letters, which according to Sergeant Cutright, required only 30 to 60 additional minutes each day. Dkt. 64 at 22. The evidence uncovered since then only strengthens the Court's conclusion.

First, the time it takes to open and inspect the contents of envelopes is far less than Sergeant Cutright estimated in February 2012. Dkt. 30 ¶4. *See* Section A.1.a.(3).

Second, Defendants claim that the mail processing takes them away from other tasks so they adopted the policy at issue. Dkt. 32 ¶25. But they did not disclose to the Court that they have switched from processing the mail in the middle of the day to the middle of the night when the Jail was much less busy. Ex. II at 122:11-123:21. This did not require removing *any* tasks from the night shift. *Id.*

Third, the Jail used to require its deputies to scrape off every stamp from incoming mail. Ex. III at 92:12-93:10; Ex. 41. Yet, the Jail has now given up that policy. *Id.* This choice reveals that the time-consuming process of removing stamps, *see* Ex. 45, unchallenged by PLN, was not that important to protect the security interests of the Jail.

Finally, the Sheriff never tried to determine whether, let alone how, contraband actually enters the jail so as to target any response. Ex. I at 74:22-75:2. Indeed, the Jail did not adopt its Postcard-Only Policy to address an actual problem, because contraband was not arriving by mail. *See* Section A.1.a.(2), above. The Sheriff acknowledged that contraband can get into the Jail through outside workers, jail staff, or maintenance persons, but the Jail does not check their bags and relies on "trust" alone to prevent jail staff from bringing in contraband. Ex. I at 62:17-69:11.

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And when a deputy is alleged to be giving prisoners contraband, the issue is ignored. Ex. 49, at 2; Ex. VII at 286:6-287:4.

Thus, there were easy and obvious alternatives to a Postcard-Only Policy to achieve Defendants' purported objective to enhance security and save time (and consistent with many other Sheriffs who didn't adopt such a policy). Defendants could have investigated whether, and if so how, contraband actually enters the Jail tailoring a plan to control it, moved the mail processing to the night shift, re-evaluated how they process the mail to make it more efficient, and stopped removing stamps. Or, they could have kept processing mail the same way they had since there was no problem they actually sought to solve (modified, of course, to comply with the Constitution). But Defendants did not even explore any of these alternatives in lieu of adopting their unconstitutional policy.

2. Defendant's Postcard-Only Policy for *Outgoing* Mail Violated the First Amendment

Supreme Court and Ninth Circuit precedent make clear that governmental restrictions on outgoing mail are analyzed under *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), *overruled in part on other grounds by Thornburgh v. Abbott,* 490 U.S. 401, 413-14 (1989) (recognizing that *Procunier* still applies to regulations concerning *outgoing* mail). *See Barrett v. Belleque*, 544 F.3d 1060, 1062 (9th Cir. 2008) ("*Procunier* is controlling law in the Ninth Circuit and elsewhere as applied to claims involving outgoing prisoner mail.").

Under *Procunier*, a government restriction on outgoing mail is justified only if "the regulation or practice in question . . . further[s] an *important or substantial governmental interest* unrelated to the suppression of expression. . . . [and] the *limitation* of First Amendment freedoms . . . [is] *no greater than is necessary or essential* to the protection of the particular governmental interest involved." 416 U.S. at 413-14. (Emphasis added). "When a prison regulation affects outgoing mail as opposed to incoming mail, there must be a 'closer fit between the regulation and the purpose it serves.'" *Witherow v. Paff*, 52 F.3d 264, 265 (9th Cir. 1995).

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PLN's prior briefing explains why the *Procunier* standard, not *Turner*, governs outgoing mail. And that briefing provides compelling argument that the Sheriff's Postcard-Only Policy for *outgoing* mail does not further an important or substantial governmental interest and is greater than necessary or essential to protect the governmental interest involved. Therefore, Defendants' policy fails under *Procunier*. *See* Dkt. 15 at 21-22; Dkt. 46 at 38-39; Dkt. 71.

Defendants concede that outgoing mail is less likely to contain contraband, so it takes them less time to process outgoing mail. Ex. II at 119:3-120:5. In his 17-year tenure, Sergeant Cutright has never encountered contraband being sent out of the Jail. *Id.* And, when asked to identify the reasons for adopting a Postcard-Only Policy for outgoing mail, as Defendants' FRCP 30(b)(6) designee, Sergeant Cutright testified that "it wasn't even addressed" and Defendants did not even consider whether to adopt such a policy for outgoing mail, they just decided to adopt one for all inmate mail "in general." *Id.* at 120:20-121:5.

Since Defendants cannot meet the lower *Turner* standard for *incoming* mail, as set forth in the sections above, they also fail to meet the higher *Procunier* standard for *outgoing* mail.

Defendants contend that *Turner*, not *Procunier*, applies to outgoing mail. Dkt. 76. However, nothing in the Supreme Court or Ninth Circuit case law supports Defendants' position. *See* Dkt. 71. The Court should apply the *Procunier* standard and hold that Defendants fail to meet it, or make clear that it is not deciding which standard applies because Defendants fail to meet the lower *Turner* standard anyway. Either way, the Court should declare that Defendants' outgoing Postcard-Only Policy is unconstitutional.

3. Defendants' No Magazines Policy Violated the First Amendment

The Sheriff told this Court that the Jail's mail policies have "always" allowed inmates to receive magazines. Dkt. 29 at 3. Although the written "mail policies" that the Sheriff filed with the Court do not explicitly prohibit magazines, discovery has revealed that these "policies" have been meaningless. In practice, the Jail has not permitted magazines at any time in recent

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memory; that is, for a least the past 22 years. And for years, the Sheriff told the public and his prisoners—*in writing*—that the Jail prohibited magazines and periodicals, as shown below.

a. *The Sheriff's Office Told Corrections Staff, Prisoners, and the Public, that It Bans Magazines*

For years, the Jail distributed Inmate Manuals to its prisoners that explicitly prohibited magazines or periodicals: "Periodicals: We do not accept any periodicals." Ex. 54 at 12 (November 18, 2010).[7] And between 2009 and November 2010, while Defendants considered several modifications to their Inmate Manual, each time they affirmed their bans:

- "Publications: We do not accept magazines." Ex. 50 at 14 (2009).
- "Periodicals: We do not accept any periodicals." Ex. 51 at 14 (July 8, 2010).
- "Periodicals: We do not accept any periodicals." Ex. 52 at 16 (July 23, 2010).
- "Publications: We do not accept magazines." Ex. 53 at 11 (September 30, 2010).

