UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER, a Not for Profit Corporation, Incorporated in the State of Washington,	)	
Plaintiff,	)	Case No.: 3:12-cv-00125-CAR
v.	)	
JOE CHAPMAN, the Sheriff of Walton County, Georgia, And WADE HARRIS, the Jail Commander For Walton County Jail, in their official and Individual capacities	)	
Defendants.	)	

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***AMICUS CURIAE* BRIEF**
OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA IN SUPPORT OF PLAINTIFF PRISON LEGAL NEWS' MOTION FOR INJUNCTIVE RELIEF

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I. INTEREST OF *AMICUS*

The American Civil Liberties Union ("ACLU") Foundation of Georgia is the Georgia affiliate of a nationwide non-partisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In 1972, the ACLU founded the National Prison Project ("NPP") to ensure that our nation's prisons, jails, and detention facilities comply with the Constitution and federal law. The NPP has found that prisons and jails often impose arbitrary rules that interfere with prisoners' ability to communicate with the outside world. The ACLU works to ensure that prisoners retain all First Amendment rights that are not inconsistent with incarceration.

This case involves a significant violation of the First Amendment rights of anyone wishing to communicate with an inmate at the Walton County Jail ("the Jail"). The ACLU believes that the Jail's mail policies represent a serious threat to the constitutional rights of persons detained therein as well as those groups or individuals who wish to communicate with the Jail's inmates. Specifically, the Jail's complete prohibition on publications of any kind and its postcard-only mail policy infringes upon the First Amendment rights of groups like Prison Legal News (PLN) and the inmates themselves.

The ACLU has challenged jail mail policies that seek to ban virtually all publications from being received via incoming mail. *See Prison Legal News, et al. v. Berkeley County Sheriff, et al.*, Case No. 2:10-CV-02954-MBS (D.S.C. Jan. 10, 2012).[1] In that case, the ACLU challenged a mail policy at the Berkeley County Detention Center (BCDC) in Moncks Corner, South Carolina, which barred virtually all incoming books, magazines and newspapers. In January 2012, the parties entered into a consent injunction in which BCDC officials agreed to

[1] Available at http://www.aclu.org/files/assets/partially_executed_injunction_1-10-2012.pdf (last downloaded Oct. 8, 2012)

"ensure that BCDC detainees are able to exercise the rights guaranteed to them by the First Amendment . . . [and] BCDC detainees shall be permitted to receive and retain any and all publications which do not threaten BCDC safety or security . . . [including] *Prison Legal News*, soft cover books, news magazines, sports and entertainment magazines, other general interest publications, and newspapers of general circulation." *Berkeley County Sheriff*, at ¶¶ 21, 23.

The ACLU has challenged postcard-only mail policies throughout the country. *See Hamilton v. Hall*, 790 F.Supp.2d 1368 (N.D. Fla. June 10, 2011) (finding that inmate stated a claim under § 1983 for violation of her First Amendment right to freedom of speech); *Clay v. Pelle*, Case No. 10-CV-01840-WYD-BNB, 2011 WL 843920 (D. Colo. March 8, 2011) (granting class certification for inmates' challenging a postcard-only mail policy). The ACLU Fund of Michigan submitted an *amicus* brief supporting PLN's challenge to a postcard-only policy in the Livingston County Jail, *see Prison Legal News v. Livingston County Sheriff Bob Bezotte*, Case No. 2:11-CV-13460 (E.D. Mich. filed Aug. 9, 2011). The ACLU of Washington submitted an *amicus* brief supporting PLN's challenge to a postcard-only mail policy in the Spokane County Jail, *see Prison Legal News v. Spokane County*, Case No. CV-11-029-RHW, 2011 WL 4073615 (E.D. Wash. August 3, 2011). In that case, the parties entered into a Consent Decree in which it was noted that "Defendants have not articulated a legitimate penological interest" for their postcard-only mail policy and "Defendants believe there is a substantial risk that a court may find that Defendants' postcard policy violates inmates' or others' First Amendment rights" and "Defendants agree . . . that an injunction is appropriate in that it lessens risk and clearly protects such rights." *Id.* at ¶¶ 15, 20.

Defendants' unconstitutional mail restrictions are an example of a disturbing national trend in which correctional facilities are exaggerating security risks and the need to preserve

scarce resources to justify policies that trample on the First Amendment rights of inmates and those with whom they correspond. Plaintiff PLN challenges Defendants' mail policies as violative of the First and Fourteenth Amendments and has moved the Court for a preliminary and/or permanent injunction. Amicus agrees that Defendants' mail policies are overly restrictive and unconstitutional because they deprive inmates of any meaningful communication with the outside world and fail to survive constitutional scrutiny

The ACLU Foundation of Georgia submits this *amicus curiae* brief in support of Plaintiff's motion for injunctive relief and to ensure that this Court is fully briefed on this case of significant constitutional importance. For the following reasons, this Court should preliminarily and permanently enjoin Defendants from enforcing the unconstitutional mail policies at the Walton County Jail.

II. STATEMENT OF FACTS

PLN is an advocacy organization that publishes *Prison Legal News*, a monthly, subscriber-based publication discussing prisoners' issues. (Declaration of Paul Wright, founder of PLN ¶¶ 1-3 ("Wright Decl.")). PLN has approximately 7,000 subscribers in the United States and abroad, including prisoners at about 2,200 correctional facilities nationwide. (*Id.* ¶ 7). It communicates with prisoners throughout the country on prison conditions, investigates claims pertaining to alleged constitutional violations, educates prisoners on their legal rights, and participates in litigation to assert prisoners' rights and as a form of political expression. (Declaration of Lance Weber, Esq. ¶¶ 7-8 ("Weber Decl.")).

