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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION
HONORABLE GEORGE H. KING, CHIEF U.S. DISTRICT JUDGE

PRISON LEGAL NEWS, A PROJECT OF THE)
HUMAN RIGHTS DEFENSE CENTER,)
) CASE NO.
 PLAINTIFF,) CV 14-0773
)
 VS.)
)
 COUNTY OF VENTURA; GEOFF DEAN, GARY)
 PENTIS, LINDA OKSNER, AND RICK)
 BARRIOS, IN THEIR INDIVIDUAL AND)
 OFFICIAL CAPACITIES; DOES 1-10, IN)
 THEIR INDIVIDUAL AND OFFICIAL)
 CAPACITIES,)
)
 DEFENDANTS.)
)

REPORTER'S TRANSCRIPT OF
MOTION FOR PRELIMINARY INJUNCTION
WEDNESDAY, MAY 14, 2014
9:03 A.M.
LOS ANGELES, CALIFORNIA

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1 LOS ANGELES, CALIFORNIA; WEDNESDAY, MAY 14, 2014

2 9:03 A.M.

3 -oOo-

4 THE CLERK: Calling Item 1 on the Court's calendar,
5 civil 13-773, Prison Legal News, et al. versus County of
6 Ventura, et al. Counsel, would you please state your
7 appearances for the record.

8 MR. GALVAN: Good morning, Your Honor. Ernest
9 Galvan for the plaintiff.

10 MR. HELD: Good morning, Your Honor. Jeff Held
11 appearing for the defendants.

12 THE COURT: Good morning, Counsel. This matter is
13 on the Court's calendar to consider the plaintiff's motion for
14 preliminary injunction. Counsel, I have fully considered all
15 of your filings. I have actually also considered the
16 supplemental of the defendant, and I think you've had an
17 opportunity to address the substance of it because it's very
18 short.

19 But, of course, Mr. Galvan, I'll give you further
20 opportunity to address that at the appropriate time if that's
21 what you want.

22 Let's begin. You can have a seat. Let me begin with
23 Mr. Held. Why don't you go up to the lectern. I have a few
24 questions I want to just chat with you about.

25 MR. HELD: Yes, Your Honor.

1 THE COURT: All right. Let's talk about some of the
2 factors that we do have to discuss in this matter. Let's begin
3 by talking about this postcard-only policy. We'll get to the
4 alleged movements issued in a little bit, but let's talk about
5 the postcard-only policy.

6 We would have to, on this motion for preliminarily
7 injunction, basically assess the state of the evidence to see
8 whether or not there's some likelihood of success on the merits
9 by the plaintiff, whether there's likelihood of irreparable
10 injury, whether the hardship would tip in their favor, and what
11 the public interest analysis would tell us.

12 Is it fair to say that you have not addressed Items 3 --
13 2, 3, and 4 of the so-called *Winter* test and that you have
14 largely based your discussion, from my reading of your papers,
15 on the first issue? And that is that they are certainly not
16 likely to succeed on the merits, in your judgment?

17 MR. HELD: Yes, Your Honor. That's a fair
18 assessment of my presentation to you.

19 THE COURT: Okay. So let's talk about that first
20 factor, likelihood of success. To be successful, ultimately,
21 the plaintiff would have to satisfy the so-called *Turner* test
22 of the four factors.

23 MR. HELD: Yes.

24 THE COURT: And so let's talk about each of those
25 factors for a moment.

1 First factor is whether or not there's a rational
2 relationship between the postcard-only policy and a legitimate
3 penological interest of your client. So I don't think -- let
4 me back up.

5 It seems to me that the only legitimate penological
6 interest that you have identified or certainly concentrated on
7 is that of prison security, jail security to prevent, and under
8 that rubric there are a lot of things. You don't want people
9 to bring in drugs or other contraband, other things that may be
10 able to be used to effectuate assaults, escapes, or other
11 communications that could be brought in which might cause
12 inmates to be able to act in an unlawful manner or to try to
13 conspire to disrupt or escape through communications in the
14 chain of command among, let's say, gangs in prison.

15 Is that a fair statement?

16 MR. HELD: Your Honor, that's a fair assessment.
17 That's a fair summary that you said because the basis of the
18 postcard-only policy is interdiction of contraband smuggling,
19 and there are a number of items under that heading. But the
20 way you summarized it is correct.

21 THE COURT: Okay. So I don't think there's really
22 any debate, at least not in my mind, that those are certainly
23 legitimate penological interests. The question I have really
24 is whether or not your policy is sufficiently rationally
25 related to that legitimate interest. So let's spend a little

1 bit of time on that issue.

2 You have presented no evidence to me that there was a
3 problem with the previous policy where there was a failure to
4 sufficiently interdict all of these negative things that may be
5 coming into prison through the mail. There may be a lot of
6 undesirable things that get into prison, but we're talking
7 about the mail here. So I don't see any real evidence that you
8 presented which tells me that this type of material that you're
9 trying to interdict came in through the mail.

10 Moreover, you have no evidence that I can see that
11 suggests that somehow your previous policy of allowing letters,
12 but inspecting the letters as obviously you did, failed to do
13 its job. Nor do you have evidence that, currently under this
14 postcard policy, that you have experienced a decline, a
15 substantial or at least non de minimis decline, in those type
16 of contraband -- I want to call it just under the total rubric
17 "contraband" -- coming into the jail.

18 So I'm a little concerned about the showing that's been
19 made that would cause me to assess the rationality of this
20 connection.

