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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PRISON LEGAL NEWS,)	
)	
Plaintiff,)	3:12-CV-0071-SI
)	
vs.)	April 4, 2012
)	
COLUMBIA COUNTY, et al.,)	Portland, Oregon
)	
Defendants.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL H. SIMON
UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES

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1 (April 4, 2012)

2 **P R O C E E D I N G S**

3 (Open court:)

4 THE CLERK: Your Honor, this is the time set for
5 argument in civil Case No. 12-71-SI, Prison Legal News
6 versus Columbia County, et al.

7 Counsel, beginning with the plaintiff, would you
8 please identify yourself.

9 MR. BLACKMAN: Good morning, Your Honor. Marc
10 Blackman appearing for plaintiff. With me are Jesse Wing
11 and Katherine Chamberlain from the firm of MacDonald
12 Hoague & Bayless from Seattle. They will be carrying the
13 bulk of the weight of the argument for plaintiff this
14 morning.

15 THE COURT: Good morning.

16 MR. KRAEMER: Steve Kraemer for defendants and
17 Greg Roberson also with my office.

18 THE COURT: Good morning. Please be seated. We
19 have as much time this morning as we need, so feel free
20 not to rush through things if you don't need to. Let me
21 ask you: Am I correct in recalling, and if so, has
22 anything changed, that there will not be any live
23 witnesses to present this morning? We are ready to move
24 to argument. Am I correct?

25 MR. WING: That's correct, Your Honor.

1 THE COURT: Okay. Let me share with you briefly
2 some of my thoughts that may or may not help shape your
3 arguments, but you are still welcome to cover and address
4 anything that you wish. I really don't think it will be
5 that effective use of your time to talk about mootness or
6 standing. That said, if you want to cover it, you are
7 welcome to.

8 With respect to the First Amendment issues, the
9 items that I see -- and if I have missed some, by all
10 means alert me to it -- come down to four categories: The
11 restrictions on incoming personal mail. There is a
12 strange definition of "personal," but we will talk about
13 that. But basically the restrictions on personal incoming
14 mail be limited to postcards only. The restrictions on
15 outgoing personal mail being limited to postcards only.
16 The issue of book catalogs, the third item. And the
17 fourth item is magazines. That's with respect to the
18 First Amendment issues.

19 I would assume that most of what we would be
20 talking about would be the application of the four factors
21 of Turner. I am interested, especially from the
22 plaintiffs, on whether or not plaintiffs would agree, at
23 least in concept or in theory, that there could be any
24 limitations, non-content based limitations, on the
25 quantity of mail that comes in, whether that be page

1 limits, if we were to allow more than just postcards but
2 full letter-sized comments or copies of Internet-generated
3 articles, would there be any appropriate limitations on
4 page limits? For example, is it your position that under
5 Turner they could not refuse to receive, let's say, a
6 480-page printout of an Internet article, and you might
7 have to read all 480 pages to see if there is something
8 inappropriate on page 430. So in theory might there be
9 appropriate page limitations?

10 Similarly, might there be appropriate
11 limitations on the quantity of incoming mail on a daily or
12 weekly or other periodic basis? If the answer to that is
13 no, then where in Turner do you get that from and why and
14 what do we do about staff resources? If the answer to
15 that is yes, then where and how should a court draw the
16 lines? So plaintiff may want to address those issues
17 especially. As I said, anybody is welcome to address
18 anything you want, but these are some of the things I have
19 been struggling with as I have been reading the papers.

20 Then with respect to the procedural due process
21 question under the Fourteenth Amendment, I think the
22 parties may want to specifically talk about paragraphs 30,
23 31, 45 and 46 of the most current policy from Columbia
24 County Jail, although as I said, you are welcome to talk
25 about anything you want.

1 Although speaking of the most current policy,
2 let me just ask, and either side can answer this. Feel
3 free to jump in, whoever wishes to. I see that sometimes
4 plaintiffs refer to Exhibit 20 to Ms. Chamberlain's
5 declaration as the most recent or the second revised
6 policy, but that's the one that is numbered J603-R06 dated
7 January 26th, 2012, whereas Sheriff Dickerson attaches as
8 Exhibit F to his declaration an inmate policy that appears
9 to be more recent. It is numbered J603-R07. It is dated
10 February 10th, 2012 as opposed to January 26th, 2012.

11 There are a couple of small differences. Some
12 on procedural due process issues, and one on the
13 magazines. I think one allows three periodicals a day;
14 one allows two. Someone needs to correct me if I'm wrong,
15 but I'm assuming that Sheriff Dickerson's Exhibit F is the
16 current state of the policy at Columbia County.

17 A couple of other issues that you might want to
18 address and that is as follows: I see that there is a lot
19 of evidence that has been presented primarily by the
20 plaintiff in declaration form about inconsistent
21 treatment. Sometimes things are returned; sometimes not.
22 Sometimes the prohibited mail slips are attached;
23 sometimes not. Maybe some magazines are treated
24 inappropriately under the policy. I have a big-picture
25 question that he would like you all to address at some

1 point. That is, what am I supposed to do with that
2 evidence on a facial challenge?

3 As I understand it, we are here, if I have got
4 this right -- and if I have got it wrong, someone needs to
5 correct me -- we are here to evaluate the facial
6 constitutionality of the most recent and current inmate
7 mail policy at Columbia County Jail, which I'm treating as
8 Dickerson Exhibit F unless I'm wrong on that. And so what
9 do I do, if anything? How do I process how things were
10 treated under earlier versions of the policies, either
11 consistently or inconsistently? What do they tell us
12 about how to interpret the current policies? Is that why
13 you are offering it?

14 But also, if the current policy has aspects that
15 are invalid facially, then what use do I make of the
16 inconsistent treatment under older policies? And to the
17 extent that we're talking about a facial challenge as
18 opposed to an as-applied challenge, what do I do with what
19 appears to be in some way an inconsistent challenge?

20 Those are my thoughts right now that I share
21 with you. As I said in the beginning, you are welcome to
22 talk about anything you want; frankly, whatever order you
23 want. Although that said, it is plaintiff's motion, so I
24 will hear from plaintiff first.

25 MR. WING: Thank you, Your Honor. May I ask,

1 having not been in your courtroom before, do you want us
2 to sit or stand?

3 THE COURT: It makes no difference to me.
4 Whatever you are more comfortable with. You can sit down,
5 you can stand, you can walk in the well of the court,
6 whatever you are comfortable with.

7 MR. WING: Thank you very much.

8 First, let me say as a housekeeping matter, we
9 agree that, as far as we can tell, Exhibit F to the
10 declaration of Sheriff Dickerson, as we understand it, is
11 the most recent version of the policy.

12 Your Honor, what is at stake here is the ability
13 of persons who are confined 24 hours a day to communicate
14 with the outside world while they are at the mercy of
15 individuals who are completely in charge of what they can
16 see, hear, review and learn about, and those prisoners
17 have a well-known and well-recognized need under the
18 First Amendment to access a range of material to educate
19 themselves, to learn about their rights, about prison
20 conditions, and many of these prisoners are prisoners of
21 the federal government who, for administrative reasons,
22 are in this jail suffering under a policy that they would
23 not suffer from if they were in the Federal Bureau of
24 Prisons.

25 THE COURT: Is that a relevant distinction? Do

1 the standards change if it is a federal prisoner versus a
2 state prisoner?

3 MR. WING: I don't think the standards change at
4 all. I think it merely illustrates that there is such a
5 differential treatment that -- I think it is over 200,000
6 prisoners in the federal system don't experience this.
7 And the question is, why does the Columbia County Jail
8 need to do this?

9 THE COURT: By the way, when I shake my head and
10 say "okay," it doesn't mean I agree. It means at least I
11 have understood what you are saying.

12 MR. WING: Thank you. Fair enough.

13 I'm going to do my best to negotiate my much
14 more developed notes on each of these topics to veer
15 toward the things you said that you think are useful to
16 turn to.

17 I want to talk about -- very briefly, if I can,
18 to set the stage -- where I think we are at. We have
19 brought both a facial challenge to the policy, but we also
20 have brought a challenge to the practices of the sheriff.
21 The sheriff has declared that the policy that we say
22 exists is not the policy that he says existed. The
23 sheriff has said that the policy that his staff were
24 working under is not the policy that he thought they were
25 working under. And so we challenge, not only the policy

1 itself, but prior policies and the application of those
2 policies. I think that becomes relevant. I will take up
3 a little bit later the question you asked, what do you do
4 with the inconsistency? I prefer not to start there.

5 THE COURT: Fine.

6 MR. WING: Okay.

7 So the defense says in their answer that they
8 have admitted virtually all factual allegations made by
9 the plaintiff, I think with the exception of one person
10 they say was not in the jail. These are what we would say
11 are dozens of unconstitutional acts. They, in three
12 places in their answer, admit "some of their past mail
13 policies violated some of the plaintiffs' constitutional
14 rights." As we sit here today, we don't know what they
15 admit to and what they don't. I think it would be helpful
16 today to hear from the defense what it is that they admit
17 was unconstitutional and what wasn't, as I think that
18 would help direct what we do.

19 We are seeking a preliminary injunction on all
20 of the policies that the sheriff has passed and the
21 practices. That is, the sheriff has, since this
22 litigation begun, just two and a half months ago, issued
23 two new policies. We see the injunction as the admonition
24 about what the jail may or may not do; not merely a
25 determination whether the current policy meets the

1 Constitution. That is, we think an injunction is
2 necessary to say: Here are the guidelines that you may
3 follow. You may not come up with a new policy tomorrow or
4 next week that violates the Constitution.

5 Now, towards this end, I would actually like to
6 go in a little bit different order, which is I want to
7 talk about the outgoing postcard policy first. The
8 defense acknowledges that the outgoing postcard-only
9 policy is still in effect. 100 percent of the mail that
10 leaves the jail cannot be in the form of a letter.

11 THE COURT: When you say 100 percent, that
12 doesn't apply to legal or official mail, I believe?

13 MR. WING: Excuse me. That's right. If we
14 could say as a caveat --

15 THE COURT: We're not talking about legal or
16 official mail.

17 MR. WING: And we have no problem with their
18 policy regarding that. If I made a statement like that, I
19 mean to not apply it to legal or official mail.

20 THE COURT: I understand.

21 MR. WING: Thank you.

22 So it is still in effect. If it is
23 unconstitutional, there is irreparable harm and it needs
24 to be halted.

25 Now, it is important, I think, to start with the

1 test. There is binding Ninth Circuit precedent that this
2 is not the Turner test, and I would like to draw the
3 Court's attention to this. I don't want to belabor it if
4 the Court is already aware of this. But the plaintiff
5 asserted in our opening brief that the threshold of
6 outgoing mail -- to censor it -- is under the Proconier v.
7 Martinez test. We said that at docket 15, 17 and 18. A
8 substantial government interest is necessary and the limit
9 be no greater than necessary. The restriction cannot be
10 any greater than necessary.

11 The defendant didn't really address that in
12 their brief, but they took the occasion in response to the
13 amicus brief that was filed, to spend half their brief
14 telling us why that is wrong. They cited to a Tenth
15 Circuit case, and then they cited to a Ninth Circuit case
16 that they say tells us that the Turner test applies. That
17 case is Witherow v. Paff. Witherow actually says exactly
18 the opposite. The Witherow Court says, "When a prison
19 regulation affects outgoing mail, as opposed to incoming
20 mail, there must be a 'closer fit' between the regulation
21 and the purposes it serves." It cites Abbott. The
22 "closer fit" language is clearly that of the Martinez
23 test. Then the Witherow Court applied Proconier. "We
24 find that the regulation challenged in this case is
25 closely related."

1 Now, if that were not enough, in Barrett v.
2 Belleque, Ninth Circuit, 544 F.3d 1060, on page 1062,
3 overturning a District of Oregon decision, the
4 Ninth Circuit said as follows: "The standards for
5 evaluation of a First Amendment claim concerning outgoing
6 correspondence sent by a prisoner to an external recipient
7 were established by the Supreme Court in Procunier v.
8 Martinez. Procunier is controlling law in the Ninth
9 Circuit and elsewhere, as applied to claims involving
10 outgoing prisoner mail." It then cites to Bradley v.
11 Hall, a 1995 Ninth Circuit case, an Eighth Circuit case, a
12 Third Circuit case and a Fifth circuit case. "It cannot
13 be colorably contended in this case that the Turner test
14 applies to outgoing correspondence."

15 I would note that the articulation of an
16 argument that the defense made, that if it has to do with
17 non-content mail, there is a reason to treat it according
18 to a different test makes no sense. Since the mail goes
19 out of the prison, whether it is content or not content,
20 it doesn't create any greater risk in the jail.

21 THE COURT: Let me show how I was looking at it
22 tentatively. I'm really not that familiar with Witherow
23 or Barrett. I thought that Procunier really was a
24 content-based case. I'm right about that, right? It did
25 involve content restrictions?

1 MR. WING: Yes, because they were saying don't
2 send your grievances.

3 THE COURT: Now, Witherow or Barrett, did either
4 of those involve content-based restrictions?

5 MR. WING: Witherow was not content-based
6 restrictions, and I think Barrett was content-based
7 restrictions.

8 THE COURT: I will take a closer look at
9 Witherow, but here is how I thought this closer fit
10 applied, if one assumes -- and I'm not sure what to do
11 about this. If one assumes that the Turner test does
12 apply to outgoing mail, then I thought all we are learning
13 from this concept of closer fit for outgoing mail is that
14 there is a less of a need for concern about the format of
15 outgoing mail because it is outgoing; and therefore, it is
16 less likely to be rationally upheld -- restrictions on
17 outgoing mail are less likely to be rationally upheld than
18 similar or comparable restrictions on incoming mail, but
19 that still would be the same analysis applied under Turner
20 but recognizing that the same test could have very
21 different outcomes depending upon the circumstances --
22 incoming versus outgoing. I'm hearing you tell me that's
23 really not the right standard to apply.

24 MR. WING: I believe that it is not the right
25 standard --

1 THE COURT: Okay.

2 MR. WING: -- and that the Ninth Circuit has
3 said, not only must the interest be higher, but there must
4 be a closer fit. It is not just a legitimate government
5 interest, but it is an important governmental interest.
6 And secondly, there must be limitation no greater than
7 necessary to achieve that.

8 THE COURT: And has the Ninth Circuit said that
9 in the context of a content-neutral regulation of outgoing
10 mail?

11 MR. WING: I believe that's what Witherow is all
12 about.

13 THE COURT: I thought Witherow was a Tenth
14 Circuit case.

15 MR. WING: Witherow was a Ninth Circuit case.

16 THE COURT: I'm sorry, okay.

17 MR. WING: I have the cite.

18 THE COURT: Please.

19 MR. WING: 52 F.3d 267.

20 THE COURT: Okay. As you can tell, I know some
21 of these cases, but not all of them. I will take a closer
22 look at Witherow. Thank you.