PLN has been unable to communicate with Walton County inmates due to the Jail's onerous mail restrictions. Since January 2012, PLN estimates that it has sent Walton County inmates approximately 222 separate issues of its *Prison Legal News* monthly journal, 41 copies

of the book, *Protecting Your Health and Safety*, 41 copies of its informational brochure pack, and 9 subscription renewal letters. (Wright Decl. ¶¶ 15-16). The Jail rejected many of these materials and sent back at least 59 issues of *Prison Legal News*, 36 copies of the informational brochures and subscription renewal letters, and rejected numerous other materials that it failed to return to PLN. (*Id.*).

From April 8, 2011, to October 12, 2012, the Jail's mail policy stated: "NO publications of any kind are to be accepted through the mail. Books are available on a regular basis from the facility library." (Policy No. 5.16.II.E (effective April 8, 2011)). On October 12, 2012, Defendants modified this policy, which now provides:

> Only books sent directly from a bookstore/publisher or retail outlet are to be accepted through the mail, nothing can be written in or added to the book. Hardback books are not accepted. Books are also available on a regular basis from the facility library. (See policy 5.25). Packages, magazines, newspapers or periodicals will not be accepted. These items will be provided by Inmate Services on a regular schedule.

From April 8, 2011, to October 1, 2012, the Jail's library policy simply read: "The general library in the Walton County Detention Facility includes a collection of books and magazines." (Policy No. 5.25.E (effective date April 8, 2011)). On October 1, 2012, Defendants revised its library policy, which now reads:

> The general library in the Walton County Detention Facility includes a collection of books and magazines. Approved magazines are provided on a monthly basis to each housing area of the detention center. Inmates may order books to be sent directly from the bookstore/publisher. These books will be inspected and approved by Inmate Services before being delivered to the inmate, nothing may be written in or added to the book. Inmates may only have one book other than religious materials in their possession. Inmates may order an additional book once they complete a book, however, they must have a family member pick up the old book or donate it to the facility library.
>
> (Policy No. 5.25.E (effective date Oct. 1, 2012)).

These policy changes were presumably made to address the constitutional problems with the Jail's previous prohibition on virtually all publications. However, the revised policies governing access to publications like *Prison Legal News* does not alleviate the constitutional concerns expressed by Plaintiff. The new policy continues to prohibit PLN from sending its monthly newsletter to inmates through subscription service, and there is no guarantee that those periodicals will be made available to inmates through the library, even if inmates request that they be made available. In addition, while the new policy allows publishers to send books directly to the library upon the request of an inmate, Defendants have yet to recognize PLN as a legitimate publisher under its new policy so it is uncertain as to whether PLN will have the ability to send its books to the Jail. (Defs.' Response Brief at 18-19).

Defendants have adopted, and continue to maintain, unconstitutional restrictions governing all outgoing and incoming mail. On October 7, 2010, Defendant Harris circulated a memorandum stating: "Effective November 1, 2010, all written communications between inmates and citizens will be done on a post card. All outgoing and incoming mail must be done on a post card except legal mail . . . ." (Memorandum from Major Wade Harris to Walton County Inmates, Oct. 7, 2010). This memorandum is consistent with the Jail's official mail policy, which had been in place since at least April 8, 2011, and provides, in pertinent part:

> Inmates in the Walton County Detention Facility are allowed to send and receive mail by non-personal photo post card only unless it is for the receipt of a money order for commissary purposes … or there is documented justification for a limitation of mail privileges.
>
> (Policy No.5.16.I).

While the ACLU Foundation of Georgia finds other aspects of the Jail's mail policy troubling and likely unconstitutional, the focus of this *amicus brief* will be on the constitutionality of the Jail's complete ban on publications received via incoming mail and the

postcard-only restriction on incoming and outgoing mail. If this Court so desires, *Amicus* will provide a supplemental brief analyzing the constitutionality of Defendants' other mail policies.

III. ARGUMENT

A. Defendants' Mail Policy Infringes upon the First Amendment Right to Send and Receive Mail.

The First Amendment to the United States Constitution guarantees the right of individuals to freedom of speech, religion and assembly. See U.S. CONST. amend. I. These freedoms are the foundation of each individual's broader right to freedom of expression. The Supreme Court has found that "[Freedom of expression] is the matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. State of Connecticut*, 302 U.S. 319, 327 (1937). "[T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought . . . ." *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

It has been established that the right to receive and send mail is protected by the First Amendment. *Blount v. Rizzi*, 400 U.S. 410 (1971). The Supreme Court has also found that incarcerated persons generally retain their First Amendment right to send and receive mail. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989); *Procunier v. Martinez*, 416 U.S. 396 (1974), overruled in part on other grounds, *Thornburgh* (finding that correspondence between a prisoner and outsider implicates First and Fourteenth Amendment protections).

In *Thornburgh*, the Supreme Court held that "prison walls do not form a barrier separating prison inmates from the protections of the Constitution nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.'" *Thornburgh*, 490 U.S. at 407 (citations omitted). In *Martinez*, Justice Thurgood

Marshall eloquently articulated the importance of preserving First Amendment rights for incarcerated persons: "When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions . . . It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit." *Martinez*, 416 U.S. at 428 (Marshall, J., concurring).

"[E]ven though this court engages in a deferential review of the administrative decisions of prison authorities, the traditional deference does not mean that courts have abdicated their duty to protect those constitutional rights that a prisoner retains." *Fortner v. Thomas*, 983 F.2d 1024, 1029 (11th Cir. 1993). The First and Fourteenth Amendments protect the rights of both inmates and those with whom they correspond from unjustified government interference with their correspondence. *Id.* at 408-09, 418 ("Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of communication between them necessarily impinges on the interest of each . . . The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment . . . .").