21 MR. HELD: Your Honor, let me retreat for a moment
22 to a point that we discussed in your previous discussion. And
23 you said that the only basis advanced for the postcard-only for
24 nonprivileged incoming mail was security. That's certainly a
25 major reason, but as indicated in my submissions, there is

1 another reason, and that's the logistical nightmare of using a
2 letter-based system. All of the letters have to be opened. We
3 have 1,700 inmates at any given time, so the --

4 THE COURT: None of that is before me. You have
5 chosen not to present any evidence of any of the logistical
6 issues other than in your supplemental briefing in a totally
7 bald, speculative, conclusory, non-evidentiary assertion.
8 That's not evidence. That's nothing to me. You had every
9 opportunity -- and I was looking for it -- we're sort of
10 getting into a little bit on the third prong, a little bit.

11 But I think we almost can't help it when you're talking
12 about the rationality at the first prong and ultimately whether
13 or not there are sufficient -- there is a sufficient showing of
14 an adverse effect upon inmates, guards, or administrative
15 resources. I understand that. But as long as we're talking
16 about that -- I didn't mean to cut you off, Mr. Held, but I
17 think it's very important that you understand that I have
18 examined this record with a fine-tooth comb. I literally have
19 read every word that anybody has said to me, including all of
20 the exhibits and declarations.

21 So my problem is, yes, you have hyperbole, conclusory
22 hyperbole in your supplemental, saying that this is all a
23 nightmare if this would happen. That doesn't do anything for
24 you without any evidence, without any facts.

25 MR. HELD: Your Honor, in the one case I've cited,

1 *Prison Legal News v. Babeu*, which was a 2013 decision, the
2 District Court judge, in ruling in favor of the postcard-only
3 policy, held that it was a matter of common sense, for example,
4 that pieces of paper are much larger than postcards and would
5 allow much greater opportunity to allow smuggling of drugs.

6 In the same vein, the fact that there is -- that a jail of
7 the size of Ventura County would have hundreds, thousands of
8 inmates, and that hundreds and thousands of envelopes would
9 have to be opened --

10 THE COURT: You're telling me things -- that's
11 totally beyond the record, totally beyond the record. It is
12 not a matter of common sense how many people you have in your
13 jail, how many pieces of mail you have to go through, how much
14 time you would have to go through it, how much time you did in
15 fact spend going through it before you instituted the current
16 policy in any of its iterations. That's called evidence,
17 Mr. Held, and that's called the lack of it in this case.

18 MR. HELD: Then, Your Honor, given the fact that the
19 plaintiff has waited years to file the suit, may I have one
20 more day to submit that in evidentiary form?

21 THE COURT: Counsel, there was absolutely nothing to
22 prevent you from doing this. The law is very clear as to what
23 the requirements are. This is not new law. *Turner* has been on
24 the books for ages. Ninth Circuit cases have been talking
25 about it. In fact, couple of cases he cites and some of the

1 cases you cite specifically talk about these factors of
2 administrative burden or whatever. You know that's one of the
3 requirements.

4 You got an extension of about a month to file your
5 opposition, if I'm not mistaken in the timing. You know, we
6 cannot just go ahead and have everybody prepare something,
7 understanding there are no surprises. We know what the law
8 says. We know what the requirements are. You don't do it.
9 You choose not to do it. You had plenty of opportunity. It is
10 not somebody who has sandbagged you.

11 Then on the day of the hearing, you say, Golly gee, I'd
12 like to make my argument a little bit better. Well, you know,
13 at what point do we stop that? So I allow you to do that, and
14 we have another argument, and I say I think you're a little
15 weak on that. Well, Judge, give me a second. Give me another
16 day, and I'll soup that up too.

17 That's not how we do business, Mr. Held. With all due
18 respect to you, you're an experienced, seasoned lawyer. You
19 know that's not how we do business.

20 MR. HELD: Let me now address the Court's comments
21 that there was -- I think you said there was no evidence that
22 the mail or that the envelope was used to smuggle contraband.
23 I have submitted declarations. They're Exhibits 1, 15, 16, and
24 17 by Aguilar, Jauregui, Wilkinson, and Margetin that have
25 described in firsthand personal knowledge detail that the seams

1 of the envelopes were frequently used to secrete or hide tar
2 heroin, paper clips, razor blades.

3 This is vastly more of a showing than was made, for
4 instance, in the en banc Ninth Circuit decision, *Mauro v.*
5 *Arpaio*. In that case the only evidence was a sort of
6 conclusory declaration by a high ranking jail official.

7 While I certainly have submitted that in terms of
8 Commander Barrios's declaration, I have also submitted
9 firsthand personal knowledge declarations of Deputies
10 Wilkinson, Jauregui, and mailroom cadet Aguilar to show that
11 the seams of envelopes in the pre-postcard-only era were used
12 to smuggle in contraband.

13 THE COURT: Actually, I think that's an
14 overstatement. With all due respect to you, that's an
15 overstatement. Again, remember, I've read everything, every
16 word. I think that's an overrepresentation of what you have
17 shown. Let me tell you why.

18 It is not an analytically rigorous way of getting to your
19 argument because, yes, there has been declaration by some or
20 all of these people talking about the possibility of secreting
21 certain things in the creases of envelopes. You're absolutely
22 right. But that's not the issue here. The issue here is
23 whether or not those methods were used to smuggle in, as
24 opposed to used to secret while in prison.

25 Your very declarants have admitted they can't be sure

1 whether these things came through the mail. Ms. Aguilar, whose
2 only experience is what, a quarter century old -- but let's
3 just say we'll review it for its currency. Okay. She says
4 that, yes, she has seen certain things while working in the
5 mailroom, inspecting these things, that heroin or drugs could
6 be hidden in the seams of envelopes.

7 But the fact of that is an inspection interdicted it,
8 found it. You know, the question here is not do we either let
9 you have the postcard-only policy; or it's unrestricted mail,
10 whatever anybody wants, it just comes right through. That's a
11 false premise. That's not what we're talking about. We're not
12 talking about that kind of dichotomy.