23 MR. WING: And Barrett, please. Can I give you
24 the cite, please? The defense really didn't argue this.
25 We haven't had the chance to brief this in more detail.

1 THE COURT: Barrett, I wrote down 544 F.3d 1060
2 at 1062.

3 MR. WING: Yes. I guess I told you already.
4 Barrett is 2008.

5 THE COURT: And Witherow was when?

6 MR. WING: 1995.

7 THE COURT: And Witherow is Ninth Circuit, huh?

8 MR. WING: Yes. I will note that Barrett also
9 quotes Bradley v. Hall --

10 THE COURT: I got that.

11 MR. WING: -- a 1995 case.

12 THE COURT: Okay.

13 MR. WING: All right. Let me see where I'm at.

14 THE COURT: By the way, to give both sides a
15 heads up on how I approach this, as long as we have time,
16 and I'm sure this morning we will have time, I am not
17 going to follow a rule where plaintiff argues, then
18 defendant argues and plaintiff gets the last word and
19 we're done. I am going to let people go back and forth.
20 After plaintiff's opening comments and defendants' opening
21 comments, we can go back and forth until everybody has
22 said their piece, at least twice. Three times, I will
23 probably put a limit on it.

24 MR. WING: Thank you.

25 Your Honor, turning to the merits of the

1 outgoing mail. I would like to draw the Court's attention
2 to a Northern District of California opinion. Harrison v.
3 Institutional Gang of Investigations. I can give you the
4 cite, but let me first tell you what this is. The Court
5 said in 2010 that applying Barrett -- that is the
6 important governmental interest test in prison -- the
7 Court said, "The defendants have the burden to prove that
8 the confiscation furthered an important government
9 interest and to prove that the confiscation of the
10 materials was no greater than necessary to protect that
11 interest."

12 So I point out it is not merely a different
13 standard, but the Northern District of California
14 recognizes that the burden is on the Government. I have
15 not seen other cases that address this issue, but that
16 further illustrates the need for the different treatment.
17 I have a Westlaw cite for that. 2010 WL 653137.

18 The U.S. Supreme Court in two different cases
19 tells us that the burden of proof on a preliminary
20 injunction is the same as it is at trial. So the burden
21 would be on the defense in a motion for preliminary
22 injunction. That's Ashcroft v. ACLU in 2004 and
23 Gonzalez v. O Centro Espirita in 2006.

24 So what is the important governmental interest
25 that the Government says is served here? They say, "The

1 postcard-only policy allows the jail staff to attend to
2 other equally important constitutional duties and
3 administrative functions."

4 Now, if that were the standard, that could be
5 used to violate all kinds of constitutional rights. If
6 the test is simply, could we be doing other things instead
7 of this thing, then it would work always.

8 THE COURT: And that's why I'm concerned as to
9 whether there is going to be any limit to the plaintiff's
10 position on this or is there ever any position that the
11 defendants can say that what you were asking us to do was
12 so burdensome that we're being called away from our other
13 important functions.

14 MR. WING: That's a fair analysis. So Prison
15 Legal News v. Cook and Prison Legal News v. Lehman says,
16 well, that clearly isn't the standard. It isn't does it
17 affect your time, and they point out that all the mail
18 must be handled in some fashion.

19 So it is not meaningful to say, well, because we
20 have to handle it, we choose to handle it by censoring it
21 as opposed to admitting it or reviewing it. The Court
22 says is the mechanism by which the defense is handling it
23 rational for the purpose -- in this case the limitation is
24 no greater than necessary. What the Courts say there was
25 the prison already has a policy -- that's the Washington

1 Department of Corrections and Oregon Department of
2 Corrections -- that says a prisoner may not collect more
3 than a certain amount of printed material in their jail
4 cell.

5 So it seems to me that the law is already clear
6 that there can be limits on the amount of mail that is
7 collected by somebody, and the jail could say to a
8 prisoner: You can't have this because you already have
9 too much in your cell. They may also say: We're going to
10 put this in your property, and when you get rid of
11 something else, then we will look at it.

12 So I think the Court already says, yes, there
13 are ultimately some limits, but I'm not sure the Court
14 needs to reach what those limits are here. It is simply
15 enough to say that there are other acceptable policies
16 that can accomplish the goal that the defendant claims it
17 is trying to achieve.

18 The risks here are that it is some individual
19 deputy who is sitting and looking at something and saying,
20 ah, this is too much. And what is the criteria for that?
21 I think if the jail came up with a policy, then we would
22 all be able to evaluate whether they are successfully
23 implementing what the Ninth Circuit said was okay in
24 Prison Legal News v. Cook or Prison Legal News v. Lehman.

25 Right now they have no other policy that the

1 Department of Corrections have adopted to achieve that
2 goal, which they could.

3 The defense has not explained why such a policy
4 would not work, even in face of the Ninth Circuit
5 precedent. The defense, unlike regarding the incoming
6 mail, offers no statistics or estimates or even
7 speculation about the effect of outgoing mail on its time.
8 They submitted two declarations from the sheriff and
9 from --

10 THE COURT: Sergeant Cutright.

11 MR. WING: Thank you. They don't say how much
12 they spent inspecting outgoing letters, how much time they
13 save from restricting this to postcards. Whether they've
14 had security concerns that are addressed by this record is
15 bare. Given the fact that I don't think that accomplishes
16 what is necessary for the defense, even under the Turner
17 standard, it can't possibly satisfy their burden under the
18 Procunier test.

19 I would also note that their policy doesn't seem
20 to suggest that there is any routine inspection of the
21 outgoing mail at all. The only policy that I see is in
22 Docket 32-6 at page 12. That's Section 36, which says
23 essentially that there does not appear to be routine
24 inspection, but a supervisor may authorize the inspection
25 of the outgoing mail affirmatively.

1 That suggests that there is not a reason to
2 think there is a problem, a known problem, or that the
3 postcard policy is solving any problem since they are not
4 spending time reviewing outgoing mail on a regular basis.

5 I would like to answer any questions you might
6 have about the outgoing mail. I was going to turn to --

7 THE COURT: I will not be shy about interrupting
8 with questions.

9 MR. WING: Thank you.

10 THE COURT: Thank you.

11 MR. WING: So from our perspective, shifting
12 from the outgoing mail to incoming mail means we are now
13 clearly within the Turner test. The parties are not in
14 disagreement over that.

15 Well, what is the policy that we're seeking to
16 enjoin? We say that the defense says all incoming
17 correspondence, except legal and official mail, must be on
18 a postcard, period.

19 Now, you noted in your initial remarks that they
20 try to claim -- this is only regarding personal mail, but
21 personal mail is defined to say, first of all, postcards,
22 which is a little bizarre because --

23 THE COURT: My sense is they clearly intended to
24 not have full-sized correspondence and letters, but that
25 doesn't fit within the definition of "personal mail,"

1 because "personal mail" is defined as postcards.

2 MR. WING: Right.

3 THE COURT: I kind of see that point. I don't
4 think that necessarily rises to a constitutional issue,
5 but they are trying to limit incoming mail whether from
6 family, from friends, from businesses, solicitations -- I
7 see all of that -- to postcard size. I don't think, by
8 the way, and I think your briefs may have said this, but
9 I'm not positive. I don't think that the postcard
10 limitation applies to magazines and junk mail and books.
11 I do think that catalogs is falling through the cracks,
12 and that's a different issue. But I don't think anyone is
13 expecting that only magazines that fit on a postcard can
14 come in.

15 MR. WING: Because they have allowed -- the
16 definition of "periodicals" appears to address that. I
17 think that in the past there have been censorship where
18 they have identified that a magazine is not a postcard;
19 and therefore, it is not allowed in. But I agree with you
20 that this current policy does not seem to say that.

21 THE COURT: Sure. I don't see the evidence in
22 which I can make a finding that they are interpreting
23 their policy to say that a periodical or a magazine must
24 be on a postcard.

25 MR. WING: Their current policy. I think we

1 concede that.

2 But as you have noted, personal mail does, by
3 definition, prevent delivery of mail from businesses. The
4 defense seems to say, well, their current policy allows
5 PLN's mailings. But it doesn't. The fact that the jail
6 is saying that they are allowing PLN's mailings now raises
7 a question about the legitimacy of the policy that they
8 have created here.

9 THE COURT: Don't we distinguish different types
10 of PLN mailings? One is the magazine.

11 MR. WING: Yes.

12 THE COURT: That would come under the magazine
13 provision. Then I also think you are talking about other
14 solicitation, fund-raising requests, requests for
15 subscriptions, things like that, and that would fit under
16 the postcard-only policy as I read it.

17 MR. WING: Yes. So our view is that -- their
18 policy says that they would censor everything other than
19 our magazine, our journal. They say that's not true. And
20 I don't think that's a legitimate interpretation of the
21 policy, which makes this policy unconstitutional.

22 THE COURT: My big concern about the
23 postcard-only policy -- on plaintiff's side -- is I can
24 understand the value of wanting to cut out or print off an
25 Internet-generated article and send it to a family member

1 or friend. I am really worried about the 480-page
2 Internet article and the burden that that would place on
3 the institution in terms of either person power or in
4 terms of security of having to go through all 480 pages to
5 see whether contraband has been interlaced on page 430 or
6 whether there is a paragraph on estate planning on page
7 430, because I just don't see the Constitution requiring
8 them to read all 480 pages that come in.

9 Am I wrong?

10 MR. WING: I am pondering your question. I can
11 envision a policy that, again, might limit how frequently
12 a prisoner receives something of size or possibly the
13 length. It might be possible that somebody has to send
14 such an article over the course of more than one day so
15 that the burden is less. I don't know where one would
16 draw the line, but I would have to concede that there
17 would be a line in which that would be necessary. Now,
18 the Court in Clement didn't discuss that.

19 THE COURT: Right.

20 MR. WING: I realize they put it off for another
21 day so you have to figure it out.

22 THE COURT: Or I can put that off for another
23 day too.

24 MR. WING: I think, actually, there is a good
25 reason for you to put it off because you have not been

1 faced with any factual circumstance that sharpens the
2 issue for you. But I do agree that's a problem that might
3 result in a legitimate limitation.

4 THE COURT: I'm just thinking that if I were to
5 agree with some portion of the plaintiff's arguments on
6 the incoming mail policy, I don't think I could phrase it
7 or should phrase it in such a way to be limitless.

8 MR. WING: I guess that I would suggest,
9 Your Honor, as Clement defines the issue, it is really
10 that you cannot limit something being sent in to the
11 prison simply because it is printed off from the Internet.

12 THE COURT: I agree. I think that's what
13 Clement says, but they leave open the possibility of these
14 lengthy articles.

15 MR. WING: Yeah. So I think we would be seeking
16 an injunction along those same lines. That doesn't have
17 to say that they could never limit something because of
18 its length, but certainly that's not what they have asked
19 for.

20 THE COURT: By the way, I take it there is no
21 challenge at all as to binders and fasteners. They could
22 have a policy that says no staples, no binders, no binder
23 clips. That's not being challenged; am I correct?

24 MR. WING: It is not being challenged but nor
25 have they claimed that that's the reason why they rejected

1 anything. And if they were to start doing that, we might
2 be back in front of you. I think there has been for very
3 long time materials that have been sent into jails that
4 have staples. The binding, I'm less sure about. I don't
5 think that's before you now.

6 THE COURT: I'm just trying to get a handle on
7 these issues and sort of understand where the limitations,
8 if any, might lie.

9 MR. WING: Okay. So the incoming policy can
10 only save the defense time if there is a substantial
11 reduction in the amount of speech. It seems quite
12 evident. They claim that the amount of savings that they
13 have is 30 to 60 minutes a day. Now, that's not a great
14 deal of time for the First Amendment. And as we've
15 pointed out, there is a series of steps, if you were going
16 to censor somebody's mail, that you would have to go
17 through, and it seems like that would be eaten up pretty
18 quickly.

19 And if the same amount of speech were to come
20 through the door, whether on a postcard versus a letter,
21 it is hard to conceive, just if you walk through the
22 steps, that if you have to take a stamp off of 20
23 postcards versus a five-page letter, you are taking off 20
24 stamps versus one stamp. You are looking at the same
25 amount of print to determine whether or not they have

1 written something about an escape plan. If you are
2 censoring the letter, you are also writing a mail notice.
3 It is hard to see where the savings occur.

4 So the natural conclusion -- we have not
5 conducted discovery yet -- is that people are giving up.
6 As the declarations from people state, from our witnesses,
7 they state: This is too much of a hassle. I can't write
8 something meaningful to my spouse on a postcard that
9 everybody is going to see. So they just stop sending.
10 The defense points at its conclusion: See, we save time.
11 And we say: That's because you have chilled speech.

12 THE COURT: So your argument is, in terms of
13 peeling off a stamp, if anything, you require more
14 postcards, so you have more stamps to peel off. So that
15 can't be the basis. An argument would be that opening an
16 envelope and looking inside the envelope is de minimis;
17 and therefore, what we are really talking about the time
18 saving is the reading of the content, the reading of the
19 words. And there, if you can send 10,000 words in a
20 number of postcards versus 10,000 words in a number of
21 sheets of paper, there is no savings of time. Therefore,
22 the time savings must come in the chilling of the speech
23 because people, as some of your declarants have said,
24 don't want to say as much in a postcard, don't want to
25 write a postcard. Maybe the child can't draw a picture on

1 a postcard as they can on a larger piece of paper, or they
2 can't send a copy of their grades or a greeting card.

3 Do I understand that correctly?

4 MR. WING: That's right. We think this is a
5 hard argument to refute and that the defense possesses all
6 of the evidence but has not come forward with anything to
7 support it.

8 THE COURT: And in fairness to the defense right
9 now, obviously that's what I'm expecting they will spend
10 some time addressing in their arguments.

11 MR. WING: Okay. I want to draw the Court's
12 attention to the opinion in Crofton v. Roe, which was a
13 censorship decision in 1999 which involved the Washington
14 Department of Corrections, the Ninth Circuit said, "The
15 State did not offer any evidence that it actually
16 experienced any of these problems in connection with its
17 publications or attempt to explain in what way
18 publications by a particular characteristic of their own
19 threatened security."

20 This just illustrates the need for the
21 Government to actually come forward with something, not
22 theorize. They have plenty of experience with this. They
23 should be able to relatively easily put their hands on
24 evidence to present to the Court.

25 I would also point out that if the goal is to

1 keep out contraband, and they illustrate things like drugs
2 or poison, 24 stamps is 24 opportunities to put drug or
3 poison under a stamp. A letter with one stamp, only one
4 opportunity. It is irrational to suggest that there is
5 fewer chances.

6 THE COURT: Is it easier to hide things, though,
7 in the interior of an envelope, whether it be needle at
8 the bottom of the envelope or the folds of the envelope,
9 things like that? I am also concerned that I haven't seen
10 evidence of that, and I get that point. But isn't it not
11 completely irrational to say things can be hidden in an
12 envelope than a postcard, also biologicals too?