It is clear that by severely limiting inmates' access to publications via incoming mail, prohibiting outside publishers from communicating with inmates through subscription service and direct mail, and by severely constraining the information an inmate is allowed to send and receive through the implementation of a postcard-only mail policy, Defendants have infringed

upon the inmates' First Amendment right to send, receive and read mail, as well as Plaintiff's First Amendment right to distribute mail.

Groups like PLN have the First Amendment right to correspond with prisoners by mail. *Thornburgh*, 490 U.S. at 408 ("In this case, there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."); *see also, Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005); *Jacklovich v. Simmons*, 392 F.3d 420, 426 (10th Cir. 2004); *Prison Legal News v. Fulton County*, No. 1:07-CV-2618-CAP, 2007 WL 4712494 (N.D.Ga. Feb. 4, 2008) (action challenging constitutionality of Fulton County Jail ban on publications; motion for preliminary injunction granted).

While the Court does allow for greater regulation of prisoners' speech, such regulations must be "reasonably related to legitimate penological interests," *Turner v. Safley*, 482 U.S. 78, 89 (1987), and the prison authorities must "show more than a formalistic logical connection between a regulation and a penological objective," *Beard v. Banks*, 548 U.S. 521, 535 (2006). Prison authorities are not allowed to "rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary hearing is required as to each point." *Walker v. Summer*, 917 F.2d 382, 386 (9th Cir. 1990).

Correctional policies regulating outgoing mail are to receive greater constitutional scrutiny as outlined in *Martinez*, 416 U.S. at 413-414; *see also Thornburgh*, 490 U.S. at 413 (upholding the strict scrutiny standard articulated under *Martinez* as applied to outgoing mail because "[t]he implications of outgoing correspondence for prison security are of a categorically

lesser magnitude than the implications of incoming materials."). Policies that regulate incoming mail are to be reviewed under the constitutional standard articulated in *Turner*. *Id*. In *Turner*, the Court articulated a four factor test to determine whether a prison regulation infringes upon a constitutionally protected right:

> (1) whether there is a valid, rational connection between Defendants' postcard-only policy and the security and costs interests upon which Defendants rely to justify the regulation;
>
> (2) whether there are alternative means of exercising the asserted constitutional right that remain open to inmates and those with whom they correspond;
>
> (3) whether and to what extent accommodating the asserted right will have an impact on prison staff, on inmates' liberty and on the allocation of limited prison resources; and
>
> (4) whether there exists ready alternatives that fully accommodate the prisoners' rights at *de minimis* costs to valid penological interests. [*Turner*, 482 U.S. at 89-90].

The *Turner* test applies to *convicted* prisoners, and thus pretrial detainees held in jails like Walton County Jail may enjoy greater constitutional protections. *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners."). Even if the Jail's inmates are only afforded the constitutional protections guaranteed to convicted prisoners, Defendants' mail policies fail to satisfy constitutional scrutiny and Plaintiff's motion for a preliminary and a permanent injunction should be granted.

1. **Defendants' Mail Policy Violates the Right of Publishers to Send Their Publications to Inmates, Places Unconstitutional Restrictions on Inmates' Access to All Incoming Publications, and Violates Inmates' Right to Receive Publications.**

The First Amendment right of a publisher to send books and magazines to prisoners is well settled. *Thornburgh*, 490 U.S. at 408; *see also Perry v. Sec. of Fla. Dep't of Corrections*,

664 F.3d 1359, 1363 (11th Cir. 2011) ("The Supreme Court [has] held that both inmates and noninmates have a First Amendment interest in correspondence sent to one another."). The Fourth Circuit has found that a magazine publisher "indeed has a constitutional interest in communicating with its inmate subscribers." *Montcalm Publishing Co. v. Beck*, 80 F.3d 105, 108 (4th Cir. 1996).

Federal courts throughout the country have recognized that publishers have a First Amendment right to mail their publications to incarcerated persons, and those courts have rejected unreasonable restrictions on the right to send and receive publications. *See Mann v. Smith*, 796 F.2d 79, 82 (5th Cir. 1986) (finding that a jail's "policy that forbade inmates to receive or possess newspapers and magazines" violated the First Amendment); *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986) (finding a jail's prohibition on newspapers violates the First Amendment); *Johnson v. Forrest County Sherriff's Dep't*, No. 98-60556, 2000 WL 290118, at *1 (5th Cir. Feb. 15, 2000) ("A blanket ban on newspapers and magazines…violates the First Amendment); *Sizemore v. Williford*, 829 F.2d 608, 610 (7th Cir. 1987) (acknowledging prisoners' "First Amendment right to receive and to read newspapers and periodicals"); *Crafton v. Roe*, 170 F.3d 957, 960-61 (9th Cir. 1999) (striking down prison ban on gift publications); *Thomas v. Leslie*, Nos. 97-3346, 97-3361, 1999 WL 281416, at *7 (10th Cir. Apr. 21, 1999) (holding that an "absolute ban on newspapers" violates the First Amendment); *Parnell v. Waldrep*, 511 F.Supp. 764, 768 (W.D.N.C. 1981) (striking down publications ban at a jail and holding that "prohibition of virtually all reading materials deprives the inmates of their First Amendment right to receive information and ideas."); *Mitchell v. Untreiner*, 421 F.Supp. 886, 895 (N.D. Fla. 1976) (holding that the failure to permit inmates to read the daily newspaper denied First Amendment freedom of speech, association, and right to be informed citizens in a

democratic society); *Payne v. Whitemore*, 325 F.Supp. 1191, 1993 (N.D. Cal. 1971) (striking down a publications ban at a jail and holding "[t]hat the right to receive newspapers and magazines is part of the First Amendment is beyond question.").