13 We're talking about, on the one hand, should we have a
14 postcard-only policy versus should we have a policy that allows
15 letters in but subject to inspection and search just like you
16 had before you instituted this policy. Just like, according to
17 Mr. Clark, the plaintiff's expert of some apparently
18 substantial qualification and experience, a policy that is not
19 only the mainstream but virtually followed in any of the
20 well-run institutions in this country, including the Federal
21 Bureau of Prisons, the California Department of Corrections and
22 Rehabilitation, and probably most, if not all, of the other 50
23 states' prisons.

24 So when you juxtapose that type of evidence that they have
25 presented versus your lack of evidence showing that, yes,

1 there's contraband in prison -- and I'm not debating whether or
2 not that's a problem. Of course it's a problem. Nobody is
3 going to argue that that's not a problem.

4 But the inquiry really does have to be much more nuanced
5 and focused. In other words, is this a problem that can be
6 interdicted or was caused by receiving letters in the mail?
7 Just because an envelope is capable -- more capable, even
8 assuming, than a postcard because it has more seams --
9 postcards don't have really any seams -- just because an
10 envelope might be a greater source of opportunity for hiding
11 drugs does not necessarily mean that drugs are being introduced
12 into the prison, or paper clips or any of the other things
13 introduced, because of the mail policy of allowing letters,
14 especially where that policy is not by itself. The policy is
15 in conjunction with -- and I agree, sensibly so -- with a
16 robust examination policy.

17 So I think that's really -- I don't -- I think it's a
18 little bit vague for you folks to keep saying, Well, look, all
19 these things happened. But you have to sort of be more
20 analytically rigorous and say, Okay, but is it happening
21 because it's coming through the mail and being undetected
22 through inspection and therefore this is a good way of
23 interdicting it by restricting to a postcard? None of which
24 you have evidence on.

25 And any evidence that you do have of it coming in, that

1 same person is saying, I found it by inspection.

2 MR. HELD: Your Honor, I'd also like to call to the
3 Court's attention the discussion in *Bell v. Wolfish*. The
4 Supreme Court stated there, quote, "A detention facility is a
5 unique place fraught with serious security dangers. Smuggling
6 of money, drugs, weapons, and other contraband is all too
7 common an occurrence," unquote.

8 And the Court goes on to say the fact that there had only
9 been one instance proven was more a testament to the
10 effectiveness -- to the deterrent effectiveness of the policy.

11 And in *Mauro v. Arpaio* --

12 THE COURT: Before you go there, *Bell v. Wolfish* was
13 not a postcard-only policy case.

14 MR. HELD: No, it was not.

15 THE COURT: Now we're starting to talk about, again,
16 apples to oranges. Rise to the level of generality which says
17 they're both fruit, and then we can go up to the level saying,
18 Well, they're all consumable food products. That's the key
19 thing.

20 Again, I bring you back to analytical rigor. Just because
21 we can pull some language from some other case is neither here
22 nor there. I understand smuggling can be a problem in prison.
23 I understand allowing contraband, money, drugs, is not a
24 desirable thing. And it is hard. Your clients have a hard
25 job. I admit it. I admit it. I admire them doing that job.

1 I wouldn't want to do that job, nor would I purport to tell
2 them what to do on that level.

3 But I have to police the constitution. That's my job, and
4 that's all I'm doing. I'm policing it on the level of
5 constitutional law. I am not micromanaging them on the level
6 of detention or corrections law. So I don't think *Bell* stands
7 for anything that is applicable in this case that would require
8 a different conclusion.

9 Go ahead. You were starting to tell me about another
10 case.

11 MR. HELD: Yes. The same premise applies from *Mauro*
12 *v. Arpaio*, 188 F.3d at 1060, because what you've said is that
13 the fact that the contraband items -- the tar heroin, the razor
14 blades, et cetera -- were interdicted means that the policy
15 is -- does not pass constitutional muster.

16 THE COURT: Well, no. Now you're jumping again.
17 Let's get back to analytical rigor. I'm only talking about
18 this in the first element. We haven't even talked about the
19 second, third, or fourth. We don't get to constitutional
20 muster, or not yet. These are all factors that we have to
21 talk, and then we have to see how they balance out. That's
22 what the law is.

23 So just because I question the rationality of the
24 connection to your sufficiently legitimate penological purpose
25 doesn't mean that I have already concluded that this is

1 unconstitutional.

2 Be that as it may, go ahead.

3 MR. HELD: Nothing further on those points,
4 Your Honor.

5 THE COURT: Okay. Do you want to address the
6 second, third, and fourth issue of the *Turner* test?

7 MR. HELD: Well, very definitely the second.

8 THE COURT: Okay. Let's talk about that.

9 MR. HELD: The second test, as the Court is well
10 aware, is whether alternative methods remain, or alternative
11 avenues -- alternative avenues of communicating with family and
12 friends. In other words, are there means available by which
13 the inmates can still receive communications, notwithstanding
14 the challenged policy?

15 And these are described, for example, Your Honor, in
16 paragraph 18 of Commander Barrios's declaration, that there are
17 unlimited number of postcards. There's all -- all enveloped
18 mail from attorneys of record and government sources come into
19 the inmates without interdiction. We have an e-mail policy,
20 have had for about a year, under which the inmates can receive
21 any items e-mailed from any sender. In addition, publications
22 direct from the publisher are fully admissible. So in this --

23 THE COURT: Let me get a clarification on that, by
24 the way.

25 MR. HELD: Yes. Go ahead, Your Honor. I'm sorry.

1 THE COURT: You said publications from the
2 publisher?

3 MR. HELD: Yes. Directly from the publisher.

4 THE COURT: Okay. Do you think that PLN qualifies
5 as a publisher?

6 MR. HELD: Yes. Certainly.

7 THE COURT: So they want to send a magazine, a
8 56-page magazine that they want to send in. That's fine?

9 MR. HELD: Yes.

10 THE COURT: Okay.

11 MR. HELD: Yes.

12 THE COURT: But if they want to send in not just the
13 magazine but also they want to send a letter, saying, Don't you
14 want to subscribe to this magazine, that can't happen?

