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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PRISON LEGAL NEWS,)
)
 Plaintiff,) Case No. 3:12-CV-0071-SI
)
 vs.) November 16, 2012
)
COLUMBIA COUNTY, et al.,) Portland, Oregon
)
 Defendants.)

MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE MICHAEL H. SIMON

UNITED STATES DISTRICT COURT JUDGE

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APPEARANCES

FOR THE PLAINTIFF: Jesse Wing
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 1000 SW Third Avenue, Room 301
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 (503) 326-8182

1 (November 16, 2012)

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

3 (Open court:)

4 THE COURT: Good afternoon.

5 COUNSEL: Good afternoon.

6 THE CLERK: Your Honor, this is the time set for
7 oral argument in civil case 12-71-SI, Prison Legal News
8 versus Columbia County, et al.

9 For the record, we have Alissa Hull, who is
10 appearing today pro hac vice. Her application hasn't made
11 it up to us yet. Counsel, beginning with the plaintiffs,
12 can you please state your names for the record.

13 MR. WING: Good afternoon, Your Honor. Jesse
14 Wing on behalf of Prison Legal News.

15 MS. CHAMBERLAIN: Katie Chamberlain on behalf of
16 Prison Legal News.

17 MR. KRAEMER: Steve Kraemer for defendants, Your
18 Honor.

19 MR. ROBERSON: Greg Roberson for defendants.

20 THE COURT: All right. Good afternoon.

21 We have before us today several items. We have
22 plaintiff's motion for partial summary judgment regarding
23 declaratory and injunctive relief. That's Docket 85.
24 Included within that, in the reply brief, we see a motion
25 to strike -- that's Docket 119 -- several portions of

1 defendants' evidence.

2 Then we also have plaintiff's motion for partial
3 summary judgment to dismiss defendants' affirmative
4 defense of failure to mitigate. I have reviewed all of
5 the briefing. I have reviewed a portion of the evidence,
6 although my staff have reviewed all of the evidence, I
7 understand, but I have reviewed a portion of it. I have
8 reviewed all of the briefing.

9 I would like to begin with a few questions. At
10 some point you will all have an opportunity to say
11 anything that you want to say about any germane topic, but
12 I want to begin with some questions, primarily beginning
13 with questions for defendants.

14 With respect to plaintiff's motion for partial
15 summary judgment for declaratory and injunctive relief,
16 with respect to that portion of that motion that concerns
17 the challenge to the postcard-only policy under the
18 First Amendment, are there any evidentiary facts that are
19 material to that issue that are in dispute?

20 MR. ROBERSON: Your Honor --

21 THE COURT: A little louder, please.

22 MR. ROBERSON: Do you want me to address that
23 now or do you have other questions?

24 THE COURT: Right now. I am going to take you
25 through a lot of questions. I do promise you that, I

1 guess at the end of my questions, you will have the
2 opportunity to say anything else anybody wants to say. I
3 have a series of questions. I would like to hear that one
4 first.

5 And please speak up.

6 MR. ROBERSON: Thank you, Your Honor. The
7 challenge to the postcard policy, the terms are what they
8 are. I don't think PLN is arguing that the postcard
9 policy had terms different than what it states.

10 THE COURT: I'm sorry. Can you begin by
11 answering my question yes or no? If the answer to my
12 question is yes, tell me what the evidentiary facts are.
13 If the answer is no, we will deal with that.

14 MR. ROBERSON: Your Honor, we think there are
15 disputed facts, questions of fact that require the denial
16 of PLN's motion on the postcard policy violating the
17 First Amendment.

18 THE COURT: All right. Will you tell me what
19 several of the most important ones are one at a time,
20 please.

21 MR. ROBERSON: The first is the security risks
22 that are inherent in envelope mail versus a postcard that
23 does not have to be put in an envelope. We have detailed
24 what those security threats are. PLN is disputing that
25 those are threats. I think they agree that those things

1 could occur, but they are disagreeing because it never
2 happened at the Columbia County Jail.

3 THE COURT: So where is the evidentiary dispute?
4 I understand that you have put forward some of the
5 potential security risks. I know that some of them
6 identified the California declaration. We will get to
7 that issue later. I understand you have identified some
8 of the security risks. If I have got it right, some of
9 the risks are contraband that could be under postage
10 stamps, although I'm not quite sure how I see that's
11 relevant since postage stamps could also be on postcards.

12 But I notice you also put in there might be
13 metal paperclips, staples, razor blades, a variety of
14 potential types of weapons and/or contraband contained
15 under the gummed flaps of envelopes or within the leaves
16 of paper. I understand that.

17 But what is the evidentiary dispute? I don't
18 see the plaintiffs denying that those threats or risks
19 exist. Do you?

20 MR. ROBERSON: Well, I think they deny that
21 those threats exist, but they also admitted that those
22 things can happen.

23 THE COURT: Right. See, I'm trying to figure
24 out, do we need a trial to resolve that issue and other
25 issues. So do we need a trial to resolve the question of

1 whether there are the risks or threats or potential
2 dangers that can come in an envelope?

3 MR. ROBERSON: Your Honor, our position is we do
4 need a trial on that. Part of the issue here is what
5 inferences are drawn from the facts? What inferences are
6 drawn from the facts that the parties maybe could agree
7 on? This is on a summary judgment record. We're entitled
8 to those reasonable inferences.

9 THE COURT: Okay. What are the inferences that
10 you say you are entitled to?

11 MR. ROBERSON: That these security risks -- on
12 the security risk issue, that these justify treating
13 personal inmate mail differently than mail from an
14 organization.

15 THE COURT: Now, is that an inference or is that
16 a conclusion? My understanding -- and feel free to
17 disagree with me -- but my understanding is an inference
18 is akin to circumstantial evidence. We have certain basic
19 evidentiary facts. From those, we can infer other facts.
20 On the other hand, here, I don't think that there is a
21 dispute that there are security risks or threats that can
22 come in envelopes, but the question is going to be
23 ultimately how does one balance those against
24 First Amendment rights?

25 So are you saying that the question of how does

1 one balance it is a fact question?