Specifically, the right of PLN to mail its publication to incarcerated persons has been well established. "The speech at issue [consisting of *Prison Legal News* and other publications] is core protected speech . . . receipt of such unobjectionable mail implicate penological interests." *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) (striking down prison mail rule that prevented delivery of *Prison Legal News*); *Miniken v. Walter*, 978 F. Supp. 1356, 1363 (E.D. Wash. 1997) (granting prisoner's motion for summary judgment and stating "Plaintiffs' First Amendment right to receive his personal subscription to *Prison Legal News* has been violated"); *Simmons*, 392 F.3d at 433 (reversing grant of summary judgment for Defendants in case involving *Prison Legal News*).

Last year, the U.S. Department of Justice joined Plaintiff PLN in challenging the constitutionality of an incoming publication ban at Berkeley County Detention Center in Moncks Corner, South Carolina.[2] The U.S. Department of Justice decried the jail's policy of restricting inmates' access "to a breathtaking array of books, publications, and religious and educational materials, including the *Washington Post*, [and] *USA Today* . . ." and determined that the ban was facially unconstitutional because it prohibited "a significant amount of core First Amendment speech" and was "not reasonably connected to any legitimate penological interest."[3]

[2] David Fathi, *U.S. Department of Justice Says Jail Policy Banning All Books and Magazines Except Bible is Unconstitutional*, April 12, 2011, available at http://www.aclu.org/prisoners-rights/us-department-justice-says-jail-policy-banning-all-books-and-magazines-except-bible (last downloaded Oct. 9, 2012).

[3] *See* United States' Brief in Support of Plaintiff Prison Legal News' and Human Rights Defense Center's Motion for Preliminary Injunction in *Prison Legal News, et. al., v. Berekely County*

The U.S. Department of Justice reasoned that the publication ban lacked a legitimate penological interest since the "the majority of correctional institutions in the United States, including the Federal Bureau of Prisons" do not impose a similar ban.[4]

a. Defendants' Revised Mail Policy Governing Inmates' Access to Periodicals and Books is Unconstitutional

Defendants' revised policy governing publications fails to satisfy the four factors that courts must consider under *Turner*, 482 U.S. at 89-91. Defendants will argue that the revised policy expands inmates' access to publications because it allows publishers to send books via incoming mail and intends to make other publications available through the library. However, the policy still amounts to a publication ban because it prohibits inmates from receiving most publications directly, including all newspapers, magazines, and periodicals. In addition, there is no guarantee that inmates will have access to the publications they request under the new policy. This de facto publication ban fails each factor of the *Turner* test.

The revised policy fails the first factor of the *Turner* test because there is no valid, rational connection between the ban and a legitimate government objective. No penological interest is served by denying inmates' access to unobjectional publications like such as *Prison Legal News, TIME Magazine, The New York Times,* or numerous religious publications like *Sojourners Magazine*. As the U.S. Department of Justice argued in its brief cited above the majority of correctional facilities do not impose a ban on all incoming newspapers, magazines and periodicals, and thus it seems dubious as to whether this publication ban serves a valid, penological interest. Indeed, a publication ban is inconsistent with the policies of most other

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Sheriff's Office, No. 2:10-cv-02594-MBS, available at http://www.justice.gov/crt/about/spl/documents/prisonlegalnews_briefinsupportPI_05-23-11.pdf

[4] Fathi, *U.S. Department of Justice Says Jail Policy Banning All Books and Magazines Except Bible is Unconstitutional*.

correctional facilities in Georgia because the Georgia Department of Corrections allows inmates in state-run prisons to receive "a limited number of individual books, periodicals, or newspapers . . . " via incoming mail.[5]

Defendants claim that the restrictive policies regarding access to publications are necessary in order to maintain sanitary conditions, limit fire hazards, and reduce the likelihood of weapons and contraband from being smuggled into the facility. (Harris Aff. ¶ 16). It is unclear, however, as to how the implementation of this de facto publication ban furthers these objectives.

Without offering any evidence in support, Defendants express concern that "individually mailed periodicals, brochures, newspapers and journals" may be used to "stop up toilets or sinks" and would thus lead to unsanitary conditions. (Defs.' Response Brief at 14). Defendants also argue that allowing individually mailed reading materials presents a fire hazard by increasing the amount of "flammable material that is available to fuel a fire." (*Id.*) Defendants also contend that the increased amount of reading materials will make it easier for inmates to conceal weapons and contraband. (*Id.*) While maintaining sanitary living conditions, reducing fire hazards, and preventing inmates from concealing weapons and contraband are all legitimate objectives, banning individually mailed publications is not reasonably related to those penological interests and the policy constitutes an exaggerated response to those concerns.