And, Defendants widely communicated the same prohibition in March 2010 when Sergeant Cutright wrote a Memorandum titled "Mail Procedure Changes," which was distributed to the entire Corrections Division, to all prisoners, and was published on the Sheriff's website. Exs. 2, 3, and 6; Ex. II at 66:4-68:9. The Memo stated: "Magazines are not allowed inside the facility," Exs. 2, at 2; 3, at 2, and remained in the prisoner living areas until Plaintiff inspected the Jail on May 8, 2012. *See* Second Declaration of Brad Berg, ¶¶ 2-5 submitted herewith. Jail supervisors reviewed the content before the Memo was distributed. Ex II at 68:12-14. Sergeant Cutright, who testified as the Sheriff's Office's FRCP 30(b)(6) designee on the interpretation, and implementation of the Jail's Mail Policy since January 1, 2009, described the Memo as a "summary of the mail policy," *id.* at 68:15-18, and testified that the purpose of writing the memo was to:

> [H]ighlight some changes made to the *policy* in 2010. It was also written, the biggest point was so we could add this information to the internet *so the public*

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[7] The Sheriff notified Spanish-speakers of this prohibition: "Publicaciones periodicas: No aceptamos ninguna publicacion periodica (periodicos, revistas, etc.)" Ex. 55. at 14 (Nov. 2010).

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> *would know* what the change to the policy was or *what the mail policy of the Columbia County Sheriff's Office at that time was*."

Id. at 66:9-19 (emphasis added). The Sheriff's Office posted a similar notice on its website on March 18, 2010, that stated "Magazines: Are not allowed inside the facility." Ex. 6, at 2; Ex. VI at 14:21-15:8, 17:12-15, 21:7-11. Prior to January 19, 2012, the Sheriff's Office added additional information about its prohibition on magazines: "Publications: We do not accept magazines." *See* Ex. 7; Ex. 70, at Admission 1. So, at the time that PLN filed this action, the Sheriff's website stated in *two places*, that the Jail prohibits magazines. *Id.*

Despite authoring his widely publicized 2010 Memo, at his deposition Sergeant Cutright denied knowing whether the Jail's policy actually prohibited magazines. Ex. II at 72:24-25. And, while admitting that he cut and pasted the content of his Memo from the Inmate Manual he suggested he did so "without particularly reading the whole entirety of it." *Id.* at 76:17-77:3. But despite his efforts to backpedal, the undisputed facts are: Defendants communicated to their staff, the public, and to the prisoners in their custody, repeatedly, that magazines are not allowed.

b. *Defendants' Magazine Ban Resulted in a Near Absolute Chill of Speech*

The undisputed evidence establishes that the Sheriff's jail staff read and blindly followed the Sheriff's Office's directive that the Jail banned magazines. In Sergeant Cutright's 17 years with the Sheriff's Office, including many years processing the mail and supervising the mail processing, he testified that he has "never" seen a magazine arrive for an inmate at the facility. Ex. II at 75:8-19. Captain Jim Carpenter, who worked for the Jail for 22 years and was the Jail Commander from 2009-2011, Ex. IV at 9:11-15, 8:9-9:15, testified that throughout his tenure, the practice and custom of the Jail was to prohibit magazines and periodicals, *id.* at 75:7-20, 75:21-76:12. He could not remember what the policy was, but it was the Jail's "procedure" to ban magazines. *Id.* He testified that "As long as I worked at the jail, that I can remember, we never accepted magazines." *Id.* at 75:18-20. In Captain Carpenter's 22 years at the Columbia County Jail, he has only seen one magazine at the Jail and it was rejected. *Id.* at 76:13-77:6.

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Indeed, corrections deputies told prisoners that magazines were not permitted. When a prisoner asked whether there are any restrictions on the number or type of magazines that can be delivered, the Jail responded "We Do Not Allow Magazines." Ex. 20. And, as documents from prisoner files reveal, corrections deputies censored magazines because they were not permitted by the Jail. *See, e.g.*, Exs. 21-22. In fact, the Sheriff 's Office's rarely-used Mail Violation Notice form has a checkbox for "Do not accept periodicals." Exs. 21-22. In short, Defendants' complete ban effectuated an arctic chill on prisoners receiving magazines that was near absolute.

If the Sheriff is accurately reporting that the Jail's mail policy "always" permitted magazines then the Jail's custom and practice is to violate its written policy, as well as the Constitution. If, contrary to the Sheriff's representation, the Jail's longstanding policy was to ban magazines then his word is unreliable and the Jail's policy has been to violate the Constitution for as long as anyone can remember. Under either scenario, the undisputed facts establish that Defendants told their staff, inmates, and the public, that their mail policy prohibited magazines, and the Jail censored magazines. This likely suppressed most attempts to obtain magazines, and when they were sent the Jail censored them accordingly.

4. Defendant's Due Process Policies Violated the Fourteenth Amendment

"[T]he decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards." *Procunier v. Martinez*, 416 U.S. 396, 417-418 (1974), *overruled in part on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). Thus, the Fourteenth Amendment requires that prison officials provide notice and an opportunity to appeal their censorship decisions to prisoners and their correspondents. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692, 701 (9th Cir. 2005); *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986); *Montcalm Pub. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996).

Although the Constitution mandated that Defendants afford both prisoners and their correspondents due process when censoring mail, Defendants' mail policy plainly failed to provide for constitutionally adequate due process. At the time this lawsuit was filed (January 13,

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2012), the Inmate Mail Policy posted on the Sheriff's website was devoid of any provision for due process. *See* Ex. 7. The March 23, 2010 Memo available to prisoners and jail staff also contained no due process rights or requirements. Exs. 2, 3. And the Inmate Manual distributed to prisoners failed to provide for due process, except for "notice" to the prisoner if the Jail *confiscated* mail but at the same time stated, "We will return to sender any form of prohibited mail" for which "You may *not* get a notice. . ." Ex. 54 at 10 ("Mail Confiscation") (emphasis added).