2 MR. ROBERSON: I think the legal question on the
3 Turner test, evaluating each of the factors, is the job of
4 the Court. But the reasonable inferences drawn from the
5 facts such as what the jail perceived to be threats to
6 envelope mail, the jail's adoption of the postcard policy,
7 these are things that PLN spends about half of its brief
8 simply attacking the sheriff for defending a postcard
9 policy. The essential argument is the sheriff just can't
10 be trusted or believed.

11 We want you to hear from the sheriff himself at
12 a trial for the issues that a jury gets to resolve and for
13 the issues that Your Honor gets to resolve.

14 THE COURT: So the Turner issue is for me or the
15 jury?

16 MR. ROBERSON: I believe the balancing test is
17 for Your Honor.

18 THE COURT: Okay. So what you want to hear as
19 part of the factual presentation is the sheriff's
20 explanation for why he came to the balance that he came
21 between security risks versus, say, First Amendment
22 interests and that should, you say, be part of the full
23 evidentiary record that the Court needs to hear as part of
24 making its Turner analysis?

25 MR. ROBERSON: Yes, Your Honor.

1 THE COURT: Okay. So that's security risk. Any
2 other evidentiary issues that you believe are in dispute?

3 MR. ROBERSON: PLN has raised -- they have made
4 this argument that the jail had a policy of banning
5 magazines. We admitted in our answer all of the facts.
6 We admitted liability in our answer, and we've put forth
7 evidence that we had an unconstitutional magazine practice
8 prior to the filing of the lawsuit. To be honest, I think
9 both sides have said there is no evidentiary dispute about
10 that. They have said that we obviously have a policy of
11 banning magazines, and we've said that we don't. But the
12 policy says what the policy says. It allows periodicals.
13 To the extent there is any dispute, there is disputed
14 facts on that and that requires denial of PLN's motion
15 finding that we had a policy of banning magazines prior to
16 the lawsuit filing.

17 THE COURT: Well, let me make sure I understand
18 what you say the disputed fact is, because as far as I see
19 it, it is undisputed that you had a written policy that
20 allowed magazines. I don't think I saw a dispute from the
21 plaintiffs on that. If I did, they can correct me later.
22 I think it is also undisputed that from time to time you
23 prohibited or your client prohibited magazines. Neither
24 of those facts, I think, are in dispute. You can correct
25 me if you disagree. I just need to figure out what's the

1 legal consequence of having a written policy that says
2 magazines are allowed, but on a fair number of occasions
3 not allowing magazines on other written statements to
4 inmates and family telling them that they can't send in
5 magazines.

6 None of those underlying evidentiary facts seem
7 to me to be in dispute. But what the parties are
8 disputing, as far as I can tell, is what the legal
9 consequences are of those undisputed evidentiary items.

10 Do you disagree?

11 MR. ROBERSON: Regarding their argument that we
12 had a policy of banning magazines, there is a material
13 dispute of fact, Your Honor. I think the briefing makes
14 that clear.

15 THE COURT: What is the evidentiary dispute?
16 What pieces of evidence are in dispute? It is undisputed
17 that you had certain documents that say what they say.

18 MR. ROBERSON: Right.

19 THE COURT: I think it is undisputed that from
20 time to time you did what they say you did. So what is
21 the evidentiary dispute as opposed to the labeled or
22 nominal dispute?

23 MR. ROBERSON: PLN has pointed to non-policy
24 documents and argued that that is a policy. We dispute
25 that those documents mean what PLN is saying they

1 represent.

2 THE COURT: Okay. So the parties agree, for the
3 most part, on the terms of what certain documents say.
4 The parties probably seem to agree on certain actions that
5 took place and statements that were made. But in terms of
6 municipal liability, the County can only be held liable
7 under 1983 if they had a municipal policy. So you are
8 arguing that whether those undisputed evidentiary facts
9 constitute a policy of a municipality is disputed.

10 Do I have that right?

11 MR. ROBERSON: I think you have that right,
12 Your Honor.

13 THE COURT: Now, why isn't that a legal dispute
14 as opposed to a factual dispute?

15 MR. ROBERSON: Well, I think it bleeds into
16 both, Your Honor. You mentioned the County. We have a
17 separate argument for Columbia County.

18 THE COURT: Okay.

19 MR. ROBERSON: Another disputed fact, though, is
20 part of the analysis is whether the adoption of the
21 postcard policy was an exaggerated response to a perceived
22 problem. That's in Turner. That's in Beard v. Banks and
23 other cases we cited. Whether something is an exaggerated
24 response to something is a factual issue. That is
25 disputed and it certainly is something that is drawn from

1 the inferences of the evidence before you.

2 THE COURT: Okay.

3 MR. ROBERSON: It's something that you should
4 hear testimony on at a trial.

5 THE COURT: Is it your position as well that's a
6 question for me to draw from the evidence at trial as
7 opposed to the jury?

8 MR. ROBERSON: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. ROBERSON: Another dispute we have is the
11 adequacy of the sheriff's training of its deputies in the
12 inmate mail policies and practices, the supervision of the
13 deputies, who we can identify that were rejecting mail, in
14 violation of the Constitution. Those are also disputed
15 facts.

16 THE COURT: Okay.

17 MR. ROBERSON: We have a dispute over what the
18 Web site should have said at different times. I think a
19 lot of these, if I could --

20 THE COURT: I'm not following you on that one.

21 MR. ROBERSON: Okay. PLN has stated that our
22 Web site is a violation of the Constitution because it
23 didn't have due process procedures written on it.

24 THE COURT: Well, now, that's not an evidentiary
25 dispute, is it? That's a legal dispute between you and

1 plaintiff. Am I wrong?

2 MR. ROBERSON: I agree with you, Your Honor.

3 THE COURT: Right now, let's focus on cataloging
4 the evidentiary piece. I'm trying to visualize what a
5 trial like this would be on these issues that you contend
6 should be for trial and not for summary judgment.

7 MR. ROBERSON: Another issue, Your Honor, is,
8 and I think this goes to what we've already discussed as
9 inferences drawn from the facts as opposed to facts. Part
10 of your analysis on Turner is the alternative means
11 available to inmates and the correspondence, and there are
12 disputed facts as to whether those -- I think PLN agrees
13 those are available. So we have a dispute over whether
14 they have -- whether the postcard policy presents an undue
15 burden on those folks.