Defendants fail to explain why individually mailed newspapers, magazines and periodicals present a greater threat to the security and safety of the Jail as compared to the other reading materials that inmates are allowed to possess. An inmate could certainly conceal contraband within one of the permitted religious texts, and he could foreseeably use one of the permitted library books to start a fire. This new policy is underinclusive because it arbitrarily

[5] Georgia Department of Corrections, *Orientation Handbook for Offenders*, Section I.A(2), available at http://www.dcor.state.ga.us/pdf/GDC_Inmate_Handbook.pdf

prohibits certain publications even though it is evident that those reading materials present no greater risks than materials currently available to inmates. Thus, this Court should find that the new policy is an "exaggerated response" and prohibited under *Turner*. *See Turner*, 482 U.S. at 95-97; *Mann*, 796 F.2d at 82 (striking down jail's ban on newspapers and magazines where "[t]he patently underinclusive nature of the regulation strongly suggests that it is indeed an exaggerated response"); *see also Spellman v. Hopper*, 95 F.Supp.2d 1267, 1287 (M.D. Ala. 1999) ("The under-inclusiveness of defendant's prohibition on subscription magazines with regard to contraband further suggests that the connection between the regulation and its stated objective is weak."); *Cf. Jackson v. Elrod*, 671 F.Supp. 1508, 1511 (N.D.Ill.1987) (finding that hard cover books are no greater a risk to conceal contraband than, e.g., clothing, paperbacks, mattresses, light fixtures, and ceilings "disproves defendant's assertion of a rational connection between their hardcover book ban and a governmental interest.").

It is not necessary to prohibit individually mailed publications in order to address the legitimate concerns articulated by Defendants. In fact, the Jail already has adequate policies in place that address those concerns. First, inmates are required to clean their housing and common areas each day. (Walton County Jail Inmate Handbook at 6). Second, the Jail is authorized to seize any items, including reading materials that inmates are allowed to possess, if jail officials believe that their "accumulation" is "excessive and constitute[es] a safety, security or health hazard." (*Id.* at 5-6). Third, the Jail prohibits the possession of any "smoking accessories," including lighters, which should prevent inmates from lighting fires with their reading materials. (*Id.* at 3). These regulations are reasonable and are logically related to the legitimate penological interests asserted by Defendants.

Defendants legitimate concerns with maintaining jail security can also be addressed by other means. In addition to exercising their discretion to confiscate material that is deemed a security threat, jail officials can, and should, screen incoming publications and restrict those publications that could create a genuine threat to security. Officials can also expand the "publishers-only" mail policy that they recently adopted for incoming books and extend that policy to other incoming publications. This policy is constitutional and it addresses concerns over both security and economic allocation of jail resources. Items sent directly from a publisher are more trustworthy, less likely to contain contraband and will not necessitate an intense and time-consuming screening process by jail staff. *See Bell*, 441 U.S. 520 (1979) (upholding a "publishers-only" regulation based on prison officials' security concerns that "hardback books are especially serviceable for smuggling contraband into an institution" and that it was a "rational response by prison officials to an obvious security problem."); *Spellman,* 95 F.Supp.2d 1267, 1287 ("Given the fact that subscription magazines are sent to inmates by publishers rather than family or friends – and, thus, are unlikely to conceal contraband – any additional contraband searches in the mailroom may not be onerous . . . [and] any additional time or trouble to prison staff caused by accommodation of the right in question appears, in context, to be *de minimis*."). Adopting a publishers-only policy for all incoming publications, including newspapers and periodicals, would be consistent with many other facilities, including prisons operated by the Georgia Department of Corrections.[6]

For these reasons, the new restrictions on inmates' access to publications are not reasonably related to the stated penological interests and therefore they fail to satisfy the first factor of the *Turner* test. This is particularly significant because the Sixth Circuit Court of

[6] Georgia Department of Corrections, *Orientation Handbook for Offenders*, Section I.A(2), available at http://www.dcor.state.ga.us/pdf/GDC_Inmate_Handbook.pdf

Appeals has found that "[f]ailure to satisfy the first factor renders the regulation unconstitutional without regard to the remaining three factors." *Jones v. Caruso*, 569 F.3d 258, 267 (6th Cir. 2009) (citing *Turner*, 482 U.S. at 89-91); *see also Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) ("Nothing can save a regulation that promotes an illegitimate or non-neutral goal.").

The policy also fails the second factor of the *Turner* test. Defendants claim that they are taking a jail-wide "survey" to ascertain inmates' preference as to desired reading materials, and that they will make certain materials available to inmates on a "monthly basis" through a library cart. (Harris Aff. ¶ 15; Policy No. 5. 16.II. E (effective date Oct. 1, 2012), D.E. 21 at 2). Under the new policy, however, Defendants will still be able to deny inmates' access to many, if not all, publications. In addition, Defendants have yet to define PLN as a "publisher," and thus there is a distinct possibility that PLN may be prohibited from sending its' reading material to inmates in Walton County Jail. (Defs.' Response Brief at 18-19). There is no guarantee that inmates will have access to unobjectionable reading materials like *Prison Legal News*, and there is no guarantee that publishers like PLN will be able to communicate with inmates through its publications. Thus, the new policy fails the second prong of the *Turner* test because it does not provide any alternatives for inmates who are denied access to information from unobjectionable publishers and it does not provide alternatives for publishers who are prohibited from making their materials available to inmates.

The new policy likely fails the third factor of the *Turner* test because lifting the de facto publication ban should have little or no impact on penological interests asserted by Defendants. Defendants will have a difficult time proving that the publication ban has made the Jail more sanitary, decreased the risks of fire hazards or helped reduce the risks of contraband being smuggled into the facility. At this point, Defendants have provided no credible evidence that

subscription-based reading materials increased any of those risks or that these specific reading materials have been used in the past to "stop up toilets," start fires or conceal weapons or contraband. "In order to warrant deference, prison officials must present credible evidence to support their stated penological goals." *Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002).