15 MR. HELD: They can send it on a postcard. They can
16 send it by e-mail. They can have a subscription order form
17 within the magazine itself. But, no, under the policy as it
18 exists, they could not -- they and anyone else could not send
19 in the solicitation -- I'm sorry -- whatever you just said. I
20 think you said a subscription form via a letter envelope.

21 THE COURT: Let me ask you this: Supposing they're
22 sending in -- it's a big envelope because it's a -- I don't
23 know -- big magazine. It doesn't matter whether it's theirs or
24 Time or U.S. News or Economist. You have a magazine. You have
25 an envelope that the magazine can be in. Okay? They send that

1 in. It just contains the magazine. Is that okay?

2 MR. HELD: Could I have that one more time,
3 Your Honor. I'm sorry.

4 THE COURT: Sure. Sure. Think of a magazine, any
5 magazine you care to: Time, Economist, whatever. Let's say
6 the publisher of Time sends in a Time magazine in an envelope
7 that would -- that you can fit the Time magazine in. Okay?
8 They send that in. Is that okay?

9 MR. HELD: Yes. If it's -- yes, if it's readily
10 apparent that it's a magazine or newspaper or --

11 THE COURT: Okay.

12 MR. HELD: -- publication directly from the
13 publisher, then that would be fine.

14 THE COURT: Okay. Let's say Time magazine sent in
15 in that envelope its Time magazine plus a one-piece paper that
16 says, Dear Mr. So-and-so, here is your Time magazine. Enjoy
17 it. And if you like it, we've got a special promo offer. You
18 can sign up for another 65 years for this lousy little price.
19 Is that okay? Same envelope but not part of the magazine.
20 It's just sort of like a cover letter. Is that okay?

21 MR. HELD: Yes. That would be okay too.

22 THE COURT: Really? Why would that be okay?

23 MR. HELD: Because it's contained in a communication
24 directly from the publisher.

25 THE COURT: Okay. So let's say the publisher sent

1 this in two different envelopes. One envelope, big one with
2 Time magazine in it. No other communication. Here's the
3 magazine. You agree, that's fine?

4 MR. HELD: Yes.

5 THE COURT: PLN can do the same thing with this
6 magazine, and you would say that's fine too; right?

7 MR. HELD: Yes.

8 THE COURT: Let's say Time, instead of sending a
9 cover letter in that magazine envelope, sends a regular
10 business envelope that says, Dear Mr. Prisoner, we just sent
11 you a Time magazine. Golly gee, we sure hope you enjoy it, and
12 if you like it, we got this special offer that we can give you
13 65 more years of this magazine for a low price of X number of
14 dollars. Thank you very much. You can even use the bottom
15 part of this form to send back to us to get your wonderful
16 subscription. Okay?

17 Put in a little envelope, and it gets sent. Let's say it
18 even arrives at the same time, albeit in two different
19 containers. Is that business envelope from Time magazine okay?

20 MR. HELD: No.

21 THE COURT: Is that rational?

22 MR. HELD: In your hypothetical, is the envelope
23 clearly from the publisher?

24 THE COURT: Let's say it says Time magazine on it,
25 just like they can have PLN on it. They're a publisher. You

1 say they're a publisher.

2 MR. HELD: Yes.

3 THE COURT: Let's say, instead of Time magazine,
4 instead of U.S. News and World Report, substitute that for PLN.
5 Comes PLN, there it is. It's no good whether it's PLN. It's
6 no good whether it's Time magazine, no good whether it's
7 U.S. News?

8 So, anyway, look. I understand at least -- I apologize.
9 I interrupted your presentation when I wanted to get this
10 clarification under the current regulations. Now I've gotten
11 that clarification. You may go ahead and finish up what you
12 were going to say.

13 MR. HELD: Thank you.

14 THE COURT: I apologize.

15 MR. HELD: No. No apology necessary, Your Honor.

16 So the second *Turner* inquiry is whether there are
17 alternate avenues of communicating or of vindicating the
18 constitutional right, which in this case is communication, and
19 these are described in paragraph 18 of Commander Barrios's
20 declaration. There are unlimited numbers of postcards. There
21 are enveloped mail from attorneys of record and from any
22 government source. E-mail has been implemented in the last
23 year, publications directly from the publisher --

24 THE COURT: Let me ask -- I understand that.

25 MR. HELD: -- daily access to the inmate phone

1 system.

2 THE COURT: Like I said, I've read all of this. I
3 appreciate it, and I understand it. Here's my question: Do
4 the Ventura county jail inmates have access to a law library?

5 MR. HELD: Yes.

6 THE COURT: And do they have access to electronic
7 legal research?

8 MR. HELD: I believe so. I'm not prepared to -- I
9 don't know that answer. I'm the attorney for the Sheriff's
10 office, but I don't have a mastery of every aspect of their
11 operation. I believe so, but I'm not sure.

12 THE COURT: Typically, jail facilities are not going
13 to allow inmates to willy-nilly get on LexisNexis because those
14 are typically Internet-based search tools, and nobody wants the
15 inmate to have open access to the Internet. Typically, from my
16 own personal experience, that doesn't happen.

17 Nevertheless, there are certain alternatives to this, and
18 those alternatives are that I know institutions have a closed
19 database of research material so that they can search it just
20 like they're going on LexisNexis, except that it is not
21 Internet based. It is a closed database. So, yes, they can do
22 that but no more. They can't all of a sudden go on Google or
23 go on someplace else on the Internet. You have this limited
24 database which happens to be, you know, all the case law that
25 you can have that's published electronically, and then you

1 would be able to search it.