13 MR. WING: We haven't had anybody explain how
14 this works on the record, but it seems to me that most
15 things that would be of a serious nature other than drugs
16 or biologicals would simply fall out of a letter. It is
17 quite hard to put a knife or anything that is hard in a
18 letter that wouldn't just simply fall out. So then we are
19 talking about the amount of space. It is hard for me to
20 imagine that, other than let's say soaking the letter,
21 there is really any effective way to try to hide something
22 in the folds of a letter.

23 Now, if the sheriff thinks that that truly is
24 the case, then it certainly seems possible that the
25 envelope itself could be crumpled, folded, twisted --

1 whatever -- and that that censoring all letters on the
2 chance that this might happen with some envelope seems
3 very speculative, and it could be handled in a much more
4 protective way of the First Amendment.

5 THE COURT: I'm still struggling with, well, if
6 a No. 10 envelope is allowed, then what about an eight and
7 a half by eleven envelope where some limits on those
8 things is part of the concern? Also, it really is easier
9 to put biologicals in an envelope that would cause risk to
10 the security of jail and prison officers in a way that you
11 can't do that in a postcard, at least not as easily.
12 There, it is much more likely that those problems will be
13 discovered at the post office, not at the prison. If
14 someone wanted to cause injury to a correctional officer,
15 there is that opportunity.

16 See, one of the things I have in mind right is
17 another one of my cases, granted on the criminal side of
18 the docket, is the defendant in Vancouver who was recently
19 arrested and indicted and accused of sending the powders
20 to Speaker Boehner and others. It is a different side of
21 my docket, but it is one of the things I'm thinking about
22 when I think about envelopes versus postcards.

23 MR. WING: It is a fair question. I don't have
24 the cite in front of me. I think we did cite in our
25 materials a Third Circuit decision specifically about

1 anthrax. The Third Circuit there said: Hold on a second.
2 It is true anything is possible, but we can't have as a
3 general rule something based on a theoretical possibility
4 that some person might include anthrax in an envelope.

5 So it is not irrational to have that concern,
6 but if our nation adopts a postcard-only policy based on
7 the possibility that one or two people might do that, I
8 think that's an exaggerated response, even though there is
9 a potential concern there.

10 THE COURT: Thank you.

11 MR. WING: I do also want to point out that,
12 although the defendant cites its policy as a non-content
13 based policy, they actually put in something in their
14 brief, Docket 29 at page 15, that it is reasonable to
15 treat personal mail different than business mail because
16 personal mail might be more likely to contain prohibited
17 topics, like threats, blackmail, distortion. That's a
18 content-based decision. If they have to read everything,
19 now they are turning this into a viewpoint discrimination
20 case.

21 THE COURT: I also didn't see any distinction in
22 the policy between business mail and personal mail with
23 respect to the postcard-only issue.

24 MR. WING: Yes. So we say that prohibiting all
25 letters is not a common sense way to save time and reduce

1 contraband. There is a whole series of decisions from the
2 Ninth Circuit where prisons have tried banning all
3 subscription mail, third-class mail, gift subscriptions.
4 They go through this gamut, and the Court has repeatedly
5 said -- and we don't know why the law enforcement at jails
6 don't get it -- that these kind of arbitrary
7 classifications are not rationally related to achieving
8 the legitimate goal of reducing contraband.

9 And what is the cost? The cost of the
10 First Amendment is quite high. It chills speech
11 altogether. There are those people who don't write at all
12 because of the hassle or the loss of privacy. We have
13 Dockets 36 through 40 and 53, declarations that say that.

14 There is not just the hassle, but the cost to --
15 in many cases -- people who are paying a criminal defense
16 lawyer and may have other debts to go out and buy
17 postcards and postage and spend a bunch of time to write a
18 bunch of postcards is really too much to bear.

19 There is the confusion ID. You can send as many
20 postcards as you want, but then you have to number them
21 and expect the U.S. Postal Service to deliver them the way
22 you would like to receive them, or you are getting pages
23 17 and 20 and 10 and 4. It is not an effective or
24 meaningful way to communicate.

25 THE COURT: And I am concerned about the expense

1 too. If it takes ten postcards to have the same amount of
2 content of a two or three-page letter, we are talking
3 about three and a half dollars or so versus 46 cents, give
4 or take.

5 MR. WING: Indeed. I might add that this
6 applies to the outgoing mail as well; that is, the
7 prisoners who in many cases are indigent are limited to
8 two postcards. So there is a limitation.

9 Then, of course, there is the well-recognized
10 harm to rehabilitation. For those people who have been
11 convicted, staying in touch with their families, figuring
12 out how to manage their lives is harmed by this.

13 So what can the jail do, because the jail must
14 find a way to manage the contraband. Well, the first
15 thing you can do is do what it used to do. Not so very
16 long ago it allowed letters. It could simply go back to
17 what it did before.

18 We have provided copies of the policies for the
19 Multnomah County Jail, the Lane County Jail, the King
20 County Jail, the Oregon Department of Corrections, the
21 Washington Department of Corrections, the Federal
22 Bureau of Prisons. One of the illustrations of an
23 exaggerated response is that most other well-known
24 institutions don't have to have this limitation. What is
25 so special about the Columbia County Jail that it can't

1 manage mail -- letters -- which have been used for
2 hundreds of years to communicate in and out of jail.

3 As the Ninth Circuit said in *Bradley v. Hall*, it
4 takes little imagination -- little imagination -- to find
5 constitutional ways to run a prison or a jail. They just
6 have not exercised common sense in this situation to limit
7 contraband and show that there is a problem.

8 Now, we have already talked about, I think,
9 about the junk and the bulk mail. Unless you have
10 questions, I will simply point out that it doesn't seem to
11 me that it is remotely rational to have a policy that
12 allows in junk; that is, in order for it to be admitted it
13 must have no value whatsoever, by definition. But if the
14 catalog or the brochure or the solicitation letter has
15 value, then it is not allowed in. It just doesn't make
16 any sense on its face.

17 And what the jail is saying is: Well, we
18 consider your material as junk, so it gets in. Now, that
19 means that some mail handler, some clerk, some deputy is
20 making the decision what has value and what doesn't. And
21 if we look at cases along the lines of the vagueness and
22 overbroad criteria, when somebody is seeking a parade
23 permit, for example, there are a whole lot of cases that
24 talk about too much discretion makes a policy
25 unconstitutional.

1 As to the junk mail policy, that seems clearly
2 to fall within those line of cases. You cannot have
3 individual clerks deciding whether something has value or
4 not. In this case, if it doesn't have value, it gets in.
5 If it does have value, it doesn't get in.

6 THE COURT: Help me analytically here.
7 Obviously what they allow in terms of the junk mail to
8 come in, that's not constitutionally infirm as I see it.
9 The problem is the things that are excluded that don't
10 fall within the junk mail policy, which could include, as
11 you say, business brochures and other solicitations and
12 also book catalogs.

13 MR. WING: Yes, that's right. The very
14 definition here is violative of PLN v. Lehman, which said
15 you must allow catalogs in. The Ninth Circuit didn't say
16 "if they have value or don't have value." So this a clear
17 violation of this Ninth Circuit ruling.

18 THE COURT: Right.

19 MR. WING: Okay.

20 THE COURT: By the way, I don't know if you have
21 gotten to the magazines or periodicals yet. If so, I have
22 a question. If not, I'll wait.

23 MR. WING: Please go ahead and ask your
24 question.

25 THE COURT: On the magazines, I see that they

1 have restrictions. It used to be two per day; now it is
2 three per day. Is that part of plaintiff's challenge
3 here? If so, I would like to you tell me why and talk
4 about it.

5 Also, their definition of a "periodical or
6 magazine" requires four publications per year. I think
7 that PLN easily satisfies that. But is that part of PLN's
8 challenge as well? So talk to me about both the substance
9 of that as well as whether PLN has standing as assert that
10 issue.

11 MR. WING: So we have not contended that the
12 three periodicals a day violates the law. If we were to
13 be faced with the facts where it so happened that a fourth
14 periodical arrived one day, we might take the position
15 that the jail should not be returning it and that maybe it
16 should set it aside and let it be dealt with the next day.
17 Prisoners don't have control over when periodicals arrive.
18 But we really don't have those facts in front of us.

19 As to the separate question, the definition of
20 "periodical," it is a strange and, we think, arbitrary
21 definition. What is the justification for saying that a
22 periodical is only allowed if it is sent a certain number
23 of times in a year, whether that be four or two or
24 fourteen, and why must it be regular? And who decides if
25 it is regular? Does that mean that a poetry magazine that

1 is run by creative folks who produce it five times a year,
2 but it doesn't get out the door on a regular basis, that
3 gets to be censored? It seems an irrational basis. The
4 Government might say: Well, this is one way to determine
5 whether the organization is legitimate, but that doesn't
6 strike me as a rational basis for determining that it is
7 legitimate.

8 THE COURT: The example that came to my mind is
9 the Georgetown Law Journal annual issue on the summary of
10 criminal law and criminal procedure. I think you don't
11 have to subscribe to the entire Georgetown Law Journal to
12 get just that one issue. You can subscribed to that once
13 per year, and it is only issued once per year.

14 MR. WING: I think that's right. I think there
15 are sports annuals. There is Life Magazine. They come
16 out with their "Best of the Year." There might be a
17 number of circumstances where less than once a year or
18 irregular would be censored on an arbitrary basis.

19 THE COURT: So that part of the magazine policy
20 is part of PLN's challenge in this case?

21 MR. WING: Yes, it is.

22 I wanted also to sort of leave you with this
23 thought about the incoming/outgoing mail. Would we ever
24 have postcards from Birmingham Jail; 55 postcards from
25 Martin Luther King handwritten telling the world about the

1 destruction of society and the need for a civil rights
2 movement if Martin Luther King were to sit in his cell
3 trying to collect postcards to write that?

4 I printed off a copy of it from the Internet.
5 It is 17 pages typed. It is quite an important piece of
6 literature and political and social commentary and
7 illustrates in kind of stark terms what the defense is
8 doing.

9 As to irreparable harm, I do want to also
10 identify for the Court that after Winter, the U.S. Supreme
11 Court decision, the Ninth Circuit retained its so-called
12 sliding scale. It sounds like you are familiar with that.

13 THE COURT: I am.

14 MR. WING: We think that strongly favors the
15 plaintiffs here with a strong merits case, a strong
16 hardship and public interest.

17 THE COURT: Do you want to turn to procedural
18 due process? Although it probably can be written better,
19 doesn't paragraphs 30, 31, 45 and 46 and the attached
20 prohibited mail notice provide all the process that really
21 is due?

22 MR. WING: We are on the same page here. I just
23 literally pulled up my due process. I don't think so.

24 THE COURT: Tell me why.

25 MR. WING: Well, first of all, I read this

1 entire policy several times, and I have been unable to
2 find a due process provision that applies to outgoing
3 mail. That's the first problem. I just don't see
4 anything that provides due process to the inmate and to
5 Prison Legal News or any other recipient as to outgoing
6 mail.

7 THE COURT: Now, I'm kind of missing your point
8 here because, as I understand it, it is a blanket rule
9 that says all outgoing mail must fit on a postcard. They
10 are not asking for -- you are right -- they are not giving
11 appeals from that. And if that's constitutional, then it
12 is constitutional in the First Amendment, right? If it is
13 unconstitutional, then it is unconstitutional. Where does
14 procedural due process fit into that? Aren't we starting
15 down a dangerous path to say: Well, we will prohibit
16 outgoing mail, unless it is on a postcard -- unless it
17 fits through our appeal process; unless it is approved by
18 an appeal process.

19 MR. WING: I think it is a twofold answer. If
20 it is unconstitutional, then the outgoing mail has to
21 allow letters, but totally apart from that, the jail may
22 determine that it is going to censor outgoing mail for
23 other reasons. It has a whole long list of things that
24 they might believe violate policy. And there is no due
25 process for addressing that. So, for example, let's

1 suppose that the jail, we think irrationally, decides that
2 requesting a subscription to Prison Legal News violates
3 some policy. Well, Prison Legal News would never know
4 that that prisoner wrote a letter that was censored asking
5 for a Prison Legal News book or magazine or a
6 subscription.

7 THE COURT: Are you saying that the prisoner
8 wouldn't know that his outgoing mail was censored?

9 MR. WING: I believe that's correct, and we
10 believe that the recipient, as Proconier very clearly
11 declares, both the sender and the recipient -- no matter
12 who is sending and who is receiving -- is entitled to due
13 process notice. There are no provisions for due process
14 for outgoing mail.

15 THE COURT: That's interesting. I have not
16 thought about that.

17 MR. WING: So that's the first point. We think
18 it is plainly unconstitutional for that reason.

19 Secondly, this is a very confusing policy, and
20 it is not just my opinion. Last month Lucy Lennox sent in
21 eleven pieces of identical mail. She received back three
22 of those. Of those three, one of them simply said "return
23 to sender," with no explanation, no opportunity to be
24 heard, and the other two stated a reason.

25 Nobody has any idea, from our perspective, what

1 happened to the other eight. Were they delivered contrary
2 to the policy? Were they not delivered and they are
3 sitting in the property room? Were they thrown out in the
4 trash? So apparently the jail is having a hard time
5 implementing this confusing policy.

6 THE COURT: Now, that's interesting. Let me
7 share with you -- this goes back to the comment I made
8 earlier. At least with respect to incoming mail, and I
9 haven't given much thought to outgoing mail on procedural
10 due process. But I will.

11 With respect to incoming mail, I didn't see the
12 policies, especially the four paragraphs I have
13 identified, as very confusing, but I do see your argument
14 on inconsistent treatment. That's why I'm asking: What
15 do I do with the inconsistent treatment? I'm hearing you
16 say: All right, I should consider that as evidence that
17 the policy is confusing. All right; maybe. But what if I
18 don't find the policy confusing, but I'm concerned about
19 inconsistent treatment?

20 MR. WING: Okay. Then you are dealing possibly
21 with the "as applied," and it would still call for an
22 injunction that says you may not apply these policies on
23 an inconsistent basis. You need to get your house in
24 order and make sure that due process occurs whenever mail
25 is censored. I don't think that relieves the Court of an

1 obligation to tell the defendant you are not applying your
2 policy.

3 But if I may --

4 THE COURT: Sure.

5 MR. WING: -- I have some examples of where I
6 think there are problems with the due process policy as it
7 goes to incoming mail. I have identified nine places
8 where I think there are due process provisions. I will
9 rattle them off, if that's okay with you.

10 THE COURT: Slowly.

11 MR. WING: Okay. Section 21.

12 THE COURT: You say "section;" I say
13 "paragraph."

14 MR. WING: Paragraph. I mean numbered sections.

15 THE COURT: 21.

16 MR. WING: 24.

17 THE COURT: Okay.

18 MR. WING: 26, 27, 30, 31, 45, 46 and the
19 prohibited mail notice, which is an attachment.

20 THE COURT: All right. I'm especially
21 interested in hearing why you think 30, 31, 45, 46 and the
22 prohibited mail notice are confusing.