The new restrictions fail the fourth factor of the *Turner* test because there are existing alternatives that fully accommodate the constitutional rights at issue at a *de minimis* cost to valid penological interests. By enforcing its other written policies, the Jail could ensure sanitary conditions, reduce the risks of fire hazards and decrease the likelihood that contraband will be concealed. The Jail should also continue its prior policy of inspecting all incoming publications and rejecting only those publications that undermine security or contain objectionable content such as graphic pornography. The current policy represents an exaggerated response to prison concerns and thus fails the fourth *Turner* factor.

b. Defendants' Original Mail Policy Prohibiting Inmates From Accessing Virtually All Publications is Unconstitutional

Defendants' original policy governing publications fails to satisfy the four factors that courts must consider under *Turner*, 482 U.S. at 89-91. While Defendants have modified the original policy which banned virtually all incoming publications, it is important for this Court to address the previous policy because Defendants clearly changed its policy in anticipation of litigation and there is a possibility that Defendants will revert back to the publication ban at some point in the future.

Defendants' original publication ban fails the first factor of the *Turner* test because there is no valid, rational connection between the ban and a legitimate government objective. As stated in the argument above, no penological interest is served by banning unobjectionable

publications like *Prison Legal News*. Defendants' legitimate concerns of maintaining sanitary conditions, decreasing the risks of fire hazards, and reducing the risks that contraband and weapons will be concealed can be addressed by other means which do not infringe upon the First Amendment rights of inmates and publishers. As discussed herein, Defendants can enforce its current policies that maintain the cleanliness of the facility and reduce the risks of fire hazards. Defendants can also reduce the risks that reading materials can conceal contraband by inspecting all materials that are received via incoming mail, by applying a publishers-only policy to all publications received via incoming mail, and by limiting the number of reading materials that an inmate can possess at any given time.

The publication ban also fails the second factor of the *Turner* test because there are no other alternatives for the inmates or for the Plaintiff. PLN has no alternative means of sending its monthly journal or brochures because those materials are prohibited under the current policy. Although it is theoretically possible for PLN to communicate with the Jail's inmates over the phone or through in-person visits, those options would be cost-prohibitive and it would be impossible for PLN to communicate with all 7,000 of its subscribers through these costly and inefficient methods. Also, there is no alternative available for inmates. As a result of the publication ban, inmates are deprived of topical, relevant information provided by publishers like PLN who send out monthly publications containing current news. It would be impossible for PLN to communicate the breadth of information contained within its monthly publications through other forms of communication such as postcards, phone calls or in-person visits.

The original publication ban likely fails the third factor because lifting the ban should have little to no impact on the penological interests articulated by Defendants and Defendants

have yet to present credible evidence that publications receive via mail have been used to undermine the safety of the facility.

Finally, the ban fails the fourth factor of the *Turner* test because there are existing alternatives that fully accommodate the constitutional rights at issue at a *de minimis* cost to valid penological interests. The other policies in place adequately addresses the penological concerns expressed by Defendants without burdening the First Amendment rights of inmates and those who wish to communicate with those inmates. The current policy represents an exaggerated response to prison concerns and thus fails the fourth *Turner* factor.

2. **Defendants' Postcard-Only Mail Policy Violates the First Amendment Right to Send and Receive Mail.**

The First and Fourteenth Amendments protect both inmates and persons with whom they correspond from undue government interference with their correspondence. *Martinez,* 416 U.S. at 408-409 (explaining that it does not matter "whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication."). On May 29, 2012, the U.S. District Court for the District of Oregon, Portland Division, granted PLN a preliminary injunction, halting the enforcement of Columbia County Jail's postcard policy. *See Prison Legal News v. Columbia County*, No. 3:12-CV-00071-SI, 2012 WL 1936108, at *14 (D. Or. May 29, 2012) (noting that publishers have a First Amendment right to communicate with inmates by mail and that inmates have a First Amendment right to receive mail from publishers).

Walton County Jail's sweeping postcard-only policy fails to satisfy constitutional scrutiny under both *Martinez's* "generally necessary" standard of review applicable to outgoing

inmate mail, and the more deferential "reasonably related" standard applicable to incoming mail announced in *Turner*, 482 U.S. 78 (1987).

a. **Defendants' Postcard-Only Mail Policy is Unconstitutional as Applied to Inmates' Outgoing Mail.**

The First Amendment prohibits interference with inmates' outgoing mail unless (1) the regulation furthers one or more of the substantial government interests of security, order and rehabilitation; and (2) the restriction is no greater than is necessary or essential to the protection of the substantial government interest involved. *Martinez*, 416 U.S. at 413-414; *see also Thornburgh*, 490 U.S. at 413. Defendants' postcard-only policy cannot survive the constitutional scrutiny applied to outgoing mail because it is neither necessary to maintain security, nor is it necessary to effectively allocate resources.

Limiting inmates' outgoing correspondence does little to further Defendants' security interests, and may actually compromise the security of the jail. By severely restraining the inmates' ability to communicate with their friends, family and other outside support systems, the inmates will be less successful in adjusting to incarceration and will be at greater risks for restlessness and violence. In Los Angeles County, California, the Sheriff's Department rejected the use of postcard-only mail policies within that county's detention facilities because it believed that "the mail coming to inmates is as important as their phone calls … If we were to limit the mail, we believe we would see a rise in mental challenges, maybe even violence."[7]

The postcard-only policy also inhibits inmates' successful rehabilitation by undermining their ability to maintain healthy and supportive relationships with friends, family, religious counselors, etc. Postcard-only policies restrict the amount of information that inmates can

[7] Steve Chawkins, *Ventura County to Restrict Inmates' Mail*, LOS ANGELES TIMES, Sept. 23, 2010, available at http://articles.latimes.com/2010/sep/23/local/la-me-jail-mail-20100923 (last downloaded Oct. 7, 2012).