2 But you don't know whether Ventura has that facility?

3 MR. HELD: I don't, Your Honor. I'm sorry.

4 THE COURT: Okay. So now let's me ask you, the
5 plaintiff really is complaining about for themselves. They're
6 not talking about necessarily family, kids, and all of that,
7 although, you know, those are obviously also -- have been
8 presented.

9 Your declarations say, Hey, I went to some of these cells.
10 I saw a postcard. There's plenty of pictures of family members
11 and so forth and so on. And you tell me there are a myriad of
12 ways that the prisoners can go ahead and communicate with the
13 outside world.

14 Let's focus on what the plaintiff is saying as to what's
15 impinging upon their ability. What alternatives do the
16 plaintiffs have in communicating with the prisoners? They talk
17 about three things. One is sort of like a subscription or
18 renewal letters. Two is some sort of a brochure that talks
19 about the myriad of publications that would be available to
20 them through the inmates. And three would be recent case law.

21 Now, I of course will give an opportunity to plaintiff's
22 lawyer to address this, but it seems to me that a solicitation
23 for a subscription that could reasonably easily be put upon a
24 postcard -- and I don't know why that would not be a sufficient
25 alternative, and we understand alternatives don't have to be

1 optimal. They just have to have some availability of
2 alternative communication viewed in a practical way.

3 Let me skip to the third thing, which is most troubling to
4 me. And, that is, if the plaintiffs are sending in recent case
5 law that may have an effect upon the rights or the confinement
6 conditions of these prisoners, how are we going to get case law
7 onto a bunch of postcards?

8 MR. HELD: Well, Your Honor, your question is skewed
9 in assuming that postcards are the only method of communicating
10 with the inmates. So they also send their publications. We've
11 established that publications direct from the publisher go to
12 the inmates.

13 THE COURT: These are not publications. These are
14 case law. They've said from time to time they'll Xerox off
15 cases that are important. Let's say the Columbia -- *PLN v.*
16 *Columbia County* case. That may be something that they want to
17 let the prisoners know that, you know, you may have a problem
18 with your policy, things of that kind. Not part of their
19 magazine but just case law coming in.

20 MR. HELD: Your Honor, that could easily be made
21 part of the magazine, or Prison Legal News could create a new
22 publication and put those items in that publication. As long
23 as it was direct from the publisher, it would come in.

24 THE COURT: Is that rational to say --

25 MR. HELD: It seems so, yes.

1 THE COURT: So here's a case that I just photocopied
2 here from my bench book. It's the *Mauro* case. Okay? Right
3 here I have it photocopied, and it's, like -- I don't know how
4 many pages it is -- 15, 16 pages. They want to send this.
5 Just as a hypothetical, they want to send this to a prisoner in
6 your jail. They put this in an envelope. You say, rejected.
7 Violation of postcard-only policy; right?

8 MR. HELD: Yes.

9 THE COURT: Okay. But if somehow I turn the same
10 thing -- I put a cover on it. I say this is the *Mauro* magazine
11 or the magazine re *Mauro v. Arpaio*. I put it in the same
12 envelope. I send it in. You say, welcome in. It's okay now.
13 I'd like to know what the rational basis for that distinction
14 is.

15 I will assume from your silence that there is no rational
16 reason for it. So I'm concerned about that because this --
17 look. I'm aware that it doesn't have to be optimal. If it's a
18 reasonable substitute or at least it's available, okay. Fine.
19 But I'm really -- to be perfectly honest with you, Mr. Held, I
20 am concerned about case law. Case law cannot readily be put on
21 postcards. Case law cannot be sent in. Case law cannot
22 necessarily await the periodic publication of a magazine.

23 I don't remember how frequently -- how frequently do you
24 publish a 56-page periodical?

25 MR. GALVAN: Monthly, sir.

1 THE COURT: Cases can't wait a month sometimes.
2 Some inmates may be pro per; so they can't -- you can't say,
3 Well, just give it to their lawyer. Believe me, I know we've
4 got a lot of pro per cases; so I know there are a lot of
5 pro per people doing pro per litigation. That's not getting in
6 there because they don't have a lawyer.

7 So now you have something that's happening, and under the
8 new law of Prisoner Litigation Reform Act, many of these
9 prerequisites that they have to see, they have to make sure
10 they have to go through before they can have access to the
11 courts and so forth, I don't know.

12 What I'm saying is case law is sort of like news.
13 Sometimes it can wait. Sometimes it can't. News usually can't
14 because today's newspaper headline is tomorrow's lining in a
15 birdcage. But case law sometimes can't wait a month. That's
16 why, you know, people who publish case law, like West or
17 whatever it is, they have supplements. They don't just wait
18 and say, yeah, a month later we'll let you know.

19 You wouldn't want to come before me, when a case just came
20 down yesterday that's directly on point absolutely in your
21 favor, but you can't get it for a month. So today you come to
22 me, and you can't cite it today. I have a problem with case
23 law. I do.

24 Brochures, I'm not clear on whether there is a nonoptimal,
25 but nevertheless open, avenue for an alternative way of getting

1 the contents of a brochure out on a postcard. But I don't see
2 how, given our conversation, what you've told me, what the
3 record is so far as to what the reasonable alternative would be
4 for sending case law, which obviously is a big concern of
5 theirs, their reason for communicating and of substantial
6 importance from their standpoint, from the kind of business
7 that they're in.

8 In any event, if you have something else to add to that,
9 I'll hear from you. If not, if you want to talk about any of
10 the other two of the *Turner* factors, I'll be happy to chat with
11 you on that.

12 MR. HELD: Your Honor, I don't have anything to add
13 to what's already in my papers.

14 THE COURT: Okay. Then why don't we skip forward to
15 the question of mootness as to your other policies. Let's put
16 postcard-only policy aside now. We're not talking about that
17 anymore. Let's talk about the other policies, that is, giving
18 notice of rejection, an opportunity for administrative appeal,
19 not giving random reasons for why things are rejected, and not
20 rejecting something just because it's Xeroxed, because that's
21 not the real reason. The real reason is it's not on a
22 postcard.