23 MR. WING: Okay. Would you mind if I take a
24 lead in, because I think the earlier ones illustrate that?

25 THE COURT: No, that's fine. Do whatever you

1 want. But I tend to agree with you that some of those
2 early ones are very confusing, but I thought it was all
3 clarified and the appeal rights were set forth. But when
4 one looks at 30, 31, 45 and 46 and the prohibited mail
5 notice, I just wasn't sure what to do with that
6 conclusion.

7 MR. WING: Okay. So 21 says that the sender and
8 the inmate will receive notice via paragraph 31.

9 24 says that the sender or the inmate will
10 receive notice via paragraph 31.

11 Paragraph 26 doesn't mention paragraph 31. Does
12 that mean that paragraph 31 doesn't apply, or is it just
13 an oversight?

14 Paragraph 27 says notify the sender only via
15 paragraph 31.

16 Paragraph 30 says normally the staff should
17 confiscate postcards and letters and provide notice via
18 paragraph 31.

19 Paragraph 31 says the opposite: Don't
20 confiscate the postcards and the letters. Return them.

21 Now, if you were a staff member, what would you
22 do? You might read one and do that, or you might read the
23 other and do that. Maybe some days you would do one;
24 maybe some days you would do the other.

25 Paragraph 30 -- this may seem like small

1 matters, but they really raise questions -- says send a
2 prohibited mail slip. There is no identified mail slip.
3 There is a mail notice. Is that a different form or the
4 same form?

5 Paragraph 31, which is supposed to be the way in
6 which the jail says here is how you do it, says send a
7 "notice of right to reconsideration". What is that? It
8 does not talk about sending a prohibited mail slip or a
9 prohibited mail notice.

10 I think this is far too confusing to be
11 constitutional. Some of the censorship without due
12 process that we have seen illustrates that problem. We
13 have had the sheriff declare he didn't know people were
14 using stickers. He didn't know they were censoring. It
15 is a particular concern here where this is the considered
16 effort -- after the jail has been sued -- to have so many
17 provisions that could leave both the jail staff and the
18 public confused as to the proper way something should be
19 handled. I think that if there is a sufficient risk that
20 constitutional due process will not be given, because the
21 policy is confusing and contradictory, then it rises to
22 the level of being constitutionally vague.

23 I will also point out that the prohibited mail
24 notice says to go to the Web page for information. We
25 brought with us a copy of the mail page, which was printed

1 off yesterday before we left Seattle, which says it is
2 pending.

3 THE COURT: For disclosure to everyone, I
4 checked a couple of days ago, and that's what I saw too.

5 MR. WING: Okay.

6 THE COURT: Let me ask this: I notice in the
7 defendants' response -- I'm not sure which declaration.
8 It might be Mr. Roberson. They attach the Spokane, I
9 believe, consent decree and said that has less process
10 than here. I take it your argument is not necessarily the
11 quantum of process but the clarity of process and the
12 inconsistent explanations as the problem. Am I correct?

13 MR. WING: Yes, with a footnote, if I may. We
14 didn't approve of that policy. We signed a consent decree
15 which essentially, as the Court order says: You must
16 provide due process notice. After that was done, Spokane
17 County went and wrote their policy. So we didn't endorse
18 it; we didn't say this is fine.

19 THE COURT: I see.

20 MR. WING: And so I don't think that can be used
21 as sort of an acknowledgment on our part that that's just
22 fine. But I will note that the Spokane policy does
23 provide due process notice for outgoing mail, and I think,
24 while we might think it is not enough, it certainly is
25 clear and concise and you can find it and relatively easy

1 to apply is my view on that.

2 THE COURT: Okay.

3 MR. WING: Let me see what else you asked about.

4 I think we have discussed generally what our views are on
5 how to apply the inconsistent practice; that it really
6 goes to the vagueness. It goes to the ability to
7 implement the policy. And if it is too difficult to
8 implement; and therefore, there is a likelihood of
9 violations in the Constitution, then it is
10 constitutionally vague and confusing.

11 I don't have a real need to discuss the magazine
12 censorship right now. It seems very clear that the
13 magazines need to be delivered. The current policy
14 doesn't say that they are going to censor the magazines.
15 This might go more towards the evidence that we think
16 shows the lack of mootness, and I don't plan to get into
17 that at this point.

18 The sheriff has done so many things that show
19 either he is not paying attention to what is happening
20 with the mail, that the policies and practices have been
21 very inconsistent, and there have been lots of violations.
22 We think it is essential that there be a preliminary
23 injunction regarding the magazines because this sheriff
24 needs to know that this is a top priority, and it would be
25 a court order. It would be a violation of a court order

1 as opposed to his own policy. His own policy seems to
2 have meant relatively little to him, the policy on the Web
3 site for two years that he has said he has never seen
4 before.

5 He told us that every policy he has had allowed
6 for magazines, and we have provided you with a copy of the
7 inmate mail manual, which is signed by him on
8 November 18th, 2010 in which it actually prohibits
9 periodicals.

10 THE COURT: Where does it say that?

11 MR. WING: Do you see the first page with the
12 signature on it?

13 THE COURT: Okay. What I was looking at, and I
14 have spent most of my time -- of the time that I spent
15 looking at policy --

16 MR. WING: Yes.

17 THE COURT: -- I was looking at Exhibit F to
18 Sheriff Dickerson's declaration. The last page of that
19 Exhibit F, page 17, is the Inmate Mail Guide. It does not
20 prohibit periodicals, but nor does it say that periodicals
21 are allowed. So I was going to ask defendants about that.

22 MR. WING: Yes.

23 THE COURT: I think what you are showing me on
24 the screen right now is an outdated policy.

25 MR. WING: I would agree with you. My point in

1 showing it to you is that the sheriff has not been honest
2 about what his policies provide for or not. His staff,
3 either with his direction or his being oblivious to what
4 they are doing, have violated their own written policy, or
5 in some cases he had a policy that said the opposite of
6 what he represented to the Court. He has said that he has
7 never seen a policy that has prohibited periodicals. Here
8 it is.

9 THE COURT: What's the exhibit or docket you are
10 putting up on the screen?

11 MR. WING: This is Docket 36. Page 10 of that
12 is the inmate manual; the first page with his signature on
13 it. Page 12 is the very short policy under the heading
14 "Periodicals," which says, "We do not accept any
15 periodicals." He represented to the Court that he has
16 never had such a policy. We think that a preliminary
17 injunction is essential to make sure that the sheriff does
18 things constitutionally.

19 If you could give me one moment, I think I am
20 about wrapped up for our initial presentation.

21 I may just add we submitted to the defendants,
22 and it is in the record, a proposed preliminary
23 injunction, which includes a very short and clear due
24 process provision. We don't see why the sheriff needs to
25 have nine different provisions that one must read the

1 entire policy to figure out what the due process is. I
2 just think that's an important component. It can be
3 constitutional and very short.

4 THE COURT: Can you remind me where in the
5 record that is, please?

6 MR. WING: It is in the declaration of Katie
7 Chamberlain, Exhibit 14, Docket 9-4.

8 THE COURT: One second.

9 MR. WING: I think at I have nothing further,
10 unless have you a question.

11 THE COURT: When we're all done with this aspect
12 of the preliminary injunction hearing on the substance, I
13 do want to ask all counsel about where things stand with
14 respect to a protective order and discovery issues, but we
15 will cover that later.

16 All right. Thank you very much. I appreciate
17 that.

18 Mr. Kraemer or Mr. Roberson, or both.

19 MR. KRAEMER: Your Honor, I would like to start
20 for a minute, and then Mr. Roberson has got, frankly, a
21 better working knowledge of the ins and outs of the facts,
22 if that's okay.

23 THE COURT: Whatever you want.

24 MR. KRAEMER: My understanding, and admittedly I
25 could be mistaken in part or in whole, is that we're here

1 today to determine whether preliminary injunction is going
2 to be issued.

3 I look at this case as being divided into two
4 discrete parts. The first is a historical part that
5 nothing that is done here today is going to address.
6 That's why we will have a jury trial at some point.

7 As to past practices, as this Court knows, we
8 have taken what I will say, without trying to beef
9 anything up or to be blusterous or anything, is a rather
10 unusual approach in that our answer admits liability to
11 some extent, which doesn't happen very often. So from a
12 historical perspective, I kind of look at that as being
13 off to one side. Mistakes were clearly made.

14 Now, moving forward as to why we are here, which
15 is: Should a preliminary injunction be issued? As the
16 Court is aware better than I, there are really four
17 elements: One is, is the plaintiff likely to succeed on
18 the merits? The second is, will the suffer irreparable
19 harm? That's a high standard. Irreparable harm without
20 the injunction. Third is, do the balance of equities
21 favor the preliminary relief? And the fourth is, is the
22 injunction in the public interest?

23 So is what we have here in the first instance --
24 and again, the facts, Mr. Roberson will address, and the
25 issues that you have raised that you want to hear about.

1 Is the plaintiff likely to succeed? Well, we
2 have addressed the due process problem, and it was a
3 problem for us. We have admitted that in our answer. I
4 recognize that there may be some question with the
5 plaintiffs as to whether we have addressed them enough.

6 But to me the big issue that we're here about
7 right now is this postcard matter. Going to the issue of
8 is plaintiff likely to succeed on the merits, I have not
9 seen a case yet that says it is a constitutional violation
10 to use postcards. PLN is a very experienced litigating
11 company. They have many, many cases that they have filed.
12 Everybody here has done a tremendous amount of legal
13 research. We have a content-neutral postcard policy and I
14 don't think -- maybe I missed it, and it wouldn't be the
15 first time. But I don't think anybody here has said:
16 Here is a Ninth Circuit case that says postcard are
17 permitted, incoming or out, or any case that says that.

18 I don't think the Constitution -- at least I
19 have not seen any cases -- dictate the size of the medium
20 in which somebody is going to correspond on. Put another
21 way: If this Court said: Okay, you can't use postcards.
22 And we went and said: Okay -- I don't mean this wrong.
23 I'm talking from a constitutional standpoint. We said:
24 We can't use postcards, so just cut all the eight and a
25 half by eleven paper in half. It will now be 8.5 by 5.5,

1 which is the same size as the postcard, and let them write
2 on that size of paper. Would that be unconstitutional?

3 My point is, where we're at here, all I'm trying
4 to emphasize, Your Honor, is that to some extent I think
5 the cart is before the horse, because we haven't had a
6 summary judgment hearing or a trial on whether or not the
7 postcard policy is even unconstitutional. So without the
8 County being told whether it is or is not, why should
9 there be a preliminary injunction prohibiting them from
10 doing something that as of the time we are right here,
11 right now, no court has said it is unconstitutional.

12 The second issue -- the second element is
13 irreparable harm. I would suggest that there may be many
14 ways to look at whether somebody or an entity experiences
15 irreparable harm. One is course of conduct. Now, as this
16 Court is aware from the filings that we have submitted on
17 both sides, they have sat here for a year aware of
18 constitutional violations.

19 Each constitutional violation creating
20 irreparable harm -- and these very good lawyers in
21 response to each of those -- I think there are 70-some
22 instances -- what did they do? Nothing. They did nothing
23 but monitor it and document it and gather their evidence
24 for the better part of a year.

25 I would suggest that if they were truly

1 concerned about irreparable harm to their client, there
2 would have been an e-mail to the sheriff's office saying:
3 Hey, do you know what you are doing? There would have
4 been a phone call to the sheriff's office. There would
5 have been a letter to the sheriff's office. I'm not
6 saying that's required.

7 THE COURT: I'm not familiar with that way of
8 looking at irreparable harm. Do you have any case law
9 authority that supports that that's a legitimate way to
10 look at the concept of irreparable harm; namely,
11 essentially lawyers who are trying to accomplish sort of a
12 big picture systemic change. If they wait and allow
13 several instances of irreparable harm, or even many to
14 happen over a year, and then they bring their lawsuit,
15 that they have somehow lost the right to claim irreparable
16 harm in an preliminary injunction?

17 MR. KRAEMER: I haven't researched it, and I'm
18 not saying they don't have a right. I'm saying that when
19 you are evaluating whether there would be irreparable harm
20 in the future, I think there is nothing inappropriate
21 about taking a look at what they did in the past.

22 THE COURT: All right.

23 MR. KRAEMER: But that's only one issue. I
24 didn't mean to beat that to death.

25 THE COURT: Frankly, the way I look at your

1 argument, it is an interesting point, and probably in my
2 opinion it is better in the balance of the hardships,
3 because I do think there is irreparable harm if either
4 inmates or senders of mail are being denied their
5 constitutional rights. I just don't think that's a close
6 question. I do see a point, though, and it is an
7 interesting question. We will hear from Mr. Wing or his
8 colleagues on how that may fit into the balance of the
9 equities.

10 MR. KRAEMER: Fair enough. I put it in the
11 wrong place. It is something that I was just kind of
12 thinking about when I wanted to talk about what this is
13 about today, which is this is a preliminary injunction.

14 I'm just actually just about done. There is
15 only about two other things I wanted to say, and then I'll
16 let Mr. Roberson take over. Again, in my mind it is a
17 cart before the horse scenario because when we were made
18 aware of these constitutional violations, which as you
19 know from our submissions, when we received the complaint,
20 we moved immediately -- maybe too fast -- to correct the
21 changes, although I would say that you can't move too fast
22 when somebody tells you you've violated the Constitution.
23 So there have been a couple of versions of this that have
24 come out. Quite frankly, there may be another one. I
25 don't know, because we move rapidly to remedy what was

1 clearly a historical wrong.

2 Enough said. My point is: I think, if
3 anything -- and I appreciate counsel's advocacy for his
4 client. This county immediately responded when it first
5 became aware of the constitutional problems. And if this
6 Court is going to issue some preliminary ruling that it is
7 a constitutional violation, I don't think that it follows
8 that this Court needs to issue any type of preliminary
9 injunction because there is no evidence that we would
10 violate the ruling. I guess that's what I'm getting at
11 here. I don't know if I'm expressing it very artfully.

12 THE COURT: I don't want you to answer this.
13 But what more would I expect to learn or what additional
14 evidence would I expect to see at a trial on the merits
15 that would affect the constitutional question on either on
16 the outgoing postcard-only rule or the incoming
17 postcard-only rule that defendants haven't had the
18 opportunity to present so far?

19 MR. KRAEMER: I don't think you would at a
20 trial. I personally think -- and we actually discussed
21 this once before -- and I believe the plaintiffs said they
22 didn't want to do it, although I could be mistaken, was a
23 discussion about making this a motion for summary
24 judgment.

25 THE COURT: Or a trial on the merits.

1 MR. KRAEMER: Yeah. I thought the decision was
2 not to go that route.

3 THE COURT: That was plaintiff's decision.

4 MR. KRAEMER: This is not a motion for summary
5 judgment on whether or not the policy is unconstitutional.
6 This is only a hearing to determine whether the Court
7 should issue a preliminary injunction.