16 THE COURT: All right.

17 MR. ROBERSON: I think testimony on that
18 issue -- factual testimony on that issue will be important
19 to Your Honor's balancing the Turner test.

20 THE COURT: All right. Other evidentiary
21 disputes on this First Amendment issue -- by the way, I'm
22 not going to hold you to this.

23 MR. ROBERSON: I think I have covered the main
24 ones.

25 THE COURT: This is for my understanding. It is

1 not a trick question to limit you. Any other primary
2 evidentiary disputes on the First Amendment issue you can
3 think of right now?

4 MR. ROBERSON: No. I think we have hit the
5 highlights.

6 THE COURT: What about the due process issue on
7 policy. Are there any disputed evidentiary questions on
8 that issue?

9 MR. ROBERSON: I don't believe so, Your Honor.
10 PLN is not even challenging the due process procedures in
11 the current inmate policy or in the one that was adopted
12 in May.

13 THE COURT: No. But they are moving for partial
14 summary judgment, or they are asking for a declaration
15 that defendants' due process policy violated the
16 Fourteenth Amendment. So am I hearing you correctly say
17 that there is no evidentiary matter; I can resolve that on
18 summary judgment, I should just resolve it in defendants'
19 favor?

20 MR. ROBERSON: Well, a couple of things,
21 Your Honor. If it is regarding our pre-lawsuit due
22 process procedures, there is no point in issuing a
23 declaratory relief. It doesn't serve any practical
24 purpose. We have admitted that our prior due process
25 procedures were a violation of the Constitution. We have

1 admitted that in this briefing. We've admitted it in our
2 answer. We've admitted it in our response to preliminary
3 injunction. So that aspect of your equitable discretion
4 should be there is no need to issue a ruling on that.

5 THE COURT: What about for trial on damages? Do
6 we tell the jury that it is undisputed that there were due
7 process violations by the defendant and now it is passed
8 to the jury to decide whether or not they caused damages,
9 and if so, how much?

10 MR. ROBERSON: Yes, Your Honor.

11 THE COURT: Okay.

12 MR. ROBERSON: If we are discussing the January
13 and February inmate due process procedures in those two
14 policies, Your Honor has already denied PLN's request in
15 the preliminary injunction order.

16 THE COURT: Yeah, I know.

17 All right. That answers a number of my initial
18 questions on that.

19 Shall we turn now briefly to plaintiff's motion
20 to strike some of the evidence that defendant presented
21 with their response primarily attached to the declaration
22 of you, Mr. Roberson.

23 As I understand it, there are three categories,
24 one of which you have withdrawn. There was the Oregon
25 Live news article. That's Docket 1511. Plaintiff moved

1 to strike that primarily based on hearsay grounds. If I
2 understand it correctly, you withdraw that exhibit, right?

3 MR. ROBERSON: Yes, Your Honor.

4 THE COURT: All right. That's done.

5 With respect to the document in Docket 115-6,
6 that's the transitions to postcard for inmate mail that
7 was discovered in late September by Captain Carpenter. I
8 understand your response to that. I will hear from
9 plaintiff on that in a few minutes. I have no questions
10 for you on that document.

11 But with respect to the California declarations,
12 let me take you through them and ask you a few questions;
13 first, some specifics about the declarations and then some
14 big-picture questions.

15 With respect to the declaration of Sergeant Rob
16 Davidson, what am I supposed to get out of that? What's
17 the relevance of Sergeant Davidson's declaration? What
18 does that tell me that's relevant to this case? That's
19 Docket 115-12 at Exhibit L, page 3. I didn't really
20 understand the relevance of Sergeant Davidson's
21 declaration.

22 MR. ROBERSON: We relied on Sergeant Davidson's
23 declaration to show that Ventura County adopted a policy
24 for incoming and outgoing mail.

25 THE COURT: All right. I don't mean to be rude,

1 but so what?

2 MR. ROBERSON: Just for context for the other
3 declarations.

4 THE COURT: So Sergeant Davidson is to help give
5 context to the others but no independent evidentiary
6 value. That's fine.

7 MR. ROBERSON: Right.

8 THE COURT: Okay. Then with respect to the
9 declaration of Tracy Martinez, one of the things that I
10 glean from that was that narcotics were concealed under
11 postage stamps and in the seams of envelopes. You are not
12 making a point, are you, that contraband can be under
13 postage stamps? That's not relevant to this case, is it,
14 or is it?

15 MR. ROBERSON: I think it is relevant to this
16 case.

17 THE COURT: How so, because postage stamps are
18 also on postcards. As a matter of fact, the same number
19 of words would probably take more postcards than to be in
20 one letter with one postage stamp. So I'm not sure I
21 quite understand your postage stamp point given that you
22 are not prohibiting postage stamps from being on postage
23 cards.

24 MR. ROBERSON: I see your point, Your Honor.
25 Columbia County Jail was removing stamps from postcards

1 because they could contain contraband underneath.

2 THE COURT: Absolutely. I get that. But
3 whether or not it is a postcard-only policy or letter
4 policy, the fact that there can be contraband under a
5 postage stamp, I think, is legally irrelevant to that
6 question, but you are welcome to tell me why I am wrong.

7 MR. ROBERSON: We agree. Contraband could be
8 under a stamp on an envelope as well.

9 THE COURT: Okay. Now, I do see that
10 Tracy Martinez tells us that contraband can also be
11 concealed under the seams of envelopes. That's what I was
12 getting from that. I didn't quite know what to get
13 from -- and I see she also talks about paperclips and
14 staples. I get that. Was there anything in paragraph 9
15 about this suspicious, unknown substance on a blank sheet
16 of paper. I didn't know quite what to make of that. If
17 the answer is nothing, that's fine too. I get from
18 Tracy Martinez the risk of contraband in the seams of
19 envelopes and staples and paperclips.