After this lawsuit was filed, Defendants provided PLN with the Jail's Mail Policy dated October 21, 2011, which was never publicly available. *See* Dkt. 9 ¶18; Dkt. 9-4, Ex. 62; Ex. 68 at ROG 7(d). This policy also failed to require constitutionally adequate due process to prisoners and their correspondents. While it required the Jail to provide the prisoner-addressee notice when the Jail censored incoming mail (which the Jail routinely failed to do, *see* Dkt. 12 at ¶¶4, 6; Dkt. 11 at ¶¶4, 6, 7; Dkt. 14 ¶¶4, 6, 7; Dkt. 13 at ¶¶4, 6, 7), the policy failed to require any notice to or opportunity to appeal for the publisher or other sender of incoming mail, or to the prisoner or intended recipient of rejected outgoing mail. *See* Dkt. 9-4; Ex. 62 at 6, II.D.1.b.

After PLN filed its lawsuit, Defendants revised their mail policies on January 26 and February 10, 2012. Dkts. 32-5 and 32-6. The Court recognized the notice provisions in these policies were "not a model of clarity" and the due process provisions did "not expressly apply to outgoing mail." Dkt. 64 at 25. Indeed, the due process provisions were scattered and confusing. Dkt. 15 at 16-17. It is no surprise that the corrections staff continued to fail to provide adequate due process when censoring inmate mail. *See*, *e.g.*, Dkt. 34; Ex. I at 209:21-210:8.

For these reasons, the Court should declare the following policies violated the Fourteenth Amendment: (1) Defendants' publicly available mail policy posted on their website on January 13, 2012, Ex.7, which failed to provide for any due process rights; (2) the March 23, 2010 Memo, Ex. 2, which failed to provide for any due process rights; (3) Defendants' October 21, 2011 mail policy, Ex. 62, which failed to require any notice or opportunity to appeal to the

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sender of incoming mail or to the prisoner or intended recipient of rejected outgoing mail; and (4) Defendants' January 26, 2012, and February 10, 2012, mail policies, Dkt. 32-5 and -6, which failed to require the Jail to provide due process to prisoners and intended-recipients of outgoing mail.

B. Defendants Violated the First and Fourteenth Amendment Rights of Prisoners and Their Correspondents

Defendants admit in their Answer that they censored the 73 pieces of mail identified in Plaintiff's Complaint, addressed to prisoners at the Columbia County Jail. *Compare* Dkt. 1 with Dkt. 25 ¶¶4.4 through 4.4.6. They also admit that they failed to provide the prisoner-addressees due process notice or an opportunity to appeal the censorship decisions when they censored PLN's mail. *Compare* Dkt. 1 with Dkt. 25 at ¶¶4.27, 4.41, 4.51, and 4.61. Defendants admit that they censored the PLN news articles that Lucy Lennox sent to prisoners, and that they failed to provide Ms. Lennox and the prisoner-addresses due process notice or an opportunity to appeal the censorship decisions. *Compare* Dkt. 1 with Dkt. 25 at ¶¶4.70 and 4.71. The evidence also establishes that Defendants censored other prisoner mail without due process and unconstitutionally chilled protected speech. *See*, *e.g.*, Ex. 19 (Christmas card, no notice); Dkt. 53¶¶2-10 (tort claim); Dkt. 39 ¶5 (postcards, no notice); Ex. 20 ("We Do Not Allow Magazines"); Ex. 21 ("Magazines not accepted"); Ex. 26 (letters to probation officer); Dkt. 53 (personal letters), Dkt. 40 ¶¶2-4 (personal letters); Dkt. 39 ¶¶3-4 (children's drawings).

Despite these admissions, Defendants denied violating the First and Fourteenth Amendment rights of prisoners and correspondents. *Compare* Dkt. 1 with Dkt. 25 at ¶¶5.2, 5.6.

But the First Amendment required Defendants to deliver PLN's mail addressed to prisoners, Lucy Lennox's mail addressed to prisoners, and the prisoner mail described in the exhibits identified above. And the undisputed facts establish that Defendants failed to do so. Therefore, Defendants violated the free speech rights of prisoners and their correspondents, including PLN, Ms. Lennox, and prisoners' friends and family. And since the Fourteenth Amendment required Defendants to provide due process to prisoners and their correspondents

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when the Jail censored their mail, and the undisputed facts establish that Defendants failed to do so, Defendants violated the due process rights of prisoners and their correspondents, including PLN, Ms. Lennox, and prisoners' friends and family. The Court should so declare.

C. Defendants Violated PLN's First and Fourteenth Amendment Rights by Censoring PLN's Mail, for which Defendants Must Pay Damages

In its Complaint, Plaintiff alleges that Defendants used their mail policies to censor 37 *Prison Legal News* journals, 27 sets of informational subscription brochures and book catalogs and offers, 8 subscription renewal letters and brochures, and 2 fundraising letters—a total of 74 items. *See* Dkt. 1 at ¶¶4.4 through 4.4.6. In their Answer, with one exception,[8] Defendants admitted that they censored and rejected each piece of mail identified in PLN's Complaint and that they did not provide Plaintiff due process notice or an opportunity to appeal the censorship decision. *Compare* Dkt. 1 at ¶¶4.4 through 4.4.6 with Dkt. 25 at ¶¶4.5 through 4.27, 4.36, 4.37, 4.45 through 4.51, and 4.55 through 4.61. Defendants also admitted that "some of its past mail policies violated some of Plaintiff's constitutional rights," Dkt. 25 at ¶¶4.74.3-4.74.4, 5.2, 5.6.