23 So you say those things have been remedied because now the
24 commander has gone over and talked to people and said, Hey,
25 you've got to stick with our policy. The policy, according to

1 you, on all of these things has been in place for two years
2 since 2012, but that somehow -- the knowledge about the policy
3 has not gotten down to the people who are purportedly
4 implementing the policy: The mailroom people, whatever.

5 So you say, Well, don't worry about any injunction on
6 that. First of all, fair to say you're not defending the
7 constitutionality of any action that has been taken contrary to
8 your very own policy; correct?

9 MR. HELD: Correct.

10 THE COURT: So then the question is do we need an
11 injunction now that you say you have gone and set those guys
12 straight? Okay. The cases you cite, with all due respect, I
13 believe are not really on point. The case about -- your
14 concern about this being a hypothetical jurisdiction, *Steel*
15 *Company v. Citizens*, this isn't hypothetical at all. They have
16 suffered an injury in fact. They have alleged it. They have
17 damage claims still ongoing. So this is not a situation in the
18 *Steel* case where the Supreme Court decided not to decide the
19 merits before resolving whether or not it had Article 3
20 jurisdiction.

21 We absolutely have Article 3 jurisdiction by reason of
22 their showing of being subjected to the actions of your
23 employees, contrary to your own policy. So your policy was
24 already there, but yet they still conducted themselves in a way
25 that was unconstitutional as to them.

1 So this is not about hypothetical jurisdiction. What's
2 really here is whether or not you are able to establish that
3 this change now is different from just having a policy, because
4 having a policy didn't do any good, that somehow now this
5 instruction is so clear, so strong, that there's no reasonable
6 likelihood that there will be ongoing violations.

7 The burden is on you, and it's a heavy burden. So if you
8 want to be heard on that, I'll be glad to hear from you on it.

9 MR. HELD: Your Honor, I've submitted two
10 declarations, one from Commander Barrios, definitively saying
11 that the policy and practice have now been brought into
12 alignment and that those activities will no longer be tolerated
13 or engaged in.

14 And I've also submitted the declaration of the civilian
15 clerical supervisor, Laura Flowers, and her declaration
16 likewise attests to the definitive implementation of the policy
17 and practice. So these have been fully extricated and
18 therefore are no longer being implemented.

19 THE COURT: How is this different from any other
20 instance of voluntary secession? Because mere voluntary
21 secession of an otherwise unlawful or unconstitutional act is
22 not sufficient to prevent the issuance of an injunction if
23 other factors are present, are met. You have to show me how
24 somehow this oral instruction is going to give me the level of
25 confidence that I know this can't happen again.

1 If you were under some court order, then I say, okay.
2 State court ordered you. Then I have to assume you're going to
3 be complying with the state court order. There are other
4 circumstances which, from a logical standpoint, it makes no
5 sense that you would go back to something like this. Okay.
6 Then I might accept that.

7 But here what I'm troubled with, Mr. Held, is that, when a
8 policy that's been set for over two years did not prevent this
9 type of conduct, how do I know that, just because your
10 commander and Ms. Flowers said a few things and said, Oh, yeah,
11 Judge, sure, we understand now, that's what we're going to do,
12 that there will be no further violations, especially when you
13 know that there will be turnover. You have some employees
14 come, some employees go. Memories fade. Things may not get --
15 the training may not pass down to whoever new is coming in.
16 These are problems.

17 If you never had the policy and you said, You know what?
18 We never had a policy. We agree that's bad. Here's a policy,
19 and people follow the policy. You might have a stronger case.

20 What's troubling to me is that you had a policy that was
21 ignored. You admitted it. You even admit that that was
22 unfortunate -- not in so many words, but you rectified it, you
23 said. You don't rectify something unless something is wrong.
24 So by using the word "rectify," I assume you admit that these
25 folks behaved wrongfully against your own policy.

1 If that had happened in the past, how can you be said to
2 have met your very, very high burden when all you told me is
3 basically, Yeah, we told them again?

4 MR. HELD: As I've said, Your Honor, I believe that
5 we have met that burden because we have submitted declarations
6 from the top level and the implementation level that this is
7 now written in policy and is now taught and practiced.

8 THE COURT: When you say taught and practiced, you
9 mean as Commander Barrios instructed them?

10 MR. HELD: And as Laura Flowers, who is the clerical
11 supervisor, explained in her declaration that she had also
12 emphasized this as a method of continuing practice to the
13 mailroom staff.

14 THE COURT: Last question I want to ask you about is
15 plaintiff has asked for what they call a full injunction, not
16 just an injunction as against -- as in favor of PLN but just an
17 injunction against the enforcement of the postcard policy at
18 all. Do you want to comment on that? Because I don't think
19 you touched upon it in your papers.

20 Not that it makes that much difference to you. It seems
21 not very sensible to say, Yeah, limit it to PLN so somebody
22 else can come in and file another lawsuit. If you don't like
23 it -- I'm not saying that I'm necessarily already granting it,
24 but if I were to grant the injunction, it seems to me you're
25 better off taking an appeal to resolve that rather than limit

1 it to them so other people now can sue you.

2 MR. HELD: Correct. Your analysis is just what I
3 would have said.

4 THE COURT: So if I'm going to grant the injunction,
5 you don't oppose an injunction that says, Don't enforce a
6 postcard policy as to anyone?

7 MR. HELD: Correct, Your Honor. For the reasons you
8 said, it would be pointless for me to defend multiple suits by
9 multiple publishers. If the Court were to reach that
10 determination, we might as well have it solved once and for
11 all.