20 MR. ROBERSON: I think that's the point,
21 Your Honor. I don't think we cited to paragraph 9 in that
22 declaration.

23 THE COURT: That's fine. I think -- although I
24 will give plaintiff a chance later to tell me if they
25 disagree -- I think I can take judicial notice of an

1 adjudicative fact as a matter of common sense that
2 contraband can be concealed in seams of envelopes and
3 envelopes can contain metal paperclips and staples. So
4 I'm not sure I need additional evidence for that. But I
5 see the evidentiary purpose of that aspect of the Martinez
6 declaration.

7 With respect to Hernandez, basically it is the
8 same. Is it the same concepts, same points, or am I
9 missing something else? Mr. Hernandez talks about drugs
10 within the paper materials and letters and in envelopes.
11 He also talks about the fact that postcards have been
12 modified by being split in two by a sharp objects, such as
13 a razor blade and glued back together. He talks about
14 paperclips and things like that. Anything else I'm
15 missing from the Hernandez declaration?

16 MR. ROBERSON: No, Your Honor.

17 THE COURT: The next declaration, it is on pages
18 10 through 15, the one that the name has been redacted,
19 you are not offering that, are you, the unredacted,
20 unnamed declaration?

21 MR. ROBERSON: We are offering that, Your Honor.

22 THE COURT: Okay. How could I possibly accept
23 as evidence an unsigned, unnamed declaration? Under what
24 rule would I accept that?

25 MR. ROBERSON: I think you can in this instance

1 because the redaction was made pursuant to state court
2 order. I don't think you are required to adhere to the
3 state court order, but Your Honor can decide to accept it
4 given that the first page of Exhibit L showed that all the
5 redactions were in accordance with the state court's
6 order. That is evidence that this obviously did have a
7 name on it and a state court judge decided to redact it
8 for reasons of security or privacy.

9 THE COURT: Well, what's the purpose of a
10 declaration in opposing summary judgment?

11 MR. ROBERSON: To provide evidence of facts.
12 Maybe it is such a basic question that I'm flubbing it,
13 Your Honor.

14 THE COURT: Well, I will tell you how I would
15 answer that. I think the purpose of a declaration or a
16 sworn statement is to say, "If this case were to go to
17 trial, we would have admissible evidence of the
18 following," and then if we have a signed declaration from
19 John Smith, I could then take -- well, if this case were
20 to go to trial, John Smith would be a competent witness
21 based on whatever is revealed in the declaration.
22 John Smith would be under oath, just like you have to be
23 at trial. And assuming that it is first-hand knowledge as
24 opposed to hearsay, John Smith would be allowed to testify
25 at trial consistent with his declaration. Then that could

1 tell me, well, we would then have admissible evidence at
2 trial consistent with the content of John Smith's
3 declaration.

4 Are you representing to me that whoever was the
5 declarant of Exhibit L, page 10 of 22 and following, will
6 be one of the witnesses that you will be calling at trial?

7 MR. ROBERSON: He is not a witness that we will
8 be calling at trial.

9 THE COURT: In that case I just don't think I
10 can accept Exhibit L, page 10 of 22 through page 15 of 22
11 contained in Docket 115-12, and I'm going to strike that.

12 With respect to the declaration of Aaron
13 Wilkinson, I guess the relevant portion seems to be in
14 paragraphs 7 and 8 or so. What's the relevance of Aaron
15 Wilkinson's declaration? I guess paragraph 7 and 8 seem
16 to be it. Am I missing something else?

17 MR. ROBERSON: Yes, paragraphs 7 and 8.

18 THE COURT: All right. I cannot figure out what
19 I'm supposed to get from the declaration of Jeffrey Held,
20 Exhibit L, 19. So what am I missing?

21 MR. ROBERSON: Your Honor, you are not missing
22 anything. We cited at paragraphs 16 through 19 of that
23 declaration, and I went through that in the surreply
24 memorandum that we're relying on those paragraphs. That
25 means we're not relying on the L declaration at all

1 anymore.

2 THE COURT: Very good. To the extent it is part
3 of the motion, I'm striking Jeffrey Held's declaration.
4 That could be a wasted effort if you are not relying on
5 it. So the record is clear, I'm not going to rely on
6 Jeffrey Held's declaration or on the portion of the
7 declarations that have no name.

8 Okay. That answers my questions about the
9 motions to strike.

10 One final question that I have for defendants at
11 this stage right now is the following: Let's assume that
12 I deny the motion for partial summary judgment on the
13 grounds that you have identified that there really needs
14 to be trial testimony and there are disputed evidentiary
15 facts that the Court needs to consider as part of its
16 Turner analysis. How do we deal with that at trial? What
17 do we tell the jury that this trial is about with respect
18 to them? Do we tell them that there is a First Amendment
19 violation? Do we tell them that I will tell them at the
20 end of the trial whether there is a First Amendment
21 violation? How do we deal with that?

22 MR. ROBERSON: I think if Your Honor is ready to
23 rule on the postcard issue under the First Amendment at
24 the conclusion of the testimony, then yes.

25 THE COURT: All right. So --

1 MR. ROBERSON: You could inform the jury that.

2 THE COURT: So what you are saying is at the
3 conclusion of the evidence, basically as part of the jury
4 instructions if -- hypothetically -- if I were to conclude
5 after hearing all of the evidence that the postcard policy
6 and/or the magazine policy violates the First Amendment, I
7 would so instruct the jury as part of their jury
8 instructions, and then we turn to the jury for whether
9 damages have been caused, and if so, what amount. Is that
10 what you are saying?

11 MR. ROBERSON: Yes. And that is why Your Honor
12 can deny declaratory relief on that issue at this stage,
13 because, one, there is disputed facts; two, we're only
14 here on PLN's equitable claims. We are not here on their
15 claim for damages. You can declare a postcard policy
16 unconstitutional and not enter declaratory relief but make
17 a finding to the jury on the claim for damages that there
18 was a First Amendment violation.

19 THE COURT: I missed that last point. Would you
20 repeat that last point a little louder, a little slower.

21 MR. ROBERSON: You can decline to enter
22 declaratory relief and issue a finding on PLN's claim for
23 damages, which is not at issue today, for the jury,
24 finding that the postcard policy or at least the one in
25 this case violated the Constitution.