As explained above in Section IV. A., Defendants' Postcard-Only, No-Magazines, and Due Process Policies in effect when PLN filed this lawsuit (January 13, 2012) are unconstitutional. Although Defendants' Answer *denies* they used their Postcard-Only and No-Magazines Policies to censor and reject Plaintiff's mail, *compare* Dkt. 1 with Dkt. 25 at ¶¶4.73.3 and 4.74.1, this is contradicted by all of the evidence: Defendants' mail policies, Inmate Manuals, website, and the Cutright memo stated that the Jail accepts only postcards and prohibits magazines, and Defendants censored PLN non-postcards and magazines. Moreover, the stickers that Defendants placed on most of the mail they returned to PLN stated "As of April 1, 2010 the Columbia County Jail ONLY ACCEPTS POSTCARDS, This applies to ALL incoming and out going mail"—facts admitted by Defendants. *Compare* Dkt. 1 with Dkt. 25 at ¶¶4.25, 4.39, 4.49.

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[8] Defendants denied that Prisoner Myers was incarcerated at the Jail when PLN sent him an informational brochure pack. Compare Dkt. 1 at ¶¶4.36-4.37 with Dkt. 25 at ¶¶4.26-4.37.

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And there is no dispute that Defendants did indeed censor Plaintiff's mail. Each piece of mail sent by PLN to prisoners at the Columbia County Jail, and rejected by Defendants, constitutes speech protected by the First Amendment. The Sheriff has admitted the same. Ex. I at 164:12-165:1, 167:14-169:16, 170:21-172:10; Exs. 31-34. The Sheriff also admitted in his deposition that Defendants violated the First Amendment. Ex. I at 164:12-165:7, 166:2-167:3, 167:14-169:19, 170:7-9. And the Sheriff admitted that Defendants violated the Fourteenth Amendment by failing to provide adequate due process to PLN when they censored PLN's mail. Ex. I at 167:4-13, 167:14-170:2, 170:21-172:16.

Thus, the Court should enter an order declaring that Defendants violated PLN's First and Fourteenth Amendment rights by censoring PLN's mail, and that Defendants must pay damages as determined at trial.

V. PERMANENT INJUNCTION

Prison Legal News seeks an order permanently enjoining Defendants from rejecting or otherwise censoring mail on the ground that it is not in the form of a postcard, or on the ground that it is a magazine or periodical; and permanently enjoining Defendants from denying due process to prisoners and their correspondents when rejecting or otherwise censoring mail.

A. Legal Standard

A party seeking a permanent injunction must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

In granting Plaintiff's request for preliminary injunction, the Court held that PLN is likely to meet each of these elements. *See* Dkt. 64, at 23-24 (applying standards for preliminary injunction under *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22, (2008)). Although the

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elements are framed somewhat differently, "The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 546, n. 12 (1987).

Since the evidence has now established that the Defendants' Postcard-Only Policy does in fact violate the First Amendment and Defendants have admitted that they have repeatedly violated the Constitution in several other respects, Plaintiff has shown actual success on the merits and the remaining elements remain in favor of Plaintiff so PLN has satisfied the test for a permanent injunction. Likewise, PLN has shown actual success on its other claims so an injunction on all claims is warranted.

The only question for the Court is whether the Sheriff, the Sheriff's Department, and Columbia County can prove they will never violate the Constitution again so as to moot the need for an injunction. The burden on the Defendants is extraordinary, a burden they cannot meet.

B. The Sheriff Has Not Shown He Has "Irrevocably Eradicated" His Prior Policies

The Sheriff bears "'[t]he heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 170, 189 (2000) (burden of proof "lies with the party asserting mootness.") The Supreme Court has explained the Sheriff must meet a very high threshold:

> [T]he standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is *stringent*: "A case might become moot if subsequent events made it *absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur*."

Id. at 189 (emphasis added) (citation omitted). The Sheriff must show the Court that "interim relief or events have completely and *irrevocably eradicated* the effects of the alleged violation." *Norman-Bloodsaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1274 (9th Cir. 1998) (emphasis added) (citation omitted). "Irrevocable" means "not to be revoked or recalled; unable to be repealed or annulled; unalterable." *See* www.dictionary.com. "Eradicate" means "to

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remove or destroy utterly; extirpate." *Id.* So, his burden is indeed heavy.

1. Defendants Denied Their Postcard-Only Policy Was Illegal, and Still Do

The Court's analysis must begin with Defendants' avid defense of their Postcard-Only Policy and refusal to stop implementing the Policy in the absence of a preliminary injunction. In opposition to Plaintiff's motion for a preliminary injunction, the Sheriff argued vigorously to the Court that his censorship is not only constitutional but also a good idea. *See* Dkts. 29, 32. He articulated to the Court that his policy is important to the proper functioning of the Jail and that he stands by his policy. Before the Court issued the preliminary injunction, the Sheriff testified at his deposition that the Postcard-Only Policy met his expectations, and that it accomplished what he set out to achieve. Ex. I at 252:25-253:7. He testified, "It has saved us time and it has enabled us to have greater confidence in our security." *Id.* at 253:7-10. Similarly, Undersheriff Moyer testified, "Before the judge issued a preliminary injunction, sheriff's department decided not to give up its postcard-only policy" "for safety and security reasons and didn't believe we were violating anybody's constitutional rights by keeping that part." Ex. V at 179:10-17.

Nothing the Defendants can say now, after being told they were wrong, should dissuade the Court from entering a permanent injunction to prevent the Sheriff or his successors from again censoring incoming or outgoing mail just because it is not a postcard.

After the Court's injunction, on advice of his lawyer, Sheriff Dickerson refused to answer questions about the need for a permanent injunction. Ex. VIII at 379:15-19. Undersheriff Moyer testified that the Postcard-Only Policy did not violate anyone's constitutional rights and that complying with the Court's injunction by giving up that policy creates an increased safety risk for his employees. Ex. V at 176:17-177:20. But, he claims that nevertheless he and the Sheriff will not to return to their old ways because they want to "err on the side of caution" and "constantly changing" policies would be "harder for [our staff] to remember." *Id.*

In writing, the Sheriff's stated commitment is to avoiding liability in the face of the Court's order. To his staff, he wrote: "We are about to enter into a temporary injunction from

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the federal court in regard to our mail policy. Failure to follow the policy as it is set forth in this attachment can leave individual employees liable for federal civil rights violations, so it behooves us all to get this right." Ex. 46, at 2. Noting the injunction is "temporary" does not help the Sheriff's claim that he will refrain from his old policies. And, in emphasizing that liability can result from failing to comply with the injunction, the Sheriff's admonition misses the main point: Had he taken the rights guaranteed by the Constitution as seriously as he claims to be taking this Court's order, he would be in a better position to say a court order is not needed.