8 The last thing I want to say on that issue is --
9 again, this is that broad-based language that I know bores
10 everybody to death. But one of the most recent case that
11 just came out on Monday about the deference to jail
12 administrators --

13 THE COURT: I am very well aware of that. I
14 read the case.

15 MR. KRAEMER: I am sure you are also aware,
16 right along that same line, is the importance of 18 U.S.C.
17 3626, which talks about appropriate remedies with prison
18 conditions and how prospective relief in any civil action
19 with respect to prison conditions shall extend no further
20 than necessary; that the Court is, again, to give
21 substantial weight to any adverse impact on public safety
22 or the operation of the criminal justice system, which is
23 here. The only point is, these are very narrow remedies,
24 I think only to be applied after no other means of
25 correcting a harm appears to be available.

1 Again, I am beating this to death. I apologize
2 for being so repetitive. As of right now, there has not
3 even been a ruling that this is unconstitutional. So if
4 the Court is inclined to say "I think it is," I'm saying
5 give us a chance to comply with your order, because we
6 have no intention of violating it. But again --

7 THE COURT: I'm not sure I understand that last
8 sentence. I'm not sure I understand the point. I
9 understand the good faith expression, but substantively I
10 am missing what you are saying.

11 MR. KRAEMER: Well, they want preliminary
12 injunction, but I'm saying there has been no evidence that
13 a preliminary injunction would be necessary. If you're
14 going to rule, which this isn't a summary judgment for
15 that ruling -- but if you are going to rule that
16 postcards -- there is something unconstitutional at this
17 point, I believe it is unconstitutional and it is going to
18 be you guys can address it in more detail at a summary
19 judgment hearing, I think your ruling should stop there.
20 You should not then dictate to the sheriff's office how
21 they should respond to their ruling. You should give us a
22 chance to do what we would be obligated to do at that
23 point, which is to make sure our policy complied with this
24 ruling that you would make, although, again, our position
25 is it is constitutional.

1 THE COURT: Well, let me ask you: I know this
2 is in the form of a hypothetical, but it also is
3 tentatively where my thinking is right now. If I were to
4 conclude that the plaintiff was likely to succeed in its
5 challenge on the constitutionality of the postcard-only
6 policy, outgoing and incoming, what is your position or
7 defendant's position as to what I should then say or do in
8 response to the ruling on the motion for preliminary
9 injunction. I understand your point, by the way, on
10 balance of equities. We will talk about that. But in
11 terms of the last point you are making, are you saying
12 that I should make that finding if that's what I believe,
13 but then not give any further specifics, or what are you
14 saying?

15 MR. KRAEMER: Right, right. Isn't it -- yeah,
16 that's what I'm saying.

17 THE COURT: That I should basically say
18 something to the effect of: And defendant has X number of
19 days to come up with a new policy that doesn't violate
20 these provisions. Or to just simply state: I think part
21 of the role of the Court on declaratory relief, as well as
22 injunctive relief, if I conclude that it is likely to
23 succeed on those points, I state that. Then we will hear
24 from plaintiff what is more specifically enjoined. What
25 I'm hearing you say is you can enjoin the implementation

1 of the postcard-only rule without then dictating further
2 aspects of the policy that should be developed by the
3 defendants?

4 MR. KRAEMER: Correct. I guess I'm sort of
5 thinking along the lines of -- and this is my concern. I
6 usually think of preliminary injunctions as: Here is the
7 law; you are violating the law. These are my rights; you
8 are violating my rights. You are taking the water from my
9 well or something that is irreparable harm. What we have
10 here, though, is we don't have a case that says that these
11 postcards are unconstitutional.

12 THE COURT: No. But that doesn't mean that this
13 can't be the case where a declaration comes out --

14 MR. KRAEMER: I understand that.

15 THE COURT: -- and if I believe that it is
16 likely to succeed on the merits of a constitutional
17 challenge -- the postcard-only policy -- at least as
18 reflected in Exhibit F, is unconstitutional, I guess I can
19 enter a preliminary injunction that says stop violating
20 the Constitution that way.

21 MR. KRAEMER: Right. I'm not disagreeing with
22 what you can do. I didn't mean it that way. My point is,
23 as of right now, that's not the case.

24 THE COURT: I understand.

25 MR. KRAEMER: That's really my point. It is

1 tedious, and I mean this respectfully when I use that
2 word. To suggest that we can't be trusted, which I think
3 is their exact words, when I'm reminded of the fact that
4 the first time we learned of this is when there is a
5 lawsuit, and they sat there and did nothing for a year,
6 and we moved on it rapidly. Maybe we stumbled a few
7 times, but that's because we were running and not walking
8 when it was brought to our attention.

9 Like I say, it may even be a situation where
10 there is more tweaking as the dust settles. But I think
11 we have shown good faith to respond to this complaint.
12 Whether it pleases them is one issue, but I think that we
13 have shown good faith to respond.

14 THE COURT: I will tell you now, I'm not going
15 to rule from the bench. I will take this under advisement
16 and issue a written ruling. But since I'm tentatively
17 expressing my views on some things, I will tentatively
18 express my views. I don't believe in all the evidence
19 that I have seen, I don't believe I have seen bad faith by
20 the defendants. I think that there is that interesting
21 point about Sheriff Dickerson said the policy has never
22 prohibited periodicals, and we have seen that the earlier
23 policy did. I think it is an erroneous statement. I
24 wouldn't characterize it as dishonest. I would
25 characterize it as in error or incorrect. Whether or not

1 it was knowingly incorrect, I have not seen any evidence
2 that leads me to conclude that it was a knowing falsehood
3 or bad faith. But then again, I also don't think that a
4 conclusion of bad faith is at all required at this stage
5 of a pleading. That's where I am.

6 MR. KRAEMER: Thank you. I certainly agree.
7 That is not required.

8 THE COURT: Okay.

9 MR. KRAEMER: With that, I will turn it over to
10 Mr. Roberson.

11 THE COURT REPORTER: Judge, can we take a
12 five-minute break, please?

13 THE COURT: Actually we can take a longer break,
14 a ten-minute break.

15 (Recess.)

16 (Open court; proceedings resumed:)

17 THE COURT: All right. Mr. Roberson.

18 MR. ROBERSON: Thank you, Your Honor.

19 I thought it might be helpful to first discuss
20 what the policy actually says and answer any questions
21 that you may have about it as well as address what the PLN
22 has said about it today. First, there doesn't seem to be
23 any dispute about magazines with the current policy.

24 Your Honor raised -- I'm sorry -- any dispute
25 about the delivery of magazines and distribution to

1 inmates at the jail. Your Honor did raise a question
2 about the definition that the current policy has for a
3 magazine, which more or less states that it has to be
4 published four or more times per year. I think the
5 approach the jail has taken is appropriate. Most
6 magazines are, in fact, published four or more times a
7 year. So the jail just drew a line. It is a common sense
8 definition, but the policy actually gives some discretion
9 as well to the jail.

10 I wanted to point that out for you. In
11 paragraph 21, I think it is important that the policy have
12 these categorical distinctions, but it is not a policy
13 that predicts every single piece or type of mail that
14 could be sent to the jail. So the policy builds in some
15 issue-by-issue discretion, and the jail just cannot put in
16 a blanket prohibition. Paragraph 21 refers to prohibited
17 publications, books and periodicals.

18 THE COURT: Now, I read paragraph 21 as more
19 content based; that if there is inappropriate content in
20 there, they would decide that on an issue-by-issue basis
21 as opposed to saying the entire content -- or the entire
22 source of the magazine. Am I reading that incorrectly?

23 MR. ROBERSON: I think it definitely applies to
24 common sense. But if you get a piece of mail that doesn't
25 fit into any these categorical distinctions that every

1 mail policy makes, there is this built-in discretion that
2 the jail needs to approach that category of mail, not just
3 a blanket --

4 THE COURT: So if there is a periodical that we
5 would all accept as a legitimate periodical, no reason why
6 it shouldn't go to an inmate, but it is published twice a
7 year, what would a jail staff person look to in paragraph
8 21 and elsewhere for authority that, well, we will make an
9 exception for this one?

10 MR. ROBERSON: Well, first, does the jail deputy
11 even know whether that publication is published twice a
12 year?

13 THE COURT: If they don't, then what is the
14 point of the definition that requires four times a year?

15 MR. ROBERSON: I think it is just a common sense
16 approach to what a magazine is, Your Honor. You raised
17 the issue of the Georgetown Law Journal. I mean, that
18 sounds like it is a book to me. If it is in a binding, it
19 is a book. Certainly that would be permitted under --

20 THE COURT: It is like every other paperback law
21 journal. It kind of looks like a periodical, and it is a
22 periodical. It comes out once a year.

23 MR. ROBERSON: But it is also a book,
24 Your Honor.

25 THE COURT: Okay.

1 MR. ROBERSON: That's a submission to you as
2 well. I do think that paragraph 21 allows some discretion
3 in case something happens to be published three times a
4 year.

5 THE COURT: Okay. I would be interested at some
6 point -- you can talk about whatever you want whenever you
7 want. But I would be interested in you responding to
8 Mr. Wing's comments about the procedural due process
9 points when he identified paragraph 21 referring to sender
10 and inmate; 24, sender or inmate; 26 doesn't mention 31;
11 27 says use only 31; 30 says normally confiscates; 31 says
12 don't confiscate but return.

13 Any response to those comments as to those
14 arguments that Mr. Wing had?

15 MR. ROBERSON: Yes, Your Honor. First, I think,
16 just because the policy refers to other parts of the
17 policy, it doesn't mean it is confusing. It actually
18 makes it more clear.

19 With respect to paragraph 24, it does say "or,"
20 not "and." I think that's just simply a typo. I would
21 ask you read the policy in whole in its complete context.
22 It is clear that the other parts of the policy use "and,"
23 and it would not be the first time that the "and/or"
24 distinction -- lawyers use it interchangeably all the
25 time.

1 THE COURT: Well, let me ask you this. To some
2 extent I'm sympathetic to that, because I read it as a
3 whole. As I commented to Mr. Wing when he was arguing, it
4 did strike me as reasonably affording of due process until
5 he pointed out those other issues. But then he said, and
6 he reminded me of the declaration of Ms. Lennox. So if it
7 is really as clear as defendants say it is, why do we have
8 inconsistent treatment, as identified in the declaration
9 of Ms. Lennox?

10 MR. ROBERSON: I'm not so sure there is a due
11 process violation with Ms. Lennox's mailing. She appeared
12 to have mailed the same thing, I believe on the same day,
13 although maybe I'm wrong about that, but the same thing to
14 about a dozen or so inmates. It is true we don't know if
15 some of them were delivered outside the policy that we
16 have. However, I'm not sure that there is a due process
17 violation because she was given multiple printed mail
18 slips that put her on notice that if she wanted to
19 challenge or find out what happened to her other mailings,
20 there was a process.

21 THE COURT: I understand that. But the argument
22 that I'm hearing from Mr. Wing is that, because of the
23 inconsistent treatments that Ms. Lennox identifies in her
24 declaration, that's evidence that whoever is handling the
25 mail policies on any given day at the jail must be

1 confused because why else would they be handling things
2 inconsistently? That's evidence, therefore, they say,
3 that the policy really is inconsistent -- not
4 inconsistent -- confusing.

5 MR. ROBERSON: Well, I think it is evidence that
6 the policy was not followed.

7 THE COURT: No. But there are only two reasons
8 why the policy wouldn't be followed. One is because it is
9 confusing. The other because of some type of bad faith
10 finding, and I don't think you want me to go the latter
11 direction.

12 MR. ROBERSON: Or just a misunderstanding of the
13 policy.

14 THE COURT: Right, because it is confusing.
15 That's the plaintiff's argument.

16 MR. ROBERSON: But I don't know if that jail
17 deputy is misunderstanding or if it is because the policy
18 is confusing. I think those are two separate things.

19 THE COURT: In theory, wouldn't you agree that a
20 policy should be written in such a way as to not be
21 confusing to a reasonable jail deputy?

22 MR. ROBERSON: I absolutely agree, Your Honor.

23 THE COURT: Okay.

24 MR. ROBERSON: For paragraph 26, I don't think
25 it is a constitutional problem that it doesn't refer the

1 person reading the policy to the latter paragraphs of the
2 policy, just like paragraphs 21 and 24 do.

3 On paragraph 30, it states normally mail
4 handlers confiscate prohibited items, and I think Mr. Wing
5 raised the issue that's confusing. I disagree with that
6 contention. I think the issue is if a care package is
7 sent, you might have items in there that are prohibited.
8 So those can be confiscated. So I think this policy is
9 making a distinction between the actual correspondence and
10 what is included in the correspondence.

11 Mr. Wing raised the issue of the prohibited
12 mail. It says "prohibited mail slip" in paragraph 30 as
13 well as other parts of the policy. The actual notice that
14 is sent out is called a "prohibited mail notice." I don't
15 see how that's a constitutional issue. I don't think it
16 is confusing either. There is nothing in this policy that
17 says that prohibited mail notice is not a prohibited mail
18 slip. I think it is clear enough.

19 THE COURT: Do you think it is confusing to use
20 two different terms or labels for the same thing?

21 MR. ROBERSON: I do. But I think Your Honor
22 should read the policy in its full context.

23 THE COURT: Okay.

24 MR. ROBERSON: I believe Mr. Wing also raised
25 the issue that -- let me see if I have this correctly. He

1 does not believe that the policy states that the inmate
2 receives notice -- a due process notice from their
3 outgoing mail. I think the policy fairly clearly states
4 that.

5 THE COURT: Where?

6 MR. ROBERSON: It might even state it in
7 multiple portions here.

8 THE COURT: Where do you think it says it most
9 clearly?

10 MR. ROBERSON: I think paragraph 30B: Mail
11 handlers will use the prohibited mail slip to inform the
12 inmate of the confiscation -- for the item.

13 THE COURT: You are saying that 30B applies to
14 incoming or outgoing mail that is confiscated?

15 MR. ROBERSON: Yes. As well as paragraph 44.
16 Maybe paragraph 44 is clearer.

17 THE COURT: One second. All right. Show me
18 where in 44. Here is what I'm thinking: Imagine the
19 family member or the young daughter sends a three-page
20 handwritten letter to the father or mother in jail, and it
21 is not delivered. Where will the -- no, that's incoming.
22 Where does it say that notice will be given to the inmate
23 if the outgoing mail is rejected or confiscated or not
24 approved or not sent because it is not on a postcard?

25 MR. ROBERSON: Well, first, page 16, the actual

1 prohibited mail notice.

2 THE COURT: I agree --

3 MR. ROBERSON: Then in the middle there it says
4 it is deemed personal mail not on a postcard.

5 THE COURT: Where?

6 MR. ROBERSON: In the middle, there is a check
7 box. I'm on page 16.

8 THE COURT: But that's the prohibited mail
9 notice. Does it say anywhere in the policy that a
10 correctional officer must give notice to an inmate if the
11 inmate's outgoing mail is rejected as violative of the
12 postcard rule?