1 THE COURT: Okay. You know, as long as you are
2 here, with respect to the failure to mitigate affirmative
3 defenses, let's move to that motion a little bit. I know
4 it is plaintiff's motion. But would you tell me a little
5 bit more about what you mean in your affirmative defense
6 that plaintiffs failed to mitigate their damages?

7 MR. ROBERSON: I think PLN has made an issue of
8 this, that we are somehow trying to argue and mitigate the
9 relevance for liability, but we've made it clear -- the
10 case law makes it clear -- this only applies to the jury's
11 consideration of awarding damages. In this case PLN
12 continued to send mail into the jail, knowing that it was
13 being rejected. Mr. Wright stated in his deposition that
14 they always try to resolve these things without a lawsuit,
15 and they failed to do that in this case. We are not
16 saying that they had to do that. They could have filed
17 the lawsuit after 50 violations. But that's what the jury
18 needs to consider when they are measuring damages.

19 THE COURT: Let me ask you hypothetically:
20 Assume a person wants to challenge, let's say, a strip
21 search of a visitor. Assume hypothetically that, under
22 the circumstances, the strip search is unconstitutional.
23 If a friend of an inmate wants to go visit the inmate, and
24 they are subjected to, by assumption -- by hypothetical --
25 an unconstitutional strip search, and let's say she

1 complains about it, and they say, "Too bad, that's our
2 policy," and then she wants to visit -- the friend -- the
3 inmate a month later, and she undergoes another strip
4 search, an unconstitutional strip search. Maybe it
5 happens a third time. And then finally after the third
6 time, she sues. Is there an argument that the defendant
7 in that circumstance can present to the jury that she has
8 failed to mitigate her damages by not suing after the
9 first time?

10 MR. ROBERSON: With just three instances, I
11 think the Court can say no juror would consider that
12 reasonable to have to bring the lawsuit after the first
13 time, so I don't.

14 THE COURT: So your argument here is premised on
15 or predicated on the number of mailings that the defendant
16 sent in, the large number?

17 MR. ROBERSON: Correct. And the length of time.
18 It is PLN's knowledge of what is occurring. So the number
19 and length of time. Further, I think since it is
20 mitigation of damages, the Court has to look at the type
21 of damages being asserted. In your example, I assume that
22 is largely a non-economic damage component.

23 THE COURT: Yes.

24 MR. ROBERSON: PLN is all economic damages.
25 They are very limited resources. Frustration of mission.

1 Those are all economic damages that they are asserting.
2 So I think mitigation applies in this instance even though
3 it may not apply in your example.

4 THE COURT: Okay. Understood. By the way,
5 speaking of which, what's your opposition to the PLN's
6 request for partial summary judgment on the question of
7 their organizational standing?

8 MR. ROBERSON: That is a version of the
9 third-party standing doctrine. We are here on their
10 equitable claims only. No mail has been rejected since
11 the filing of the lawsuit; at least none of PLN's mail has
12 been rejected. The only evidence is Lucy Lennox sent some
13 mail in February, about eleven pieces of mail, and those
14 were rejected because they weren't on a postcard. Due
15 process notice was given to her, and she didn't exercise
16 her right to appeal. That is the evidence of injury to
17 third parties.

18 Your Honor, this isolated incident that Lucy
19 Lennox is alleging violated her rights, I think an element
20 of this organizational standing is a finding that she
21 cannot litigate her own rights.

22 THE COURT: I'm not following you.

23 MR. ROBERSON: I think PLN has to show that
24 Lucy Lennox, or the Court has to find that Lucy Lennox had
25 some hindrance in bringing her own claim. There is no

1 such evidence in this case.

2 THE COURT: Well, I think what they are asking
3 for, and this is the first section in their motion for
4 partial summary judgment on declaratory and injunctive
5 relief, they are asking that the Court declare that they
6 have organizational standing to challenge defendants' mail
7 policies and practices, which as I read their memorandum,
8 I think it is page 2. They say, "Plaintiff has
9 organizational standing when it suffers injury by
10 frustration of its mission and diversion of its
11 resources."

12 It is not clear to me, and I'm going to ask
13 plaintiffs this in a few minutes, whether they want me to
14 make a finding now that their organizational mission has
15 been frustrated and their resources have been diverted.
16 My question to you really is: If that's what they are
17 asking you for, is that a disputed issue of fact?

18 MR. ROBERSON: Our position is that PLN's
19 mission is the issue a monthly magazine. That's their
20 stated mission. There is a corollary to that, which is
21 investigating jail mail practices.

22 THE COURT: And advocacy too. That's part of
23 their stated mission, isn't it?

24 MR. ROBERSON: Yeah. Sorry. I didn't mean
25 to --

1 THE COURT: Which may or may not be bringing
2 lawsuits like this, but that's a different issue. I'm
3 confused. Part of it, I'm going to turn back to
4 plaintiffs in a few moments. But it is confusing to me
5 exactly what they are asking for in that first declaration
6 that they have organizational standing, but I figured that
7 as long as we were already talking -- you and me -- I
8 thought I'd ask you, what is your basis for opposing it?

9 MR. ROBERSON: Standing in PLN's own right,
10 which I don't think is organizational standing, we don't
11 think PLN has standing before this record. Your question
12 is for organizational standing, so can PLN represent the
13 interests of Lucy Lennox and prisoners? Our position is
14 that those folks have to have some kind of hindrance to
15 not remediate themselves. We've put in the record
16 references to multiple lawsuits where prisoners were
17 challenging postcard policies. Again, I don't think we
18 are talking about magazines and due process on this issue.
19 It is just the postcard policy.

20 THE COURT: And what's the case law that says
21 that a member of an organization has to have a hindrance
22 to litigate on their own before their organization has
23 organizational standing?

24 MR. ROBERSON: Can you ask that again?

25 THE COURT: Sure. Sure. What case do I look to

1 to see this point that an individual has to be hindered in
2 bringing their own lawsuit before an organization can
3 bring a lawsuit on behalf of its members?