But instead, his words and deeds all point to the need for a permanent order from the Court. So, if the Sheriff has complied with the preliminary injunction, then that is evidence that an injunction is required to force his hand for good. He did not comply with the Constitution on his own but will do so only if ordered by the Court. The Court should so order, permanently.

2. Defendants Disregarded Multiple Complaints that Their Policy Violated the Constitution, While Reaping No Appreciable Benefit for the Jail.

Prisoners wrote numerous grievances, and complained orally, that the Jail's Postcard-Only Policy was harmful to them and their correspondents outside the jail, and that it was unconstitutional. *See, e.g.,* Exs. 13-20, 29, 38. The complaints began "the day the policy changed." Ex. II, at 145:3-15. At a meeting of the Sheriff, the Undersheriff, and supervisors, the Jail decided to deny all complaints about the Postcard-Only Policy, instructing staff to print off a "Your grievance is denied" template from the computer, individualizing the responses only by listing the date and the prisoner's name. I*d.* at 145:16-146:9; Ex. 48 ("The attached letter will be the standard answer for the Columbia County Jail on all postcard grievances."); Exs. 13-20, 29. When indigent prisoners complained that they could not send sufficient information on the two postcards the Jail allotted to them in a week (as compared with multiple pieces of paper they had received in the past), their requests for more postcards were denied. *See, e.g.*, Exs. 23-24. When prisoners asked for exceptions, such as to receive their legal papers from home, or to send a letter to their probation officer, the Jail denied them. *See, e.g.*, Exs. 25-26.

3. The Sheriff's History of Ignoring Constitutional Duties Overshadows and Undercuts his Claim He will Now Respect 1st and 14th Amendment Rights.

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When the Sheriff adopted his Postcard-Only Policy he could see "no cons or downsides." Ex. I at 92:25-93:8. And, even after being sued by PLN for the harm the policy caused and reading PLN's explanations in its motion for preliminary injunction, the Sheriff testified "I can't, I can't think of any at this time." *Id.* The Sheriff's failure to recognize *any* negative impact on prisoners and their correspondents speaks ill of his conception of First Amendment rights.

But this is not the first time. The Sheriff admitted that he read the Inmate Manual when he first became Sheriff "cover to cover" but saw nothing "that needed to be changed." *Id.* at 123:13-25. And, he conceded that this was the same Inmate Manual that banned magazines and failed to afford due process rights, but that he did not correct for three years. *Id.* at 124:1-125:22. Tellingly, his explanation for overlooking this Constitutional violation has nothing to do with the Constitution: "I did not catch the differences between our policy and what our manual said, the inmate manual said." *Id* at 124:14-18. It is then remarkable that the Sheriff denied the Jail ever had a ban on magazines while at the same time admitted that he never tried to find out why his Inmate Manual prohibited them. *Id.* at 124:19-125:3.

And, as recently as December 2011, the Sheriff revealed his approach to due process appeals when he is not being monitored by a court. A prisoner, Bradley Berg, had filed a grievance the previous month (November) asserting that "the Jails outgoing mail policy that requires me to use Postcards for outgoing mail… violates my constitutional rights." Ex. 15, at 2. After Sergeants Rigdon and Cutright denied his grievance using template responses, *id.* at 3-4, prisoner Berg appealed his grievance to Sheriff Dickerson, *see id.* at 5. But the Sheriff failed to respond, *see id.* at 1, 6, so prisoner Berg raised the issue with Sergeant Miller who suggested to Sheriff Dickerson that she could "tell Inmate Berg that when no reply is coming after 10 days, the issue is denied," *id.* at 1. After not responding to Berg's appeal for a month, Sheriff Dickerson concurred: "Nothing changes, so, yes it is denied." *Id.*; Dkt. 36, ¶¶13-16.

To hold any water, the Sheriff's promise of future respect for Constitutional rights would have to break free from the lack of respect he has shown for them in the past, from his weak

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explanations for how he overlooked serious longstanding violations, and from his lack of interest and diligence in investigating how he and his staff caused them.

4. The Sheriff's Near Monthly Change to His Mail Policy and His Upcoming Election Contest Fail to Support His Assertion of Permanent Change.

Since PLN filed its lawsuit, the Sheriff has changed his mail policy five times.[9] *See* Dkt. 32-5 and -6; Exs. 63-65 While he might claim he has been trying to get it right, this is evidence that he has in a hurried fashion thrown together a new policy for the sake of expedience because of this lawsuit, which he has then had to change, repeatedly. After the Sheriff adopted his January 26, 2012 policy in response to this lawsuit, he made corrections on February 10. But in its Motion for Preliminary Injunction and at oral argument, Plaintiff showed the policy, even as modified in February, was rife with problems. Then, the Sheriff made more and more changes, which is consistent with his stated intent: "Well, the plan is ongoing policy review on all the policies."[10] Ex. I at 256:10-12. Nothing about his approach suggests any measure of permanence.

Even if the Sheriff could somehow be counted on to maintain a constitutional mail policy, there is no reliable measure of how long he will serve as Sheriff. He has only been in office for one four-year term. And, soon after taking office he adopted the unconstitutional Postcard-Only Policy and presided over unconstitutional mail practices throughout his tenure. His successor could do as much damage in as short of a time span. The Sheriff is facing a contested election this Fall. He admits that he has no idea whether his opponent, who is employed by the Sheriff as a deputy, will reinstate the Postcard-Only Policy if elected. *Id.* at 300:24-302:12. This is a failure on the Sheriff's part to make the case that the Jail will have a constitutional mail policy even until 2013, in the absence of a permanent injunction.

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[9] The revision number ("R") of the Sheriff's policy is identified on the left hand column of the caption under the policy name ("INMATE MAIL") after the policy number ("J603"). So, for example, Dkt. 32-5 purports to be the sixth revision ("R06"), and Dkt. 32-6 is the seventh ("R07"). The most recent is R10. *See* Ex. 65.