13 MR. ROBERSON: Your Honor, we are relying on
14 paragraph 30B, the mail handlers use of prohibited mail
15 slip.

16 THE COURT: Okay.

17 MR. ROBERSON: I also think that paragraph 44,
18 again, provides clear direction to the mail handlers.

19 THE COURT: Where in paragraph 44?

20 MR. ROBERSON: It is the first part: Jail will
21 not allow an inmate to receive or send mail -- that. Then
22 it contains almost a recitation --

23 THE COURT: Which one says --

24 MR. ROBERSON: -- of prohibited mail notice.

25 THE COURT: Where in 44(1), after the word

1 "contains," does it say that it has to be on a postcard?

2 MR. ROBERSON: It doesn't say that in paragraph
3 44.

4 THE COURT: See, that's what I'm asking. Is
5 there a direction being given to a correction officer that
6 says that if an inmate sends a three-page letter -- not on
7 a postcard but on letter -- stamped and addressed to his
8 daughter, puts it in the outgoing mail, it is not going to
9 be delivered because it is a postcard. Is that
10 correctional officer told that he or she must give notice
11 of that to the inmate? I don't see that in 44.

12 MR. ROBERSON: Your Honor, if you read the
13 policy in its full context, I think the clearest part of
14 the policy states that it is paragraph 30B.

15 THE COURT: Well, I think it is clear that the
16 jail is not going to deliver it. But what I'm looking
17 for, for due process purposes, is where the inmate is
18 given clear notice that it is not being delivered and
19 their right to appeal?

20 MR. ROBERSON: Your Honor, we are relying on
21 paragraph 30B, again, as well as the prohibited mail
22 notice. If you look at it, towards the bottom, it is a
23 carbon copy type form.

24 THE COURT: Yes.

25 MR. ROBERSON: It says: White to sender, yellow

1 to jail file, pink to the inmate. This is the form that
2 the jail is using for incoming and outgoing.

3 THE COURT: I agree that the prohibited mail
4 notice clearly does have that box that says it is deemed
5 personal mail and not on a postcard. If that box is
6 checked and the white copy is given to -- well, if the
7 inmate is the sender, does he get the white copy or the
8 pink copy? What does the correctional officer need to do?
9 What is the correctional officer told to do? Give him the
10 white copy or the pink copy?

11 MR. ROBERSON: I think you get the pink copy,
12 Your Honor. That's what it says.

13 THE COURT: Even if the inmate is the sender?

14 MR. ROBERSON: I believe that's correct, yes.

15 THE COURT: Okay. That's probably what I would
16 do if I were a correctional officer, but it is confusing.

17 Speaking of confusing, let me ask you this, and
18 I'll acknowledge it is probably an unfair question. Where
19 in the policy does it tell somebody that they may not send
20 a personal letter that's three pages and not on a
21 postcard? So we have got the little daughter, seven years
22 old. She wants to write a letter to her mom or dad in
23 jail. She writes a nice little letter on three pages. It
24 is not a postcard. Where does the policy clearly prohibit
25 that?

1 MR. ROBERSON: It is a three-page letter --

2 THE COURT: Eight and a half by eleven.

3 MR. ROBERSON: -- incoming to the -- addressed
4 to the inmate at the jail.

5 THE COURT: Where does it prohibit that?

6 MR. ROBERSON: First, the definition of personal
7 mail falls out by the definition of "personal mail."

8 THE COURT: It is not personal mail as "personal
9 mail" is defined; am I correct?

10 MR. ROBERSON: Say that again, Your Honor. I'm
11 sorry.

12 THE COURT: Sure. A seven-year-old daughter
13 writes a three-page letter, eight and a half by eleven.
14 Maybe one of those pages is a nice little drawing. She
15 puts it in an envelope, addresses it to her dad in prison
16 or at the jail and puts a stamp on it. That's not
17 personal mail as "personal mail" is defined in the policy.
18 Am I correct or incorrect?

19 MR. ROBERSON: I think you are incorrect,
20 Your Honor.

21 THE COURT: Let's take a look at the definition
22 of personal mail. Personal mail is defined on page 2.
23 "Postcards mailed to or from family, friends,
24 organizations, businesses or other unofficial entities."
25 That's the definition of "personal mail." Therefore, if

1 it is not on a postcard, it doesn't fit that definition.

2 Why am I wrong? By the way, I acknowledge it is
3 an unfair question. But why am I wrong?

4 MR. ROBERSON: Your Honor, you are not wrong.
5 That's one interpretation; certainly a valid
6 interpretation. I'm not saying you are reading the policy
7 wrong.

8 But it wouldn't be the first definition that
9 included the word being defined in the definition
10 basically -- to restrict something to a postcard by saying
11 it is on a postcard. I think there are plenty of words in
12 the dictionary that would use that same --

13 THE COURT: I don't agree. I think it is
14 confusing. Why don't we see a definition that tells us
15 what "personal mail" is? By the way, I don't know why we
16 include organizations or businesses in personal mail. And
17 then once we have appropriately defined "personal mail,"
18 the jail says "and all personal mail must be on a
19 postcard; no ifs, ands or buts," or something like that.
20 Wouldn't that be clearer to everyone?

21 MR. ROBERSON: Yes.

22 THE COURT: Okay. By the way, what about books?
23 I will tell you, I like receiving book catalogs from
24 Yale University Press, Princeton University Press, Oxford
25 University Press. My wife thinks I'm crazy, but I really

1 enjoy getting those catalogs and browsing through them.
2 There is some interesting stuff in there -- law related
3 and non-law related. Those catalogs wouldn't fit within
4 this policy, would they? They would not be deliverable to
5 an inmate; am I incorrect?

6 MR. ROBERSON: It would be deliverable.

7 THE COURT: Okay. Show me where.

8 MR. ROBERSON: Paragraph 10.

9 THE COURT: Okay.

10 MR. ROBERSON: It is titled "junk mail."

11 THE COURT: But then I go back to the definition
12 of "junk mail." What I just described I don't think fits
13 the definition of "junk mail." Do you?

14 MR. ROBERSON: I agree it doesn't fit the
15 definition of "junk mail." It might fit the first part of
16 it because it is to sell a product.

17 THE COURT: I agree.

18 MR. ROBERSON: There is the tail end of it,
19 which arguably the publications you are receiving do have
20 serious scientific and literary value.

21 THE COURT: Right. So the corrections officer
22 trying to figure out, "Is that book catalog junk mail or
23 not? Well, let me take a look at the definition," and
24 concludes in good faith, "no, it does have scientific or
25 literary or political or educational value. Therefore, it

1 is not junk mail. Therefore, well, I don't see where it
2 is allowed in here." And then it doesn't get allowed.

3 MR. ROBERSON: I think under paragraph 10 it is
4 allowed because the jail accepts solicited and unsolicited
5 junk mail or bulk mail for inmates.

6 THE COURT: Where is "bulk mail" defined?

7 MR. ROBERSON: "Bulk mail" does not have a
8 definition.

9 THE COURT: I don't think you want to say, well,
10 whether it does or doesn't get allowed depends upon its
11 postage class, right? There are cases that disregard
12 that.

13 MR. ROBERSON: Right. I think the intention
14 here was bulk mail is mail that we commonly know as mass
15 mailings. It is bulk mail.

16 THE COURT: Okay. By the way, as I said to
17 Mr. Wing, "okay" means I understand what you are saying;
18 it doesn't mean I'm agreeing.

19 MR. ROBERSON: I think we have talked about
20 magazines and books and various types of catalogs. The
21 other issue is Mr. Wing stated that 100 percent of the
22 outgoing mail from the inmates must be on a postcard.
23 Again, we are excluding legal and official mail, and we
24 talked about this.

25 THE COURT: I get that.

1 MR. ROBERSON: I don't think that's a correct
2 reading of the policy.

3 THE COURT: Which paragraph should I look at?

4 MR. ROBERSON: The first paragraph to look at is
5 paragraph 11. I think this is important because in PLN's
6 complaint they do mail book catalogs and also fund-raising
7 letters to inmates at the jail, and the First Amendment is
8 a two-way street. How can the inmate respond to a
9 solicitation for money or a method of purchasing? So the
10 very nature of having inmates conduct a business
11 transaction addresses a unique circumstance that we don't
12 have a full record on, but the point is the policy will
13 allow the inmate to respond to that solicitation if they
14 choose to.

15 THE COURT: If they receive it. And if they
16 receive it is up to the jail sergeant.

17 MR. ROBERSON: Yeah. Because of the special
18 nature of having to do a business transaction, the policy
19 requests that they get permission from the jail staff.

20 THE COURT: Wouldn't you agree with me that we
21 cannot allow, under the Constitution, a jail sergeant to
22 say, "Well, this is a solicitation from the ACLU; I'm not
23 going to let it go through. But this is a solicitation
24 from the NRA; I will let that go through," or vice versa,
25 by the way, to be fair? Do you agree that's not

1 constitutional, is it?

2 MR. ROBERSON: I agree with you.

3 THE COURT: So where is there in this policy
4 that solicitations, even if not on a postcard from, I
5 guess, charitable activities, 501(c)(3), charitable
6 activities are allowed? Because I don't see it in there.
7 I think what you're telling me, if I look at paragraph 11,
8 it is up to the discretion of the jail sergeant. I have a
9 problem with that.

10 MR. ROBERSON: It is up to the discretion of the
11 jail sergeant in the context of the policy. You can see
12 the prohibited mail notice as well as other parts of the
13 policy inform the deputies when you can reject mail and
14 what is an inappropriate content-based restriction. So
15 something from the NRA or ACLU does not fit under --
16 because it is an appropriate content base.

17 THE COURT: So how is a jail sergeant or a
18 corrections officer processing the mail to know whether or
19 not to let in a non-postcard-sized letter that may or may
20 not be a solicitation for money, a solicitation or
21 invitation for a subscription or just general
22 announcements about what is going on to receive to get to
23 the inmate? Do they allow it in or do they not allow it
24 in and how do they know?

25 MR. ROBERSON: I think it is in, under the

1 policy. I think what I'm addressing is how can the inmate
2 respond back not on a postcard.

3 THE COURT: I would like to know the first part.
4 How does it come in if it is not on a postcard? I notice
5 the definition of "personal mail" -- putting side the
6 postcard issue -- it also includes mail not only from
7 family or friends but from organizations or businesses,
8 whether that be NRA or ACLU or other organizations. It
9 has got to be on a postcard. So a lot of their letters
10 that either let folks know what they are doing, give folks
11 an opportunity to send in comments, give folks an
12 opportunity to contribute, those things are not on
13 postcards.

14 So what is the correctional officer, who looks
15 at the policy, to do to with those types of incoming mail?
16 It looks like to me that he is told, "If it is not on a
17 postcard, it doesn't come in." Am I wrong?

18 MR. ROBERSON: I understand your question now.
19 Those items are allowed in, I think, either as junk mail
20 or bulk mail. The issue with the definition of personal
21 mail, including organizations, businesses and other
22 unofficial entities is to basically close a loophole to
23 get around the postcard restriction.

24 For instance, if an employee wanted to send a
25 letter -- an employee of the company wanted to send a

1 letter to an inmate. They write it out. It is not on a
2 postcard. They fit it in their employer's envelope. So
3 it purportedly comes from a business address --

4 THE COURT: I have seen long letters from both
5 the ACLU and the NRA, and they purport to describe what
6 their agendas are. You can't fit that under the category
7 of junk mail, which says, "When taken as a whole, like
8 serious artistic, political," et cetera, "value," they
9 will contend that it has a lot of political value or
10 educational value. Therefore, it is not junk mail.
11 Therefore, it doesn't come in under junk mail. Therefore,
12 it has to be in a postcard.

13 MR. ROBERSON: I think it comes in under bulk
14 mail.

15 THE COURT: Which is not defined.

16 MR. ROBERSON: Correct.

17 THE COURT: Okay. By the way, Mr. Roberson, I
18 acknowledge these are hard questions I am asking you, and
19 you are doing a fine job on the hard questions.

20 MR. ROBERSON: Thank you, Your Honor.

21 Your Honor, unless there are further questions,
22 I think I have covered the meaning of the policy.

23 THE COURT: Thank you. Anything further,
24 Mr. Kraemer, at this time?

25 MR. KRAEMER: No, Your Honor.

1 THE COURT: Anything further from plaintiff?

2 MR. WING: Yes, Your Honor. Thank you. Kind of
3 some housekeeping things about what we just heard. If the
4 Court looks at page 16 of Exhibit F of the current policy,
5 which is the prohibited mail notice.

6 THE COURT: I'm there.

7 MR. WING: I'll point out that the language does
8 not support that this is ever used or intended to be used
9 to notify an inmate as a sender; that is, outgoing mail.
10 Under the four boxes, we are -- there is a box "returning,
11 confiscating, letter, publication." Do you see that?

12 THE COURT: Yes.

13 MR. WING: It has the language, "You sent to
14 inmate" -- blank -- and there is nothing on this form that
15 seems to suggest that this would be used for the purpose
16 of sending notice to an inmate or to a recipient who is
17 not in jail. So that adds to the lack of due process
18 policy. There is nothing in the policies that say that,
19 and the notice itself does not support that it is used
20 that way.

21 THE COURT: Okay.

22 MR. WING: Okay.

23 THE COURT: I will give Mr. Roberson a chance to
24 respond when you are done.

25 MR. WING: Okay. I don't believe that paragraph

1 30B does anything to help. It identifies the inmate or
2 the sender. That's how the parties are known.

3 I want to point out that Prison Legal News'
4 mailings to the jail are not what the post office is now
5 calling standard rate mail. It used to be called bulk
6 mail. So it is clearly a perhaps sizeably large class of
7 mail. Even if they were in the business of discriminating
8 on the basis of postage, PLN's mail wouldn't fit under the
9 bulk mail policy.

10 THE COURT: Because PLN is sending it first
11 class mail?

12 MR. WING: That's right.

13 THE COURT: Where in the record is there
14 evidence on that?

15 MR. WING: In the declaration of Paul Wright.
16 If you like, I will locate it. I think it is stated in
17 our brief.

18 THE COURT: I will look at that.

19 MR. WING: I think Mr. Blackman is going to talk
20 a little bit about the hardships question that you raised,
21 but I would like to draw the Court's attention as a lead
22 in to that to the declaration of Patricia Mendoza who
23 said, "I called the jail under this paragraph 11 of their
24 new policy for permission to send a Federal Tort Claims
25 Act form so my husband can file a claim against the United

1 States Government, and I was told, no, you can't do that."

2 So it reinforces the idea that this is not a
3 mechanism by which everybody who wants to get legitimate
4 mail may do so. The only example we have recently after
5 this lawsuit was, no, you can't get in a blank government
6 form that allows a prisoner to exercise their rights.