4 MR. ROBERSON: The cases we cited in support of
5 the preliminary injunction we think should apply to an
6 organizational standing doctrine as well. Those cases,
7 the third party that had a hindrance involved a statute
8 that had a criminal prosecution consequences if those
9 folks engaged in speech. There is nothing like that in
10 this case. There is no threat of criminal prosecution for
11 Ms. Lennox or prisoners for engaging in First Amendment
12 rights.

13 THE COURT: How does this translate to an
14 environmental standing, or does it? Environmental
15 organizations bring cases.

16 MR. ROBERSON: Correct.

17 THE COURT: Do you know how this concept applies
18 in those situations, or does it?

19 MR. ROBERSON: The cases brought by
20 environmental organizations, I believe, are just under the
21 third-party standing doctrine, whereas organizational
22 standing is kind of subset of that. I'm not aware offhand
23 of a case brought by an environmental organization where
24 they asserted organizational standing. PLN cases have
25 been Fair Housing Act cases.

1 THE COURT: Okay. Very good. Thank you,
2 Mr. Roberson. I will come back to you and give you an
3 opportunity to say any other points you want to make.

4 But let me turn to plaintiffs now and ask the
5 following: With respect to your motion to strike, the CD
6 transitions for the postcards for the inmate mail, Docket
7 115-6, now that you have seen the defendants' response,
8 including the declaration of Mr. Carpenter, is there
9 anything more to your objection there? I think
10 Mr. Carpenter's declaration pretty much explains that
11 situation. He discovered it. He is retired. He
12 discovered it in late September and promptly produced it
13 to you. Do you wish to pursue that motion to strike any
14 further?

15 MR. WING: Your Honor, as a preliminary matter,
16 I just want to let you know there may be some questions
17 that Ms. Chamberlain would be responding to. I just want
18 to let you know.

19 THE COURT: No problem.

20 MR. WING: Thank you.

21 Yes, I guess the point that I would like to make
22 regarding the CD is it clearly was not a basis for the
23 sheriff's decision or he would have known about it and he
24 would have used it. So it smells like post-hoc evidence.
25 I think on that basis it doesn't belong in this record.

1 We have had months and months and months of collecting
2 documents and deposing witnesses. To produce something
3 like this, when we no longer have an opportunity to
4 investigate it, I think, warrants a strike. But that's
5 the only point.

6 THE COURT: Okay. I am going to deny the motion
7 to strike on that point. If you want more time to
8 investigate that late-produced evidence, you can have it.
9 Work it out with defendants. If you can't work it out,
10 contact my chambers, and we will help you to work it out.
11 But if you need to take additional discovery on that
12 document, even though it was produced after close of
13 discovery, you can.

14 MR. WING: Thank you.

15 THE COURT: The Oregon Live news article is
16 withdrawn.

17 I am not dealing with the Jeffrey Held or
18 no-name declarations.

19 I do think that the other declarations are
20 close, but let me ask you this: Do they really say
21 anything that I can't just take judicial notice of anyway;
22 namely, that contraband can be found in the seals of
23 envelopes, that envelopes and letters can contain staples
24 or metal paperclips? By the way, I understand the fact
25 that their own inmate mail policy that they give inmates

1 also has a paperclip. I get that.

2 But is there anything that is that material in
3 the Davidson, Martinez, Hernandez or Wilkinson
4 declarations? Otherwise, I am inclined to deny the motion
5 to strike and receive it primarily out of an abundance of
6 caution. Is there anything there that I'm missing?

7 MR. WING: It is a fair point, I concede,
8 Your Honor. I guess I would feel more comfortable if you
9 took judicial notice of it, because, in part, these people
10 are not identified as witnesses. I think one of the
11 points that I think you made very well is: Are these
12 people trial witnesses? If you don't strike them, we have
13 a concern that -- again, we have not taken depositions.
14 These people are in California. This is really late in
15 the game to introduce new witnesses. We have a pretty
16 strenuous objection to them being admitted for that
17 purpose.

18 THE COURT: I'll tell you, since they haven't
19 been disclosed to you previously, absent extraordinary
20 circumstances, I'm not going to allow them to become trial
21 witnesses, absent good cause for why they weren't
22 disclosed. If there is good cause, I will give you an
23 opportunity to depose them probably. I don't know about
24 expense issues, but we will deal with that later. For
25 summary judgment right now, though, I am going to deny the

1 motion to strike with respect to those four declarations.

2 All right. Let's get to the merits of this. We
3 are here on partial summary judgment, and let's focus for
4 a little bit on whether it is a declaration or whether it
5 is preliminary injunction -- put that aside for right now.
6 Let's focus on the postcard-only policy and the
7 First Amendment. I'm hearing the defendants argue that I
8 need to hear the explanation from the sheriff to evaluate
9 the sheriff's credibility to properly balance the security
10 risks or the threats versus First Amendment concerns. I
11 need to hear from the sheriff or the other witnesses, and
12 maybe from even other witnesses for the plaintiffs, to
13 balance whether or not the postcard-only policy is an
14 exaggerated or not an exaggerated response.

15 I know that there are some alternative means
16 that are theoretically available to postcards, and I see
17 your argument that those are inadequate. But I'm hearing
18 the argument that, well, I need to hear that testimony and
19 evaluate that testimony so I can evaluate in context the
20 adequacy of those alternatives or inadequacy of those
21 alternatives.

22 And you know, that makes some sense to me. Go
23 ahead and try to talk me out of it, but it does make sense
24 to me.

25 MR. WING: I would like to provide some context

1 and history in which I think their suggestion must be
2 placed.

3 There are a string now going back now maybe back
4 15 years of cases in front of the Ninth Circuit in which
5 the Ninth Circuit has applied the Turner test, and I think
6 we would find not a single trial.

7 Crofton v. Rowe. That's gift subscriptions,
8 1999.

9 2001, PLN v. Cook.

10 PLN v. Lehman, 2005.

11 Ashker -- I can't remember -- it is a California
12 case.

13 Clement is the Internet-generated materials.

14 Ashker is the book labels.

15 Not a single case involves going to trial.

16 The rational basis test says, is this rational?
17 The defendants have had now ten months to provide evidence
18 to this Court as to why their behavior and their thought
19 process for adopting this policy is rational. They can't
20 say, in my view, on summary judgment, well, granted, we
21 have not provided you information that really shows the
22 threshold, but you ought to let us show up at trial and
23 try to convince you in person.