[10] Additionally, Exhibits 10 through 12, and 46 show changes to the Sheriff's "Inmate Mail" portion of his website in June and July; and Exhibits 56 through 60 are Inmate Manuals dated from May through July 2012.

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5. The Sheriff's Training and Supervision after PLN Filed this Lawsuit Have Been Sorely Lacking.

After the Sheriff adopted his new mail policy in January 2012, the Jail held a one-hour training in which the staff did nothing more than read the 16-page policy out loud. Ex. II at 40:4-41:23, 45:7-11. And, the training involved reading large sections of the policy that had nothing to do with correcting the unconstitutional practices at issue in this lawsuit. The lack of emphasis on complying with the Constitution substantially diminished the significance of the training. Indeed, that can hardly be called "training." Training involves teaching. And, effective training involves practicing, but the Sheriff never challenged his staff to actually apply the policy while someone already familiar with it (such as himself) watched, answered questions, gave pointers, and made corrections. But that never happened. In fact, the Sheriff did not even bother to attend this training. Ex. I at 269:3-9; Ex. 36.

Just a couple of weeks after the training, the Jail unconstitutionally censored numerous mailings of PLN news articles without affording due process notice or an appeal to Lucy Lennox, who had sent them. *See* Dkt. 34. Undersheriff Moyer has admitted that the Jail should have delivered these mailings. Ex. V at 193:16-21; Ex. 35.

Similarly, during the same month but after the training, the Jail staff was having other troubles implementing the mail policy and found it confusing. *See* Ex. V at 148:19-150:8. But rather than arranging for more effective training or simplifying the Sheriff's convoluted mail policy, the frustrated Undersheriff instructed them that "if the mail sorters need to, then they need to *review our mail policy every time they sort every individual piece of mail*." *Id.* (emphasis added). It seems unlikely that supposedly busy deputies who found the policy confusing and the training insufficient would heed this advice; instead they would stop asking questions.

Incredibly, as of the date of his deposition (May 9, 2012), five months after PLN filed its lawsuit against him, Sheriff Dickerson, had never bothered to look at the PLN mail that his Jail had censored, without due process notice and an opportunity to be heard—which PLN had filed with this Court on January 31, 2012. *See, e.g.*, Ex. I at 154:3-156:14; 167:14-23.

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The Sheriff identified Sergeant Cutright as among the most knowledgeable of his employees about Jail policies, and the Sergeant conducted the February 2012 mail policy training. *Id.* at 139:25-140:5; Ex. 36; Ex. II, at 44:4-11. And, Sergeant Cutright was responsible not only for processing prisoner mail at times but also for overseeing deputies who process the mail to ensure compliance with the mail policies. *Id.* at 25:3-26:1. In light of his role and responsibilities, it is very troubling—and telling—that at his deposition on May 9, 2012, Sergeant Cutright could not identify anything about the First Amendment or the Fourteenth Amendment to the United States Constitution. *Id.* at 136:4-13. This was five months after PLN filed its lawsuit, after the Sheriff asked for his suggestions on a new mail policy, several months after the Sergeant conducted the new mail policy training, and long after he submitted a declaration in opposition to PLN's motion for preliminary injunction (Dkt. 30).

6. The Sheriff Knowingly Withheld the Alleged Change in his Mail Policies from the Public and He Continued to Issue His Inmate Manual Stating Unconstitutional Policies to Prisoners on a Daily Basis.

The Sheriff claimed to the Court that he adopted a new mail policy in January 2012. But he kept that from the public at large and from the prisoners for many months.

As of January 24, 2012, his website said merely that the mail policy is under review. Ex. 8. And it stayed that way for the next four months. Ex. I at 107:8-108:4. At his May 9, deposition, he testified that he had not posted his mail policy on his website due to his "confidence level" and could not identify what he was waiting for or when he would post his policy. *Id.* at 107:23-109:5. Finally, two weeks later, the Sheriff posted a summary of his new policy, but it included his unconstitutional Postcard-Only Policy. Ex. 9.

Similarly, at the time of the Sheriff's deposition in May 2012 and the Inspection of the Jail Premises, the Sheriff was still routinely, and daily, issuing an Inmate Manual containing what Defendants concede was an unconstitutional ban on magazines and an unconstitutional failure to provide for due process. Ex. III at 101:11-103:4; Ex. I, at 125:24-126:9. The Manual also included the unconstitutional Postcard-Only Policy. *See* Ex. 55, at 11. Defendants did not produce a new Manual for about five (5) months after Plaintiff filed suit in January 2012, and

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Defendant has failed to revise the Spanish-language Manual so staff are supposed to give Spanish-speaking prisoners the English version. Ex.VIII at 320:5-321:15; 322:18-25.

Indeed, until the day before his deposition, the Sheriff maintained in the dayroom of every Jail pod a memo that stated unconstitutional mail policies. The memo, written by Sergeant Cutright (dated March 23, 2010), and addressed to "Corrections Division/All Inmates of the Columbia County Jail" had not only announced the implementation of a new Postcard-Only Policy, but stated "Magazines are not allowed inside the facility" and did not provide for any due process notice or appeals. *See* Exs. 2 and 3; Ex. V at 75:15-78:12. When prisoners asked for the mail policy itself in February 2012, they were told to wait: "When the policy is finalized the inmate portion will be made available via a Pod memo and Placed in the new upcoming inmate manual." Ex. 28. But, as explained below, the Sheriff made them wait for several months.

The Sheriff's behavior, claiming to have adopted a new mail policy but knowingly not notifying the public or the prisoners for many months, casts serious doubt on his representation that he has moved forward to now respect the rights of prisoners and their correspondents. His conduct after PLN filed its lawsuit shows otherwise.

7. The Sheriff's Office Misled the Plaintiff During the Inspection of the Jail Premises that was the Subject of an Order of the Court (Dkt. 60).

As mentioned above, until PLN's inspection, the Sheriff maintained in every pod the March 23, 2010 Cutright memo that stated unconstitutional mail policies. Without telling PLN, the Undersheriff instructed staff to finally remove the memo just *the day before* PLN's lawyers inspected the Jail premises (May 8, 2012). This was four months after this lawsuit was filed.