7 Then I would like to also point out that
8 declaration docket 36, paragraph 20, a current prisoner in
9 the jail asks for what the policy is; what the mail policy
10 is. It is now over two months since Exhibit F, supposedly
11 the jail's new policy, and the prisoner is told, "It is
12 pending." So I don't think the Court ought to accept at
13 face value that this is their new policy. The prisoners
14 have not been given a copy of it to use, and it is not
15 posted on the Web site to the rest of the world.

16 The only folk whose seem to know of the
17 existence of this policy is this Court, the plaintiffs and
18 the jail staff themselves. That is not, in my view, a
19 legitimate constitutional policy that is confined to just
20 a few parties. I note that the prohibited mail notice
21 says, if you want to know what the policy is, go look on
22 the Web site.

23 I will now turn it over to Mr. Blackman with
24 some comments about the hardships.

25 THE COURT: Thank you.

1 MR. BLACKMAN: Your Honor, I don't know if you
2 really wanted to address the balance of equities issue
3 that you raised with Mr. Roberson. We think they are
4 pretty clear. But to the extent that Mr. Kraemer is
5 suggesting that there is no need for preliminary
6 injunction here because PLN had some notice as to the way
7 this policy was operating for some time before this
8 lawsuit and that somehow undermines its claim for the need
9 for a preliminary injunction, I would just like to point
10 out, as the complaint identifies, PLN, it is a project of
11 the Human Rights Defense Center. Its mission is public
12 education, prisoner education, advocacy and outreach and
13 support of the rights of prisoners. It doesn't exist for
14 a commercial-only reason.

15 If its goal was to get its magazine admitted to
16 various jails, the kinds of irrational implementation that
17 we have been seeing at Columbia County would really
18 be advantageous, because it would basically create a
19 monopoly by just arranging to have its own publication
20 admitted and everything else excluded. Its goal here is
21 exactly what this complaint says -- education, advocacy,
22 outreach and support of the rights of prisoners.

23 When a facility is precluding legitimate
24 communications between prisoners, not only with PLN, but
25 others, that's a concern of PLN, and it needs to have a

1 record to present to a court to make that claim. So
2 waiting until we are certain that this isn't just a
3 mistake, that this is really a policy, is essential to a
4 legitimate claim, both in terms of the underlying merits
5 and in terms of the relief. So I hope the Court does not
6 hold it against PLN that it waited to make sure that this
7 was in fact an intentional designed policy to exclude
8 legitimate communications before it filed its lawsuit.

9 THE COURT: I understand what you are saying.

10 Anything further from the defendants?

11 MR. ROBERSON: Thank you, Your Honor.

12 I will respond to some of Mr. Wing's comments.
13 The issue in the most recent declaration that PLN filed --
14 I forget the person's name. The one filed last week about
15 the tort claim notice.

16 THE COURT: Ms. Mendoza.

17 MR. ROBERSON: Mendoza. It is unclear to me
18 what she means when she talks about a tort claim notice
19 form. There is no specific form for a tort claim notice.
20 It could be on a postcard. I don't see the constitutional
21 issue with that. It also sounds like it has an as-applied
22 challenge, and we're dealing here with a facial challenge
23 to the policy.

24 THE COURT: Do you want to talk about Mr. Wing's
25 comment, on the prohibited mail notice, the form says,

1 "Because of the rules contained in Columbia County Jail
2 Inmate Mail Policy, we are" -- and then there is a place
3 to check boxes -- "returning, confiscating letter or
4 publication," and then it continues, "you sent to inmate"
5 blank.

6 Here, Mr. Wing is saying that shows that the
7 prohibited mail notice policy is for incoming mail, and
8 this notice will be sent to senders who send mail to
9 inmates and that mail is then rejected or confiscated.
10 Mr. Wing's argument is this mail notice on its face shows
11 that it doesn't apply to confiscated or rejected mail sent
12 by inmates that are outgoing; and therefore, there is no
13 procedure for appeal, or for even notice, for outgoing
14 mail to inmates.

15 That's the argument I'm hearing. Do you want to
16 respond to that?

17 MR. ROBERSON: Thank you, Your Honor.

18 First, we think there is a procedure to provide
19 the inmate notice that their mail is not delivered. We
20 take at face value Mr. Wing's point here. It says, "That
21 you sent to inmate." We are not going to deny it says
22 that. I think this goes in line with what Mr. Kraemer
23 said earlier, which is this was rapidly done to correct
24 the violations that we have admitted to. We have admitted
25 90 percent or more of the factual allegations of the

1 complaint, and we acted rapidly to correct it.

2 THE COURT: Okay.

3 MR. ROBERSON: As far as the Web site, it says
4 the mail policy is under review. That's an accurate
5 statement. I don't think it is a misstatement. The
6 policy is under review. I think it is appropriate.

7 Now, Mr. Wing has pointed out that one of the
8 inmate declarations -- I think it was Mr. Berg if I'm
9 correct -- had a deputy told him something like he can't
10 get access to the mail policy. If you look at Exhibit K
11 attached to his declaration, there is a written response
12 from a jail deputy, not just a statement in the
13 declaration, but a written response from a jail deputy as
14 to why it is completely reasonable why -- I forgot what
15 the specific request was on the grievance form. But it is
16 a perfectly appropriate response telling Mr. Berg there
17 are no differences in the outgoing mail policy and the
18 incoming -- something about the mail policy. There are no
19 changes to outgoing mail. So that was addressing his
20 concerns.

21 I don't have anything further to say about what
22 the policy says, but we also have what standard to use --
23 Martinez or Turner -- which I think is important to
24 address. Mr. Wing has cited some case law that I have not
25 read yet, but it sounded to me that they were

1 content-based restrictions. The Bradley and Barrett case.
2 They were also cases decided, I believe, in the '90s, so
3 prior to some of the case law we cited by the Supreme
4 Court, which suggests that Turner would be a factor to
5 apply to all prisoner regulations.

6 THE COURT: Although if I heard him correctly,
7 Mr. Wing said that Witherow from the Ninth Circuit was not
8 a content-based censorship but does show that for outgoing
9 mail the standard is not the Turner case. At least that's
10 what I heard.

11 MR. ROBERSON: You are right. I was going to
12 address that. We cited the Witherow case in response to
13 their motion, and we cited it again in our response to the
14 amicus brief. We agree that it is a non-content-based
15 prison regulation. We don't agree that it applied a
16 higher standard to the regulation. What it in effect said
17 was this meets both standards. That's our interpretation
18 of the case.

19 THE COURT: As I have confessed I think already
20 in open court, I have read a lot of cases before today's
21 hearing on this. I didn't read Witherow. But I will.

22 MR. ROBERSON: It is very short, Your Honor.

23 MR. KRAEMER: Most of us haven't read all the
24 cases either, I suspect.

25 THE COURT: I have read about a dozen. I didn't

1 select that one to read.

2 MR. ROBERSON: Again, the other case that I
3 believe Mr. Wing mentioned was a District Court of
4 California was, again, confiscation, not mail policy. So
5 not having read the cases, I can't say more about them.
6 But we agree Witherow is the case you should be reading
7 when it comes to the Ninth Circuit. Our position is it
8 just doesn't tell you what the Ninth Circuit would say
9 about this, so then we are into all the other case law.

10 Unless you have questions. I didn't want to go
11 through, because I think its spelled out in the amicus
12 brief, as clear as we could.

13 THE COURT: No. I think this has been very
14 helpful. As I did say, if anyone really wants to get in
15 either the last word or the penultimate word, you are
16 welcome to do it. But I have heard plenty, and I am going
17 to take it under advisement. I do then want to talk about
18 discovery and a protective order.

19 Mr. Wing.

20 MR. WING: Yes, just briefly, on the topic of
21 Witherow. The defense argued and quoted the language that
22 the Court rejected in the exacting standard. I want to
23 tell you what that is so that when you look at the case
24 you will see this.

25 The exacting standard that was at issue in that

1 case was Mr. Witherow was challenging a non-content-based
2 regulation that said they were going to inspect his mail
3 to public officials in non-content. Those public
4 officials we're going to really read it.

5 Mr. Witherow, the prisoner, said: Well, there
6 is a lot of cases which say that letters sent to public
7 officials should be subject to an even higher standard
8 than Procunier -- an exacting standard. And the Court
9 said: No, we are not going to do that. We are just going
10 to subject it to Procunier.

11 I think it is not a reasonable interpretation of
12 this opinion to suggest that what the Court meant by that
13 is it is not applying Procunier, okay. They said we are
14 not going to go higher than Procunier, and we're not going
15 to do the Turner test. They said we are going to apply
16 the Procunier v. Martinez test. That, of course, is what
17 Barrett, much more recently, said.

18 THE COURT: Very good.

19 MR. WING: I wanted to tell you, to save you
20 time, the declaration of Paul Wright, Docket 8 --

21 THE COURT: One second.

22 MR. WING: Okay.

23 THE COURT: Yes.

24 MR. WING: That's where he says that the
25 mailings, brochures, catalogs, book catalogs, letters are

1 all sent first class, to save you time. It is Docket 8,
2 paragraph 11.

3 THE COURT: Thank you.

4 MR. WING: Finally, I think looking at Exhibit K
5 that Mr. Roberson just cited is in fact the inmate request
6 form that says, "Could you please provide me a copy of the
7 CTJs and the mail policy, please." And the sheriff
8 responds, "The mail policy is changing. The information
9 that affects inmates' mail as far as outgoing and incoming
10 mail remains the same." When is that? Remember, it is
11 not on the Web site. It is not in the inmate mail manual.
12 This is on February 8th, 2012, after they have adopted the
13 policy.

14 THE COURT: Anything further from the defendant?

15 MR. ROBERSON: Yes. I would just add that it is
16 our understanding of the inmate mail policy has been
17 changed -- I'm sorry -- the inmate mail handbook has been
18 changed to reflect the current policy, and Mr. Berg has
19 access to the inmate mail handbook.

20 THE COURT: What are you referring to by "inmate
21 mail handbook"? I know something called the "Inmate Mail
22 Guide" that's on the last page of Exhibit F. Is that what
23 you are referring to?

24 MR. ROBERSON: No, Your Honor.

25 THE COURT: What are you referring to as the

1 "inmate mail handbook"? Where do I find that?

2 MR. ROBERSON: Earlier in this hearing PLN
3 submitted an inmate mail handbook, I believe it is called.
4 It is the instructions to the inmates.

5 THE COURT: What docket number is that or where
6 can I find that exhibit?

7 MR. ROBERSON: There is a prior version in the
8 record. The current one is not in the record.

9 THE COURT: The prior version, where would I
10 find that in the record?

11 MR. ROBERSON: I don't know offhand.

12 MS. CHAMBERLAIN: Your Honor, it is in the
13 declaration of Bradley Berg, which is Docket 36, I believe
14 Exhibit A. Yes.

15 THE COURT: Now, I'm sorry, Mr. Roberson, but
16 now what point do I draw? Let me find it. One second.

17 All right. I have the declaration of Mr. Berg.
18 Exhibit A is labeled "Inmate Manual, Columbia County
19 Jail." So it is not an inmate mail handbook. It is the
20 inmate manual. It is the inmate manual for Columbia
21 County Jail. On pages 7 through 10 it does discuss the
22 mail policies. It says a number of different things in
23 there. That's where it says, under periodicals, you do
24 not accept periodicals.

25 Okay. Now, what point did you want me to draw

1 from that? I'm not following you. I'm sorry.

2 MR. ROBERSON: My point, Your Honor, is that
3 inmate manual is updated to reflect the current policy and
4 inmates, of course, have access to the inmate manual.

5 THE COURT: So you are saying that the inmate
6 manual has been updated to reflect the inmate mail policy
7 that was effective as of February 10, 2012, but we don't
8 have in our record that updated inmate manual handbook?

9 MR. ROBERSON: Correct. We did not put it in
10 the record. This is a facial challenge to the policy.

11 THE COURT: Okay. I understand what you are
12 saying.

13 All right. Thank you all very much. I found
14 this argument very, very helpful to me. Thank you,
15 counsel on both sides, for your comments. I am going to
16 take this matter under advisement.

17 Let me ask briefly, following up on our
18 telephone conversation from, I think, last week. Where
19 are we in terms of discovery issues? There was an issue
20 on the protective order, the form of that, on whether or
21 not a protective order was even needed and then also
22 discovery issues.

23 MS. CHAMBERLAIN: Yes, Your Honor. Katie
24 Chamberlain for the plaintiff. After we spoke with you
25 last Thursday, we exchanged some e-mails with defense

1 counsel. Because the defendants are requesting a
2 protective order, I asked Mr. Roberson to provide me with
3 a proposed protective order so we can take a look at it
4 and also to specifically let us know what it is he seeks
5 to be protected for special treatment in this case.

6 Yesterday afternoon I received the proposed
7 protective order that the defendants would like. It
8 identifies that they want protected the names of
9 arrestees, detainees, inmates housed at the Columbia
10 County Jail for the past several years, including arrest
11 dates and release dates.

12 I believe Mr. Roberson, as the Court suggested,
13 took a look at the tier-one protective order that's on the
14 Court's Web site. Although I have not compared it to the
15 original form but all of the potential provisions of that
16 tier-one protective order are in here, including
17 requirements that documents and deposition testimony and
18 interrogatory answers be sealed if they have inmate names
19 or arrest dates on them, including also pleadings that
20 have that type of information. It restricts the handling
21 of documents that have inmate names and arrest dates to
22 specific people, court personnel, attorneys and so forth.
23 It requires a part of the court record that contains this
24 information be kept from the public.

25 I have asked Mr. Roberson to please let us know

1 the legal basis for the protective order, perhaps the
2 Constitution or something, so we can consider it. But to
3 date the only reason I've heard, unless I've missed
4 something, is that the defendants contend that PLN had not
5 previously tried to make contact with certain prisoners,
6 and so the defendants contend that we don't have a right
7 to receive their names and arrest dates and so forth.

8 I don't think that constitutes close to good
9 cause required for a protective order. Actually I have
10 freshened up on my state legal standard for protective
11 orders. It is my understanding that the Ninth Circuit has
12 been pretty clear and actually issued a decision in
13 November affirming Judge Aiken's analysis of the legal
14 standards, which are there must be good cause for a
15 protective order and special handling of information and
16 discovery. But if a party wants to require that a party
17 file information under seal, the standard becomes
18 compelling reasons.

19 But for the first standard, the good cause
20 standard, the defendants who want this special protection
21 must make a specific showing of specific prejudice or harm
22 that will result if a protective order is not granted.
23 Actually probably the first place to look is the rules.
24 Rule 26(c)(1) says that the Court can order for good cause
25 an order to protect a party or person from annoyance,

1 embarrassment, oppression, undue burden or expense.

2 There has been no showing that there is any
3 specific need for that. Of course, we need the prisoners'
4 names and information about the prisoners to litigate this
5 case and try to help them get their mail, to send and
6 receive their mail, and I don't think there are other
7 allegations that we have other intentions.