24 I think that as to that series of cases I have
25 identified for you, there is no way on the record that

1 they presented to find their stated reasons rationally,
2 and I'm happy to go through a number of those.

3 But here is the point I would make: All of it
4 is based on their evidence. It is based on the documents
5 that they produced, it is based on their testimony, and it
6 is based on their declarations. So this is not a
7 circumstance like we see in employment litigation or fair
8 housing litigation where it is a question of what somebody
9 was thinking. Did they really intend to discriminate?
10 Did the person show up and say the things that they are
11 accused of saying? That's the not the issue at all.

12 The Court is presented with a series of facts.
13 It is not even a dispute about how much mail they have to
14 process or what time of day they process it. The sheriff,
15 if you look at his declaration, says nothing about why he
16 adopted this policy. He says nothing about the security
17 risks or how serious they are.

18 This was his chance. Instead, we have provided
19 a raft of evidence that the Columbia County Jail has never
20 had a contraband problem, incoming or outgoing; that they
21 attended a meeting and the sheriff's explanation was, hey,
22 all of my colleagues were doing this; I simply didn't want
23 to be left out. That's not a real terrific rational
24 reason for a governmental official to curtail the
25 First Amendment.

1 The second reason was, you know, it is possible;
2 it really is possible. Every single one of the cases that
3 I cited to you from the Ninth Circuit acknowledged that it
4 is possible, and without a trial, the fact that it is
5 merely possible does not meet the rational basis test. I
6 think the defense has missed the chance. I don't think
7 they could come up with evidence to present a triable fact
8 for you to take your time and the jury's time to listen.

9 THE COURT: How would this trial be different if
10 I grant partial summary judgment on that question versus I
11 don't?

12 MR. WING: The jury would be instructed that the
13 series of violations that we have outlined, the defendant
14 has not disputed that those events occurred. I'll
15 disagree with them that they have told you that they
16 violated the Constitution in each one of those. Their
17 answer is remarkably vague. It says some of our former
18 policies were unconstitutional.

19 First of all, you save many, many, many hours of
20 the jury trying to determine whether each violation
21 constitutes a violation of the Constitution.

22 Secondly, the presentation of the evidence is
23 targeted at one concept, which is, what are the damages
24 for this? I'm not trying to convince you that there has
25 been a constitutional violation.

1 And secondly (sic), that there needs to be
2 declaratory or injunctive relief. If all of that is
3 resolved through these motions, the jury will simply sit
4 there, hear what the defendants did, why they said they
5 did it, PLN explains diversion of its resources and
6 frustration of the mission, and then the jury will adjourn
7 to decide.

8 I don't know if I have answered your question.
9 I attempted to.

10 THE COURT: No, I'm fine. All right.

11 MR. WING: Your Honor, may I address one other
12 thing?

13 THE COURT: Sure. Anything you want.

14 MR. WING: This goes back to the issue of what's
15 disputed and what's not disputed. We want to point out,
16 as the Court knows, the rational basis is a sine qua non.
17 If the Court doesn't find rational basis, then we do not
18 spend time on the other three factors.

19 We think, as I elaborate more, if the Court
20 gives me time, that what has happened since early April
21 when we were here for oral argument, the evidence has
22 become overwhelming as to the other three factors,
23 rendering it unnecessary to have a trial. The Court need
24 not consider what all the other avenues are, and the Court
25 need not consider whether the defendants could do

1 something instead of adopt a postcard-only policy. I
2 would simply point to the fact that the past few months
3 they have been doing something else, and they have not
4 presented you with any evidence that it has been a problem
5 since you entered your preliminary injunction.

6 THE COURT: I see. What precisely is plaintiff
7 asking me to do with respect to the organizational
8 standing aspect of its partial portion?

9 MS. CHAMBERLAIN: Yes, Your Honor. I will cover
10 that. To back up a minute, in our original motion for
11 preliminary injunction, we asked the Court to find that
12 PLN had standing in its own right. It has third-party
13 standing, which is sometimes called the overbreadth
14 doctrine and also organizational standing. Your Honor has
15 already determined that PLN has standing in its own right
16 and has third-party or overbreadth standing.

17 I am a little bit confused by defense argument
18 that we need to show third-party standing or we need to
19 show that we can adequately serve the interests of third
20 parties to a high organizational standing. That has
21 already been determined by Your Honor in its May order.

22 THE COURT: Although would you step back a
23 moment and explain to me the difference between those
24 three.

25 MS. CHAMBERLAIN: Sure. So for PLN to have

1 standing in its own right, you have the basic elements of
2 standing: Injury, causation, redressability. Your Honor
3 has already found that.

4 For third-party standing or overbreadth
5 doctrine, Your Honor has to find that there is injury and
6 that PLN is adequately situated to represent the interests
7 and bring forth the interests of the third parties not
8 before the Court who these policies being challenged also
9 affect. In this case it is the prisoners and their
10 correspondents, and Your Honor already found on passage
11 12.

12 For organizational standing, PLN has to show two
13 specific elements with regard to injury. That is, that
14 its resources are being diverted and that the challenged
15 policy is frustrating its mission. Specifically with
16 regard to frustration of mission, PLN has to show that its
17 mission was frustrated by the defendants' conduct. We
18 have submitted both a declaration of Paul Wright with our
19 motion for preliminary injunction that supports that. We
20 have also -- actually defendants provided to the Court
21 PLN's supplemental and initial disclosures which outline
22 and also describe its frustration of mission and diversion
23 resources damages. That's docket 107-1.

24 With regard to the first piece of the injury
25 element of organizational standing, which is frustration

1 of mission, there is evidence in the record that is not
2 disputed that PLN's core mission is public education,
3 advocacy and outreach in support of the rights of
4 prisoners and in furtherance of basic human rights.
5 Certainly PLN, having its mail being censored and rejected
6 and not being provided due process, frustrates its mission
7 in both educating prisoners and communicating with
8 prisoners at the Columbia County Jail. It frustrates its
9 very core mission.