At his deposition, the Undersheriff admitted that he instructed his staff to make this switch, yet he denied it was so close to PLN's inspection. Ex. V at 75:15-78:12. But emails from his staff, which Defendants subsequently produced, undermined his denial. *See* Ex. 44, at 2 (email dated May 6: "The mail memo in the pods has to be in the pods. It's the old memo, we just need it there") and Ex. 43, at 2 (email dated the next day, May 7: "Per Undersheriff Moyer the outdated mail memo need to be pulled if found."). The Jail actually replaced the Cutright

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Memo with its Inmate Mail Guide, Ex. 66, only hours before PLN inspected the Jail (May 8) at 11pm. Second Declaration of Brad Berg, ¶¶ 2-5, filed herewith; Ex. V at 75:15-78:12.

In short, Defendant's removal of the Cutright memo was neither timely, nor honest.

8. The Sheriff Misrepresented to the Court He was Investigating How His Website Stated an Unconstitutional Mail Policy to the Public for Two Years.

In his brief responding to the Plaintiff's motion for a preliminary injunction, the Sheriff told the Court that he was in the midst of investigating how his website posted a description of his mail policy that he says was never his policy. *See* Dkt. 29 at 3 n. 1. But, after that show of good faith representing that he was trying to get to the bottom of what happened, he dropped his investigation without any meaningful effort. At his deposition, the Sheriff claimed that he asked a handful of people who should know but claimed that they didn't, but he admits he never asked the one person (besides himself) who posts items on his website. Ex. I at 115:8-120:2. When asked why he did not ask this reserve deputy, Jeff Mansheim, who instructed him to post the wrong information on the website, the Sheriff just responded: "I just haven't done it."[11] *Id.* at 116:3-9. Plainly, the Sheriff cannot be counted on to investigate and police his own department.

Indeed, when asked where he thinks the text of his faulty website was taken from, the Sheriff identified his faulty Inmate Manual as the likely source, but has failed to get to the bottom of who wrote that either. *Id.* at 120:3-10. Moreover, he told the Court that "Following the filing of plaintiff's lawsuit, I learned that the front office employees sometimes rejected mailings before sending them to the corrections staff" and "sometimes a sticker and other notations were put on rejected mail referring to the incorrect mail procedures then on the website…." Dkt. 32 ¶9. But, when asked at his deposition, "Do the volunteers at the front desk sort the mail?" he responded "I don't know." Ex. I Dickerson Dep. at 77:1-3. And to the question, "Do you know who sorts the mail?" he responded, "No." *Id.* at 77:4-5. The Sheriff likewise admitted that he has not done anything "to investigate whether, what stickers and

[11] In discovery, PLN learned that Sergeant Cutright had instructed Deputy Mansheim to post the text on the website, which the Sergeant had denied any knowledge of. Ex. IX at 2:7-8:12.

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stamps the jail uses when responding or returning mail." *Id.* at 163:14-21.

As a law enforcement official, the Sheriff has shown no inclination to use his skills, training, and authority to investigate the causes of his own department's long-standing violations of the Constitution. In sum, the Sheriff's level of inquiry has been a proverbial shrug of his shoulders, reflecting no interest in accountability and commitment to change.

9. The Sheriff Violated his Oath to Uphold the United States Constitution.

When Sheriff Dickerson was elected Sheriff of Columbia County, he promised to uphold the Constitution of the United States. *See* ORS 204.020 ("Before entering upon any elective office listed in ORS 204.005, the person elected must qualify… with an oath of office indorsed thereon, and subscribed by the elected person, to the effect that the person will support the Constitution of the United States"); ORS 204.005(1)(a) ("A sheriff.").

Now, nearly three years later, he has admitted that under his command his Jail has been violating the First and Fourteenth Amendments, repeatedly, contrary to his oath. *See, e.g.*, Ex. I at 163:24-172:16. When asked about this at his deposition last month, on the instruction of his lawyer the Sheriff refused to answer questions. Ex. VIII at 344:9-17; 384:18-20.

If his oath of office means anything, the Sheriff has a high burden to prove he will not violate his oath again after having presided over so many violations throughout his 4-year tenure. Since he refused to answer questions at his deposition, he should not be heard to explain now.

10. The Sheriff Utterly Disregarded His Promise, and His Duty, to Hold Himself and His Staff Accountable.

The Sheriff told his constituents to vote for him because "there wasn't a lot of accountability in the prior sheriff's office." Ex. I at 10:6-11:9. He explained at his deposition that "there was not a lot of accountability for misdeeds. When we came in we, *we began to hold people accountable….*" (Emphasis added). *Id.* at 11:4-12:6. And, he testified that he has "corrective measures" to investigate "any misdeed by any employee" and if sustained go through the disciplinary process. *Id.* at 61:13-21.

But the Sheriff has failed to live up to his word. Accountability is sorely lacking here.

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Despite admitting that his jail staff repeatedly violated his claimed mail policies and that he was committed to accountability, the Sheriff testified in May that his investigation into how violations occurred has been "suspended for now" "to move forward from the incident." Ex. I at 121:4-11. By July 2012, the Undersheriff testified the Sheriff has decided not to discipline any of his employees for violating his policies or the Constitution. *See* Ex. V at 96:5-10 ("There are no consequences for them.") When asked about his failure to discipline his employees, the Sheriff responded weakly, "I don't know if we've done everything we could." Ex. VIII at 388:8-14.

Finally, when asked if the Sheriff's department harmed anyone "by having unconstitutional practices for the past three years" he responded "I don't know" and he similarly said "I don't know" when asked if the sheriff's department should "be accountable for compensating whoever it harmed." *Id.* at 355:6-17. The right answer to both these questions for a public official who takes responsibility for his conduct had to be "yes." The top law enforcement official of Columbia County is uncertain whether he has any responsibility to remedy practices that violated the constitutional rights of thousands of prisoners and their correspondents over three and a half years. This does not speak well for this Sheriff's ability to meet his burden that he has irrevocably eradicated his illegal practices.