12 THE COURT: Okay. Thank you very much, Mr. Held.

13 MR. HELD: Thank you, Your Honor.

14 THE COURT: Let me give Mr. Galvan an opportunity to
15 address the court on anything that he cares to, if anything.

16 MR. GALVAN: Thank you, Your Honor.

17 Regarding the question of -- and Your Honor can stop me if
18 this is too hypothetical, but if -- if the County had come with
19 a declaration about staff time, or if they came tomorrow with
20 one or the day after if an injunction issues, if they came with
21 a Rule 60(b) motion and said, well, look, here's a declaration
22 that says it would take more staff time to open the envelopes,
23 I think that declaration would fall under the logic. It would
24 fall on the weight of the logic of what they've already
25 submitted.

1 What they've already submitted establishes two things
2 about postcards. One, you have to inspect them because you can
3 hide a Suboxone strip, the little sublingual film of a popular
4 drug, under the stamp of a postcard. You can hide it by -- if
5 you're gluing two postcards together, as Mr. Clark pointed out,
6 you can hide the iron tar heroin in there; so in reality there
7 isn't even a no-inspection policy regarding the postcard. So
8 the postcard takes time to inspect.

9 Second reason is, if the new training takes hold, they're
10 now complying with due process when they reject an envelope,
11 which means, when they reject an envelope or reject a postcard,
12 they have to fill out a little form and send it back. So all
13 of the mail handling takes staff time.

14 So I think the reason we have no declaration that says
15 that postcards take less staff time than opening the envelope,
16 or if they do, it's so small it's not worth talking about.
17 When the dust settles in the evidentiary sense, in the *Columbia*
18 *County* case, that's what it came to. It's de minimis. So I
19 think, if Your Honor had given Ventura the extra day, it
20 wouldn't make a difference to come in with any declarations.

21 The second point I want to address is -- actually, I
22 shouldn't promise just two. I have more than two. The other
23 problem is what counsel said about *Mauro v. Arpaio*, and what is
24 the significance of whether there were past incidents of
25 contraband coming in or not. And as Your Honor pointed out,

1 there's no evidence here of past evidence of contraband coming
2 in. There's a dictum in the *Mauro* case saying they don't need
3 to show that this happened before, but if you look at what
4 actually happened in *Mauro*, the en banc decision has a very
5 nice recitation of the facts, and it's a very clear sequence in
6 three paragraphs.

7 First, they had a problem of harassment of female guards,
8 and they had that problem in connection -- connected to
9 pornographic materials. People said to the female staff, Oh,
10 you know, look, I'm going to compare you to the centerfold and
11 things like that.

12 Then they stopped allowing -- they confiscated the
13 pornographic magazines.

14 Then they documented that the incidents of harassment of
15 the female staff went down. So even though there's this dictum
16 that says they don't necessarily need that, they certainly had
17 it, and I certainly think it's part of the result, the en banc
18 result.

19 THE COURT: I think it also depends on where in the
20 level of the analysis. If you take a look at what the *Frost*
21 case says, the first level, the first factor is arguably
22 divisible into three sub-steps. And the first step, at that
23 point they just have to show some kind of a rational, logical
24 connection. They don't have to show anything about how it was
25 effective or ineffective, or at this time it became effective.

1 None of that has to come in.

2 And I think that is true, very much true, and nobody would
3 expect Ventura County to have to do that at that point. And I
4 think easily they can show that there is a logical and
5 intuitive connection.

6 So the next -- then you come in, and you do present
7 evidence from your expert, Mr. Clark, among other things, that
8 this does not advance any type of institutional security or
9 interest to any significant level or any level that's more than
10 de minimis. Those are my words, not necessarily his, but
11 that's the concept.

12 At that point then they're going to have to show that
13 there is more of a robust showing of the rationality of this
14 connection so as to make it seem to be not so remote as to
15 render it irrational or arbitrary. I think at that level, if
16 you have evidence of a problem, you know, you don't have to do
17 it, but you would think that you perhaps should strongly
18 consider doing it if you have the evidence. So I think that's
19 the way I'm analyzing that.

20 And, of course, when it comes to administrative costs,
21 effect upon the guards or the prisoners, in the third prong of
22 *Turner* that certainly is an occasion to be telling me, with
23 evidence, as to how big of a burden, administrative burden it
24 is, how big of a cost it is, what effect it in fact will have
25 on these other people. And that may be an occasion on which

1 you would compare the pre and the post. And I merely was
2 pointing out to counsel that that's absent.

3 So I'm aware of what *Mauro* may have said, but I think we
4 have to read it in the context and read it in the context of
5 that being a situation of pornographic material versus this
6 case, which does not involve that but involves something else.
7 So the analysis really is quite different.

8 But be that as it may, go ahead.

9 MR. GALVAN: If I may address briefly the other
10 factors and the alternative, especially Prong 2 of the
11 alternative means under *Turner*, I think they -- they interact
12 with the first factor, especially for things like the brochures
13 and the case law, because I can certainly take a case, and I
14 could print it onto a stack of postcards. At that point,
15 though, now --

16 THE COURT: That would be a lot of postcards.

17 MR. GALVAN: It would be a lot of staff time to
18 inspect those postcards. So whatever de minimis benefit the
19 jail got from the postcards versus envelopes, they're going to
20 lose it because, Postcard 1, hold it up to the light, look at
21 it, Postcard 2, et cetera.

22 The same would be true of our brochures, and I think
23 Mr. Wright described the brochure in his declaration. It's
24 more than can go on the postcard. It's like a mini catalog,
25 really. And, again, one could convert it to a stack of

1 postcards, but then you erase whatever staff benefit you netted
2 from Prong 1 if we do that.

3 Regarding the mootness, one thing I wanted to highlight
4 about Ms. Flowers's declaration is March 24, 2014. That's the
5 date that Ms. Flowers testifies that the training happened.
6 The policy changed April 2012. Our material is still being
7 blocked under the end of this -- until we filed the lawsuit in
8 February of this year. We filed, and then we filed for the --
9 this motion, this preliminary injunction motion at the same
10 time.