convey in their correspondence, and privacy concerns will likely deter inmates from sharing personal and sensitive information on the postcards. This will likely lead to less meaningful correspondence between inmates and those on the outside. Research has shown that maintaining strong relationships with those on the outside can greatly improve inmate outcomes upon release[8] and it also greatly reduces the likelihood of recidivism in the future.[9]

With respect to the Jail's interest in economic efficiency, courts have held that constitutional rights cannot be quashed so that a governmental agency can simply improve the efficiency of its operations or reduce its expenditures. *Arizona Free Enterprise Club's Freedom Club PAC, et al. v. Bennett*, ___ U.S. ___; 131 S.Ct. 2806, 2824 (2011) ("[T]he First Amendment does not permit the State to sacrifice speech for efficiency."); *O'Bryan, et al. v. Saginaw Cty, Mich.*, 437 F. Supp. 582, 595 (E.D. Mich. 1977) ("[N]either the fact that budgetary changes may be necessary or that minor structural alterations may be required can operate to excuse the violation of constitutional guarantees."); *Battle v. Anderson*, 376 F.Supp. 402, 425 (E.D. Okla. 1974), aff'd in part and rev'd in part, 993 F.2d 1551 (10th Cir. 1993) (outgoing mail restrictions cannot be justified when imposed only for "administrative convenience" and "without furthering any demonstrated interest in the orderly operation of the institution or the rehabilitation of its inmates"). More specifically, reducing costs alone does not and cannot satisfy the *Martinez* standard for outgoing mail. *Martinez*, 416 U.S. at 413 (setting forth an

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[8] Vera Instit. of Justice, Piloting a Tool for Reentry: A Promising Approach to Engaging Family Members (March 2011), available at http://www.vera.org/download?file=3339/Piloting-a-Toolfor-Reentry-Updated.pdf (last downloaded Oct. 7, 2012) (""Research shows that incarcerated people who maintain supportive relationships with family members have better outcomes – such as stable housing and employment – when they return to the community.")

[9] Terry Kupers, M.D., *Prison Madness: The Mental Health Crisis Behind Bars and What We Must Do About It* (1999) ("Research shows that continuous contact with family members throughout a prison term makes it much less likely that a prisoner will be re-arrested and reimprisoned in the years following his release").

exhaustive list of governmental interests that can justify restrictions on inmates' outgoing mail and excluding cost from consideration).

In February 2011, Judge Richard W. Story, United States District Judge for the Northern District of Georgia, reviewed a postcard-only policy under *Martinez's* strict scrutiny standard as it applied to inmates' outgoing mail. *Johnson v. Smith*, 2011 WL 344085 (N.D. Ga. 2011) (Slip Opin. 2/1/11) (*citing Thornburgh*, 490 U.S. at 411). Judge Story determined that an inmate stated a viable claim challenging a jail's outgoing mail policy, finding that "outgoing personal correspondence from prisoners – did not, by its very nature, pose a serious threat to prison order and security . . . Plaintiff may argue that Jail officials could address their concerns by the less restrictive measure of requiring that general outgoing mail be placed in unsealed envelopes . . . instead of altogether limiting the type and size of the medium used for such mail." *Id.*

The postcard-only policy for outgoing mail fails the first prong of the *Martinez* test because it does not further a substantial government interest. In fact, it may actually undermine security by depriving inmates of meaningful emotional support from their loved ones on the outside, and it will likely inhibit successful rehabilitation. The policy fails the second prong of the *Martinez* test because less restrictive alternatives are available. Instead of implementing the postcard-only policy, Defendants could require that outgoing mail be placed in unsealed envelopes or they could simply return to the previous inspection policy which likely addressed substantial government concerns like security. For these reasons, the postcard-only policy is unconstitutional as applied to outgoing mail.

b. **Defendants' Postcard-Only Mail Policy is Unconstitutional as Applied to Inmates' Incoming Mail.**

Defendants cannot restrict inmates' incoming mail unless the regulation is reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89. Defendants' postcard-only

policy is not reasonably related to satisfying security and costs concerns. Defendants are required to present "credible evidence" as to how this policy has improved security and reduced cost. *Beerheide,* 286 F.3d at 1189. Defendants will have a very difficult time presenting credible evidence that restricting all incoming mail to postcards is "rationally related to a legitimate and neutral governmental objective." *Turner*, 482 U.S. at 89-90. In fact, this policy could very well increase security risks. By denying inmates any meaningful contact with their family, friends, religious counselors, AA sponsors, etc., it will likely increase the stress levels of inmates and inhibit successful rehabilitation. If Defendants fail to satisfy the first factor of the *Turner* test, this Court can, and should, strike down the entire policy. *See Caruso,* 569 F.3d at 267.

Defendants' postcard-only policy does not provide an alternative means for the inmates or outside parties to exercise their First Amendment right to send and receive mail. While there are other ways to communicate with inmates, including in-person visitation and collect phone calls, these alternative methods may present insurmountable financial and logistical barriers that make it virtually impossible for inmates to communicate with the outside world. These barriers include the high cost of collect calls or calling cards, and the expense and difficulty of arranging transportation to and from the detention facility.

Postcards provide an insufficient method of communication because they deter speech by limiting communications to the space of a few squared inches and they implicate privacy and confidentiality issues. Although inmates and those with whom they communicate reasonably expect that correctional staff will review traditional letters that are sent and received by the inmates, those individuals would never expect that their correspondence would be viewed by the public at-large. This public exposure is a very real problem when communications are confined

to a postcard because everyone within the postal chain can view the correspondence. The threat of this level of public exposure deters the communication of information that is personal, intimate, legally confidential or otherwise sensitive to the correspondent. Thus, postcards are not viable alternatives to traditional mail.