11. Undersheriff Moyer, the Person the Sheriff Still Entrusts to Serve as Jail Commander, Has Shown a Lack of Interest and Judgment in Attention to His Duties.

In July 2011, the Sheriff assigned his Undersheriff to serve as the Jail Commander in charge of enforcing the mail policies. Ex. V at 40:3-41:22; 44:5-10. But more than six months later, the Undersheriff had never even read the Sheriff's mail policy. *Id.* at 50:8-10 ("Q. Had you ever read the mail policy before January of 2012? A. No."). Likewise, he had never read the inmate mail provisions in the Inmate Manual. *Id.* at 50:11-51:3. And, he has never processed the mail or ever observed anyone process the inmate mail. *Id.* at 46:16-21. Remarkably, the Undersheriff thoughtlessly approved and arranged for the Jail to stamp censored mail, providing wholly inadequate notice that mail was censored. *See* Ex. 5; Exs. 4, 31, 33 (stamp on censored

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PLN mail). He admitted that he did not look into what due process required before approving the stamp and when asked why, remarked simply "I don't know." Ex. VII at 259:9-260:15.

Similarly, as of the date of his deposition, July 8, 2012, Undersheriff Moyer had no idea what mail sent by PLN his Jail had censored. Ex. V at 55:16-22. So, six months after PLN filed its lawsuit against his Jail, five months after he helped conduct the February mail "training," and six weeks after the Court issued a preliminary injunction, the Commander of the Columbia County Jail still had no idea what the staff under his command had illegally censored, repeatedly.

12. The Sheriff Disposed of Evidence after Knowing this Lawsuit was Filed.

The Sheriff changed his mail policy in January, in response to PLN's lawsuit. He gave his draft new mail policy to Corrections Sergeants Cutright and Rigdon, and to Undersheriff Moyer for review. Ex. V at 66:17-69:24. The Undersheriff then gave the Sheriff their handwritten comments on a hard-copy draft. *Id.* The Sheriff then destroyed their written notes and suggestions, knowing at the time that PLN had a pending lawsuit against him. *Id.*; Ex. 68, at 8 (ROG 5); Ex. I, at 142:15-143:12. It is impossible to divine the significance of their comments since the Sheriff threw them out. But whether harmless or provocative, it is one more strike against the Sheriff's credibility that he either knowingly or recklessly destroyed evidence—an act that he admits any law enforcement officer should know not to do. *Id.* at 143:13-145.7 (he would have disciplined any deputy who disposed of evidence). And, it is ironic since the Sheriff claimed that one aspect of holding employees "accountable" that he brought to the Department was implementing procedures to preserve evidence. Ex. I at 12:7-13:5.

13. The Sheriff's Behavior and Stated Intentions Fail to Demonstrate that the Defendants Will Never Return to Their Old Ways.

To avoid duplication, PLN incorporates its thorough discussion of the applicable precedent, submitted in its Reply in support of its motion for preliminary injunction. Dkt. 46, 6-13. In its Reply brief, PLN showed that Defendants failed to meet their "heavy" burden to show that Plaintiff's request for a permanent injunction is moot once they stopped their unconstitutional conduct. Defendants did not show mootness then, and that was before Plaintiff

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learned all the very troubling evidence set forth above.

The precedent for mootness analysis is premised on *voluntary* cessation, which by itself is insufficient. But here, Defendants did not stop their Postcard-Only Policy voluntarily. The Sheriff vigorously defended his policy until ordered to halt it. The Defense claims it promptly adopted a new mail policy allowing delivery of magazines and due process. But the Sheriff withheld the policy from the public (the mail policy was "under review") and from the prisoners for many months continuing to issue the November 2010 Inmate Manual and maintaining the March 2010 Cutright memo in their pods. In doing so, the Sheriff deprived them of their ability to exercise their First and Fourteenth Amendment rights. As explained in Plaintiff's motion for a preliminary injunction and at oral argument, the new mail policy was a confusing mess, the training was plainly inadequate, and the staff found it difficult to implement but were admonished simply to read it again when handling every piece of mail, if needed.

For these and the reasons explained above and in Plaintiff's Reply, Dkt. 46, the Court should find Defendants have not met their burden to show they have "irrevocably eradicated" their Postcard-Only Policy, their magazine ban, and their lack of due process procedures.

14. An Injunction Will Likely Lead Other Oregon Jails to Correct their Unconstitutional Policies, Which is in the Public Interest.

The top law enforcement officials at many jails communicate on a listserve of the Oregon State Sheriff's Association. Ex. I at 96:12-97:6. This lawsuit and the policies challenged by PLN here have been a topic of conversation on this listserve. *Id.* at 97:3-8; Ex. 39; Ex. II. at 196:20-22. A permanent injunction could have a wide impact among those jails, as one listserve correspondent wrote: "If the court were to grant that injunction, jails would probably want to dump the postcard only policy until there is a decision from the 9th Circuit settling the issues. PLN obviously sees this as a statewide issue – if they prevail in getting an injunction – they can pretty much make the rest of us get in line as well." *Id.* at 141:8-142:2; Ex. 42.

Additionally, the public will benefit from a permanent injunction educating those Oregon jails on the listserve that are still confused about what the First Amendment requires when they

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receive a publication like PLN that they don't care for. *See, e.g.*, Ex. 40 (OSSA listserve correspondent asks: "Are any facilities allowing this publication into their facility? If not – what criteria are you using to deny it?").

VI. CONCLUSION

WHEREFORE, PLN asks the Court to declare that PLN has organizational standing; that Defendants' Postcard-Only, No-Magazines and Due Process Policies violated the First and Fourteenth Amendment; that Defendant violated the First and Fourteenth Amendment rights of prisoners and their correspondents; and that Defendants censored PLN's mail in violation of the First and Fourteenth Amendments, for which Defendants must pay damages to Plaintiff. Additionally, PLN respectfully asks that the Court permanently enjoin Defendants from rejecting or otherwise censoring mail on the grounds that it is not in postcard form or is a magazine or periodical, and require Defendants to afford due process to prisoners and their correspondents whenever they reject or otherwise censor mail.

DATED this 13th day of September, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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