11 By March 24, 2014, the opposition to the preliminary
12 injunction motion was coming due. I think what that timing
13 tells us is it testifies that Mr. Held is very effective in
14 counseling his client to get things in order.

15 But the reason we need the preliminary injunction and
16 eventually the permanent injunction is this case will be over,
17 and as Your Honor pointed out, it is not the business of the
18 federal courts to continue being in their hair over there, how
19 they run their place. So we can't rely on Mr. Held, with the
20 license of my motion, straightening things out forever, which
21 is why I think they need the seriousness of an injunction.

22 That's all I wanted to address, Your Honor, unless you
23 have questions for me.

24 THE COURT: Thank you.

25 Mr. Held, do you have anything else you want to address

1 the Court on?

2 MR. HELD: No. That's it, Your Honor.

3 THE COURT: You know, let me do this. I'm obviously
4 going to take the matter under submission, and I'm going to
5 issue a written ruling.

6 Inasmuch as you say that in short order you can get me
7 further evidence of whatever it is you say that you can show
8 me, I'm going to give you that opportunity. I know I said this
9 is not how we do business, but just so we have the fullest
10 record that we have, I'm going to give you that opportunity.
11 How much time do you think reasonably you'll need to do that?

12 MR. HELD: Could I have, let's see -- could I have
13 through the close of business this week?

14 THE COURT: Yes. You may have until close of
15 business on Friday to do so.

16 MR. HELD: Thank you.

17 THE COURT: Mr. Galvan, you may have to the close of
18 business on Wednesday next, which will make it the 21st, to
19 file any response, and then I'll take all of that into
20 consideration.

21 MR. GALVAN: Your Honor, could I request a couple of
22 more days, just because I anticipate I may need to respond with
23 more than argument, which means I have to coordinate with and
24 schedule witnesses.

25 THE COURT: Close of business next week.

1 MR. GALVAN: Thank you, Your Honor.

2 THE COURT: That would be the 23rd to my
3 calculations.

4 MR. GALVAN: Thank you.

5 THE COURT: Close of business 23rd. I'll take the
6 matter under submission then and then issue my written ruling.

7 Now, let me bring up the issue of -- have you folks had
8 any discussion about a possible informal resolution of this
9 case? Have you thought about just trying to settle this case
10 in some matter?

11 MR. HELD: Do you want to address that, or shall I?

12 MR. GALVAN: I'll let Mr. Held go first.

13 THE COURT: Sure.

14 MR. HELD: Your Honor, that's a thought that had
15 occurred to me from soon after I got the case because, on the
16 non-postcard-only aspects, there was a concession of
17 constitutional error. So I immediately contacted Mr. Vogel,
18 who is local counsel for the plaintiff, and we worked with
19 Mr. Galvan. We tried multiple iterations of a partial
20 settlement. In other words, how would we word -- how would we
21 use language or create provisions to word resolution of the
22 non-postcard-only aspects of the case?

23 THE COURT: The non-postcard aspects of the case?

24 MR. HELD: Yes.

25 THE COURT: Certainly a consent decree would do it

1 because effectively you're saying we're not doing it. If
2 you're not doing it, you're consenting to doing it the proper
3 way. I'm sure that would resolve it.

4 I'm also talking about the postcard aspect. You might
5 want to think about whether it's worth fighting all of this,
6 and maybe you want to consider conserving resources of both
7 sides.

8 MR. HELD: Yes. I understand. The problem that the
9 discussions foundered on, Your Honor, was the partial
10 resolution. We could never get the language correct to the
11 mutual satisfaction on that. The postcard issue we never
12 discussed, but let me ask the Court this: Would it be possible
13 to arrange a settlement conference with either yourself,
14 preferably, or perhaps one of your magistrate judges?

15 THE COURT: Well, I would be more than happy to do
16 this myself, except I'm a little bit hesitant because I'm still
17 going to be deciding the motion for preliminary injunction.
18 What I can do is I can prevail upon one of our magistrate
19 judges to preside at a settlement conference. Someone I have
20 in mind is a particularly effective magistrate judge who has a
21 substantial reputation of being one of the best settlement
22 judges, period. So if I could prevail upon him to do the
23 settlement, would you folks be interested in doing that?

24 MR. HELD: Just before leaving your prior point, I
25 would submit that the fact that you, as you put it, read every

1 word, makes you the most suitable person if you have the time
2 because you know all the ins and outs and the aspects of the
3 case. I think that makes you the best candidate, if you're
4 willing to do it and you have the available time.

5 THE COURT: Mr. Galvan, what do you think?

6 MR. GALVAN: My client has invest- -- he's not
7 paying me, but he has invested a lot of my time, the time that
8 I'm available to do other cases for him in trying to work out
9 this quasi-consent decree with Ventura without much result. So
10 my -- my litigation directions from my client are now litigate
11 the preliminary injunction, then talk about settlement.

12 So my -- I certainly would be happy to have Your Honor as
13 a settlement judge, but I would not want to delay your decision
14 on the preliminary injunction.

15 THE COURT: Why don't we go ahead with the -- you
16 folks file whatever it is you're going to file within the time
17 period I have just given you, and I'll decide the preliminary
18 injunction motion, and then we'll go from there and see whether
19 or not there's any interest in settlement discussions. And at
20 that time, if you folks want me to do it, I'll make time to do
21 it because I think we can probably try to resolve this. Okay?

22 MR. HELD: That would be appreciated.

23 THE COURT: Very good. Counsel, thank you very much
24 for coming in. I appreciate your argument. Have a nice
25 afternoon.

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MR. HELD: Thank you.

MR. GALVAN: Thank you, Your Honor.

(Proceedings concluded at 10:07 A.M.)

1 CERTIFICATE OF OFFICIAL REPORTER

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