This case is distinguishable from the case in *Overton v. Bazzetta*, where the Supreme Court found that letter-writing and telephone calls were sufficient alternatives to in-person visitation. 539 U.S. 126, 135 (2003) ("Alternatives . . . need not be ideal . . . they need only be available" and "of sufficient utility that they give some support to the regulations . . . ."). The Court recognized that an inmate's constitutional right to intimate association is neither "altogether terminated by incarceration," nor is it "always irrelevant to claims made by prisoners." *Overton*, 539 U.S. at 131. In *Overton*, the Court found that the prison's restrictive visitation policy was justified because overriding security concerns and the State's interest in protecting children. In this case, there are no security or child protection concerns arising from the exchange of letters between inmates and the public that are addressed through the implementation of the Jail's postcard-only mail policy.

In addition, the postcard-only mail policy reaches beyond the inmates' right to send and receive letters and implicates the inmates' right to communicate with organizations who primarily communicate through publications. Other forms of communication like phone calls, postcards and in-person visitation, are not suitable alternatives because they do not allow the inmates to maintain association with organizations that provide valuable legal, educational, spiritual and mental health resources through newsletters and other publications. This infringes upon inmates' right of association with social, political or other organizations that pose no security risk to the correctional facility. *Pell v. Procurier*, 417 U.S. 817, 822 (1974) ("[A] prison

inmate retains those First Amendment rights [of freedom of speech and association] that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.")

Defendants' postcard-only policy forecloses any opportunity to receive materials from organizations that communicate with their members through newsletters, brochures, magazines, books, catalogs, etc. The postcard-only policy also prohibits inmates from receiving religious-based materials or other meaningful materials that bring spiritual comfort and emotional stability to inmates, and it prevents inmates from being well-informed citizens by prohibiting newspapers and other topical periodicals. *See Mitchell*, 421 F.Supp. at 895. Expensive phone calls, small postcards and in-person visitation privileges are not suitable alternatives for either the inmates or those who wish to correspond or associate with them.

Defendants will be unable to satisfy the third factor of the *Turner* test because the postcard-only policy will likely have no impact on correctional staff or the allocation of limited prison resources. Countless other correctional facilities throughout the country have managed to operate effectively without postcard-only policies and those facilities have not determined that accepting traditional mail undermines the security of the staff or inmates, nor has it proven to be cost-prohibitive to inspect traditional letters. *See Martinez*, 416 U.S. at 414 n. 14 ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction").

Defendants will be unable to satisfy the fourth factor of the *Turner* test because there are at least two reasonable alternatives to the postcard-only policy that accommodate the constitutional rights at issue at a *de minimis* cost to Defendants. First, Defendants can return to the more reasonable mail policy without incurring additional (pre-policy) costs. There is no

indication that a return to the previous policy would result in additional mail traffic beyond that which the Jail has managed for years, nor would it require a significant reallocation of prison resources or impair Defendants' ability to maintain security at the facility. *Overton*, 539 U.S. at 135 (upholding prison's strict visitation policy because the alternative would have caused a significant reallocation of prison resources and undermined prison security).

A second alternative would be for the Defendants to implement a more tailored mail policy that reasonably restricts the mail privileges of inmates who present an actual security threat to the Jail or to the public at-large. This would include inmates who have repeatedly violated the Jail's contraband policy by sending or receiving contraband in the mail, or by using mail to facilitate criminal activity. A more tailored policy would be consistent with the Supreme Court's decision in *Beard*, where the Court allowed very restrictive mail policies for those inmates "with serious prison-behavior problems." *See Beard*, 548 U.S. at 533, 535 (stating that in both *Overton* and *Beard*, "the deprivations at issue . . . have an important constitutional dimension. In both cases, prison officials have imposed the deprivation at issue only upon those with serious prison-behavior problems . . ." and noting that it might have reached a different conclusion if the restrictions constituted a *de facto* permanent ban.)

As presently implemented, Defendants' postcard-only policy is an unlawfully exaggerated response to Defendants' concern about security and allocation of Jail resources. *Turner*, 482 U.S. at 90 ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns.") While Amicus appreciates the fact that many correctional facilities are under immense financial strain, budgetary concerns do not permit the government to wholly disregard the constitutional rights of inmates and those who wish to communicate with them through the implementation of overly

restrictive mail policies. Postcard-only policies severely limit the ability of inmates to maintain healthy and supportive outside relationships which can create undue stress among the inmate population, inhibit successful rehabilitation and lead to worse outcomes upon release. These policies fail to satisfy all four factors of the *Turner* test and thus this Court should find that they unconstitutionally infringe upon the First Amendment rights of both the inmates and those who wish to communicate with them through the most basic form of communication – letter-writing.

IV. CONCLUSION

The Defendants' mail policy – both old and new – places an unconstitutional burden on the First Amendment rights of the Jail's inmates and those who wish to communicate with those inmates. The Jail's mail policy is not rationally related to a legitimate penological concern and there are no alternative means of communication for the inmates and other individuals who wish to communicate with them. For these reasons and those discussed above, the ACLU Foundation of Georgia urges this Court to grant Plaintiff's motion for a preliminary and permanent injunction and enjoin Defendants from enforcing these unconstitutional mail restrictions.

Respectfully submitted this 7th day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed this AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF GEORGIA IN SUPPORT OF PLAINTIFF PRISON LEGAL NEWS' MOTION FOR INJUNCTIVE RELIEF with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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