8 Then I'm particularly also concerned about any
9 requirement that we have to seal information that's filed
10 with the Court. It is very burdensome to have to do that.
11 Frankly, the default is that things filed with the Court
12 are a public record, and it is an important part of the
13 judicial process that there is transparency there. But
14 the standard there is quite higher -- it is compelling
15 reason -- it is what the defendant has to be able to
16 articulate. They have to show that the records may be
17 used for improper purposes, such as to gratify private
18 spite, promote public scandal, commit libel or release
19 trade secrets. The most recent case I'm reading from is
20 In Re Roman Catholic Archbishop of Portland in Oregon,
21 Ninth Circuit, 661 F.3d 417.

22 So, Your Honor, it is our position that there is
23 not good cause or compelling reasons to have any form of a
24 protective order to protect the prisoners' names in this
25 case. This came up in the context of counsel's discussion

1 regarding discovery issues and most recently following up
2 on the Court's suggestion that we sample the prisoner
3 files as part of discovery. It is our understanding
4 that's quite a bit of responsive documents that may be
5 contained in those files.

6 We got hung up on two pieces of sampling. One
7 was whether or not the defendants need to provide a report
8 to plaintiffs with the prisoners' names and arrest dates.
9 To date, we have received a report that has no names but
10 does have a booking number. We think it would be
11 unreasonable and extraordinary burdensome for us to have
12 to proceed in this case having to take depositions and
13 asking the sheriff, for example, about booking No. 86971
14 without using their name or requiring special
15 circumstances to use their name in deposition.

16 So our position is that the protective order --

17 THE COURT: Do you have the cite for the recent
18 Ninth Circuit decision on protective orders. I know State
19 v. Foltz. Is there a recent one?

20 MS. CHAMBERLAIN: The most recent one that I was
21 quoting from was In Re Catholic Archbishop of Portland in
22 Oregon, 661 F.3d 417.

23 Excuse me, Your Honor. One additional point I
24 wanted to make regarding this point and whether
25 specifically prisoners' names and book and release dates

1 should be subject to a protective order, and that is that
2 Oregon Revised Statute 192.501, part of the Oregon Public
3 Records Act.

4 THE COURT: That's what I was going to ask you
5 about next.

6 MS. CHAMBERLAIN: It specifically speaks to this
7 point; in particular Section 3. What the statute says is,
8 "The following public records are exempt from disclosure,
9 unless the public interest requires disclosure on a
10 particular instance." Then it goes on to state No. 3,
11 "Investigatory information compiled for criminal law
12 purposes. The record of an arrest or the report of a
13 crime shall be disclosed, unless and only for so long as
14 there is a clear need to delay disclosure in the course of
15 a specific investigation, including the need to protect
16 the complaining party or the victim."

17 Then it goes on later to say, "For the purposes
18 of this section the record of an arrest or the report of a
19 crime includes, but is not limited to, the arrested
20 person's name, age, residence, employment, marital status,
21 the offense with which the arrested person is charged,"
22 and it goes on.

23 So how I read the statute, very clearly it
24 states explicitly, Your Honor, that unless there is a need
25 to delay disclosure because of a specific ongoing

1 investigation. If we were to obtain the same information
2 through the Public Records Act instead of a discovery
3 request, the Columbia County Jail would be required to
4 hand it over.

5 THE COURT: Let me ask the defendant, in light
6 of the Oregon public records law on that provision, don't
7 you have to turn that over?

8 MR. ROBERSON: Well, that statute was cited to
9 me last night. I did not look into it or research it
10 because I was preparing for today's hearing, but we talked
11 about it for an hour last week. I think we're talking
12 sideways on the issue.

13 PLN's discovery request do not actually ask for
14 an inmate report with 43,000 names on it. It has come up,
15 with respect to this, how to sample files randomly. Then
16 there is a separate question later on, when we sample the
17 files, here are the names disclosed. What I have
18 explained is that I think it depends on the nature of the
19 disclosure. I need to know what records we are dealing
20 with here. That would not just be the name of the inmate,
21 the date of arrest, the date of release. That would be
22 what's in their inmate file. It is a totally separate
23 question.

24 So the first question is: Does this report need
25 to be turned over with inmate names if it is just being

1 used for the purpose of figuring out how to sample files
2 randomly? Our position is that it does not need to be
3 produced. We produced the one with the inmate numbers
4 instead, and we are relatively competent we are going to
5 be able to produce an Excel spreadsheet from the jail
6 inmate software, which is, again, an issue we discussed --

7 THE COURT: I remember that.

8 MR. ROBERSON: -- last week.

9 THE COURT: So what's the reason why defendant
10 is concerned about the list that's given with inmate names
11 and booking dates and release dates -- I'm missing that --
12 especially that it is discoverable or subject to the
13 Oregon public records law. Where is defendant's concern?

14 The concern I heard last week, and I can fix it
15 right now, you are concerned about possibly getting sued
16 for disclosure of private information or something like
17 that. I will fix that right now. You are getting a court
18 order. You may not withhold prisoner names, booking
19 dates, release dates and the like. Anything that would
20 otherwise be discoverable or producible under the Oregon
21 public records law, you can't disclose.

22 I will do that as part of an oral order from the
23 bench, an order to compel. I think that gives you and the
24 clients the protection you need to not be subject to a
25 meritorious claim for invasion of privacy because you are

1 under a court order to produce that information or not to
2 withhold it.

3 So I think that takes care of what I hear to be
4 a legitimate concern, but we have now solved that. Any
5 further concerns we need to address on that?

6 MR. ROBERSON: Does that order include a
7 protective order as well --

8 THE COURT: I have not yet heard anything that
9 would qualify for protection under a protective order
10 under the good cause standard that I'm familiar with in
11 the case of State v. Foltz, which also requires that the
12 Court has to do a serious evaluation of whether there is
13 good cause. I have not read the recent case. It sounds
14 like it is not inconsistent.

15 So if you all want to have a protective order
16 that you can stipulate to, the concept for how to deal for
17 things for which there is good cause, that's fine with me.
18 But I don't think the names of inmates, their booking
19 dates, their release dates and the like would qualify for
20 good cause.

21 MR. KRAEMER: Your Honor --

22 THE COURT: Yes, Mr. Kraemer.

23 MR. KRAEMER: You hit the nail on the head as to
24 the reason. I appreciate what Mr. Blackman has said, and
25 I'm mindful of the laws. I am also mindful of the fact

1 that somebody who is arrested for sexually abusing a
2 13-year-old girl two years ago and then charges were
3 dismissed, if it gets turned over to them and they have
4 that information, I guess in the scheme of things that's
5 life.

6 THE COURT: If it is subject to the Oregon
7 public records law, then it is life.

8 MR. KRAEMER: And whether or not that would be a
9 public disclosure of matters that have now become somewhat
10 private because of passage of time, yeah, we can probably
11 defend against it by incurring legal fees and blah, blah,
12 blah, and people would be embarrassed by this coming out.
13 I am rambling way too far.

14 I want you to understand: That's our only
15 concern, that situation right there. Some of this would
16 be stale information; charges that were never prosecuted.
17 You are ordering us to do it. Quite frankly, my notes
18 were "hopefully the judge will order us to do it," because
19 that makes it very easy for us.

20 THE COURT: It is so ordered.

21 MR. KRAEMER: I appreciate it.

22 THE COURT: All right. Anything else we should
23 talk about in terms of discovery now, or should I wait for
24 you to contact Mary and let us know when you are ready for
25 further scheduling?

1 MR. KRAEMER: I think we are good right now.

2 MS. CHAMBERLAIN: Your Honor, a couple of
3 things. We have recently noted up a request to inspect
4 the jail. We actually did that a few weeks ago and just
5 rescheduled it this week to happen the first full week of
6 May along with a 30(b)(6) deposition at the jail as well.
7 We had some discussions with counsel regarding inspection
8 and a contemporaneous 30(b)(6) deposition. There may have
9 been some issues that we can use the Court's assistance
10 on. I am not sure.

11 MR. ROBERSON: I don't think we have a dispute
12 for you at this time, Your Honor. We might have one in
13 the future over the mechanics of the 30(b)(6) deposition
14 when it is scheduled.

15 THE COURT: That's fine. And if you need my
16 assistance, contact Mary Austad by telephone or by e-mail,
17 and the Court will make itself available to you as soon as
18 we reasonably can.

19 MS. CHAMBERLAIN: Your Honor, the one other
20 additional thing we were going to talk about today is the
21 default scheduling order says discovery ends very soon, in
22 the next few weeks, and there are a number of other
23 deadlines coming up. We were going to talk about a
24 scheduling order today.

25 THE COURT: When do you all propose to have

1 discovery close? I will tell you that I expect my
2 decision on the preliminary injunction motion will be out
3 no earlier than 30 days from now and no later than 60 days
4 from now.

5 MR. KRAEMER: From our perspective we have got
6 three to six -- well, we have got three or four PLN
7 people. I can't remember how many people work for the
8 organization. Obviously we have a great interest in the
9 damages component of this case. So there is a good chance
10 that half if not all of those people will need to be
11 deposed on our end. It is really going to be a matter
12 once we get discovery from them on the financial aspect of
13 their business and diversion of resources and things like
14 that that they have alleged.

15 Then we may interview or depose a number of
16 these declarants. It depends. So I'm thinking most
17 likely at the low end for us it would be four or five
18 depositions and at the high end ten to twelve. I think
19 probably in the next two and a half or three months we
20 should have them wrapped up from our end.

21 THE COURT: Okay.

22 MS. CHAMBERLAIN: Your Honor, it is a little
23 hard to tell right now. I think in the very first
24 conference with you, I think the parties were hoping to
25 push this along and keep this on track and have an early

1 trial. Although there have been quite a few
2 communications between counsel, we have not seen the
3 discovery yet, which I understand the first part is coming
4 next week. If indeed the sheriff's deposition, Sergeant
5 Cutright's deposition and 30(b)(6) inspection happen that
6 first full week of May, and we're on track from that point
7 forward, we think probably the earliest we could be done
8 with discovery is the middle of August.

9 We would propose that there be a dispositive
10 motions deadline pretty soon after that, maybe on the
11 31st, and then we would want Your Honor's suggestion about
12 how far out trial should be after that.

13 THE COURT: All right. Let's schedule the close
14 of discovery for the last business day in August. What's
15 that, Mary?

16 THE CLERK: August 31.

17 THE COURT: Discovery closes August 31st. Is
18 there going to be -- do you all anticipate expert
19 discovery?

20 MR. WING: I don't think so.

21 MR. KRAEMER: I anticipate experts.

22 THE COURT: Do you need expert discovery to
23 close before dispositive motions? Sometimes it is more
24 economically efficient to wait until after dispositive
25 motions to do expert discovery if the expert disclosure is

1 not going to be relevant or needed for the dispositive
2 motions and responses.

3 MR. WING: Steve, can I ask you, are you talking
4 about damages?

5 MR. KRAEMER: Yes.

6 MR. WING: Then it wouldn't be relevant to
7 dispositive motions.

8 MR. KRAEMER: I'm not sure. I guess I have to
9 think this through. I guess if part of the summary
10 judgment is going to be the final issue on the
11 constitutionality of any of the policy, there may be room
12 for jail experts to be submitting declarations in that
13 regard.

14 THE COURT: And if there are facts in dispute,
15 my attitude is we shouldn't do it on summary judgment; we
16 should do it on a trial on the merits.

17 MR. KRAEMER: Would a jury decide if the policy
18 is constitutional?

19 THE COURT: Not necessarily. That's not a jury
20 question. But I would still want to do it on a
21 bifurcated --

22 MR. KRAEMER: Understood.

23 THE COURT: Even if not bifurcated, there are
24 some questions for the Court. Permanent injunctions and
25 declarations for the Court. Fact disputes and damages for

1 the jury. By the way, I'm not quite sure what it is you
2 want for the jury on this, but you all might want to think
3 about waiving jury. You have jury trial rights on
4 whatever issues you have a right to have a jury trial on.
5 If you want to stand on those rights, you are welcome to.
6 We will have a jury trial. If you want to waive it, I
7 will deal with everything on a bench trial. I think in
8 terms of permanent injunctive relief, if any, and
9 declaratory relief, that's for the Court, not a jury.

10 MR. KRAEMER: Agree. I was looking at the jury
11 and damages, how much money was involved.

12 THE COURT: If both sides want a jury -- I guess
13 if either side wants a jury trial issue on that, you have
14 a right to it, I think.

15 MR. WING: I think we are in agreement it sounds
16 like.

17 THE COURT: Okay. Let's have dispositive
18 motions due the last business day in September. What date
19 is that, Mary?

20 THE CLERK: September 28th.

21 THE COURT: September 28th for dispositive
22 motions being due and then go through the regular rules
23 for responses. Three weeks after response; two weeks
24 after that reply. If nobody needs, or if someone needs an
25 extension, we will deal with that then and then schedule

1 oral argument on motions.

2 Let's schedule a status conference sometime
3 maybe in August, early part of August, just to sort of see
4 if we're on track.

5 MR. WING: Generally speaking, this looks good
6 to us. We have got another trial that seems fairly likely
7 to go in October. We would wonder if we can bump things
8 up two weeks earlier; that is, discovery close mid-August,
9 dispositive motions two or three weeks earlier.

10 THE COURT: Sounds fine to me. Any objection
11 from defendant?

12 MR. KRAEMER: No.

13 THE COURT: Mary, let's pick something around
14 the middle --

15 THE CLERK: August 16th for discovery closing.

16 THE COURT: Will that work for you?

17 MR. WING: Yes.

18 THE COURT: Then 30 days after that, roughly
19 September 15th or 16th?

20 THE CLERK: September 13th.

21 MR. WING: Yes, that would be better.

22 THE COURT: Okay. Dispositive motions filed
23 September 13th.

24 Do you all think we need another status
25 conference? The other option is we are here when you need

1 us. Either party can contact us if there is something you
2 need to talk about. As of right now, I'm not going to
3 require any ADR report. I think you all know how to
4 discuss that among yourselves, if you need to. I am not
5 going to require that. It is too early to talk about
6 pretrial orders. We will see how things look like after
7 summary judgment.

8 MR. WING: Excuse me one second.

9 THE COURT: Of course.

10 MR. WING: What about having a status conference
11 a little bit earlier, let's say early July, to see how
12 things are moving?

13 THE COURT: That's fine.

14 MR. WING: If we have a logjam, we can do it by
15 telephone.

16 THE COURT: Mary, how do we look in early July?

17 THE CLERK: Friday, July 6th. Does that sound
18 okay?

19 THE COURT: If there is problem, just set off
20 fireworks two days earlier.

21 MR. BLACKMAN: Mary, what time?

22 THE CLERK: 9:30.

23 THE COURT: All right. Anything else?

24 MS. CHAMBERLAIN: No.

25 COUNSEL: Thank you.

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature, conformed signature or digitally signed signature is not certified.

/s/ Dennis W. Apodaca
DENNIS W. APODACA, RMR, FCRR, RPR
Official Court Reporter

April 23, 2012
DATE