10 For the second element, diversion of resources,
11 Prison Legal News must show that combating Columbia County
12 Jail's conduct has caused a diversion in organizational
13 resources. We have provided materials to the Court
14 through the declaration of Paul Wright that prisoners
15 wrote to Prison Legal News complaining about this conduct
16 of defendants, and it then diverted its resources by
17 investigating that complaint, testing the mail policy and
18 then by filing this lawsuit as well.

19 And then the second two elements, organizational
20 standing or causation of redressability, which we've met
21 here --

22 THE COURT: Let me ask you two follow-up
23 questions to this. The first is going to be very, very
24 basic. You know, it is better for the Court to ask a real
25 basic question than walk away confused.

1 What's the difference between organizational
2 standing and standing in its own right, you know, the
3 first standing?

4 MS. CHAMBERLAIN: That is a good question,
5 Your Honor. And --

6 THE COURT: In that case, maybe it is not so
7 basic.

8 MS. CHAMBERLAIN: Maybe it is not so basic.
9 Maybe Mr. Wing will take a stab at that.

10 MR. WING: Do you mind, Your Honor?

11 THE COURT: Of course not.

12 MR. WING: Your Honor, I am most familiar with
13 organizational standing in the context of fair housing
14 cases. Within the context of fair housing cases, you tend
15 to see the articulation of organizational standing coming
16 when you have a person who, let's say, is a tester. They
17 go out and get turned away from renting an apartment, and
18 they have a claim because they were turned away.

19 The defense then says, well, the housing
20 association or the organization that arranged for itself
21 is not hurt itself. So the U.S. Supreme Court in the
22 Havens case and in Gladstone said: Well, that's not
23 right. The fact is here is how we will articulate the way
24 the organization has standing under those circumstances.

25 We have articulated PLN having organizational

1 standing in part because it is the type of damages that we
2 are claiming here. I think there is no difference between
3 standing in your own right or organizational standing. It
4 is simply a way of understanding the type of damages that
5 PLN is claiming.

6 THE COURT: That's the way I was looking at it,
7 in that I have already found, post preliminary injunction,
8 that you have standing in your own right -- did you want
9 to say something?

10 MS. CHAMBERLAIN: No.

11 THE COURT: And that PLN can assert its own
12 claims, can assert its own damages, and I found just
13 standing in its own rights.

14 It is unclear to me exactly what more you are
15 asking me to find now. What I'm hearing, I think you are
16 asking me to find, is to make the factual finding that
17 your resources have been diverted and that you have been
18 frustrated in your mission and now, jury, go ahead and
19 figure out how much damages to award for that.

20 Am I hearing you right?

21 MS. CHAMBERLAIN: Your Honor, yes, but I do want
22 to explain. With the damages PLN seeks to have standing
23 in its own, we are seeking compensatory damages and
24 punitive damages and so forth. But for the frustration of
25 mission and diversion of resources damages, that's

1 somewhat related to both PLN's standing in its own right
2 and its third-party standing because it has diverted
3 resources to investigate this case and how the defendants'
4 conduct has affected its own communications with prisoners
5 and how it has affected third-party communications with
6 prisoners as well.

7 We need the Court to find that PLN has
8 organizational standing in addition to third party
9 standing so that we can present evidence to the jury and
10 ask the jury to award damages for diversion of its
11 resources and frustration of its mission. Those are
12 particular damages that link to organizational standing.

13 THE COURT: Because I don't think, and we will
14 see when we get closer to our pretrial conference and I
15 see what motions in limine or evidentiary objections the
16 defendants may have, but I don't think I have a problem
17 with you arguing to the jury that your resources have been
18 diverted, that your mission has been frustrated, and if
19 the jury agrees with you, then they can award you damages.

20 Where I'm having a great deal of reluctance is
21 in me telling the jury or having you tell the jury: The
22 Court has found that our resources have been diverted and
23 our mission has been frustrated, and your job now, jurors,
24 are to put a dollar figure on that.

25 Am I misunderstanding something?

1 MS. CHAMBERLAIN: Well, Your Honor, procedurally
2 what has happened here, we made a motion for summary
3 judgment for the Court to find that PLN has organizational
4 standing, and the defendants' response was a single
5 sentence stating that PLN has not shown that its resources
6 are diverted or its mission frustrated under the current
7 mail policy or even the May INP, which allowed PLN to mail
8 correspondence to inmates -- in return. That was the sole
9 response, and the case law shows that standing is
10 evaluated at the time the complaint is filed, not at the
11 time of motion for summary judgment. Defendant simply did
12 not dispute the fact that we provided to the Court
13 regarding diversion of resources and frustration of
14 mission at the time the lawsuit was filed.

15 So I argue that the defense hasn't really made a
16 case that this should go to the jury on whether or not
17 there has been any frustration of mission or any diversion
18 of resources or damages. We certainly agree that the
19 value of those damages is a question for the jury.

20 THE COURT: As a matter of ruling on your motion
21 for summary judgment, if I were to deny that motion, if I
22 were to deny -- there it is. If I were to deny Docket 86,
23 the motion for partial -- strike that.

24 MR. WING: 64 perhaps, Your Honor.

25 THE COURT: It goes back. No, it goes back to

1 the 85. It is just one piece of 85. It is the first
2 request under 85.

3 If I were to deny that piece of it but allow you
4 to argue to the jury that part of your damages have been
5 that you have had resources diverted and your mission has
6 been frustrated, and if the jury agrees with you, they can
7 award appropriate damages. That accomplishes what you are
8 asking for; am I correct?

9 MS. CHAMBERLAIN: It does.

10 THE COURT: Okay. I just don't want to preclude
11 the jury from deciding whether or not your resources have
12 been diverted or what your mission is and whether it has
13 been frustrated.

14 Okay. Anything else for plaintiff right now on
15 any of these issues? Then we will go back to the defense.
16 I am going to go back and forth until everybody has said
17 whatever they want to say.

18 MR. WING: You did ask them questions about the
19 mitigation defense. I don't know that it warrants my
20 spending time on that now.

21 THE COURT: I'll tell you what my tentative
22 thinking is on the failure to mitigate affirmative
23 defense. That is, my tentative thinking is I want to hear
24 the evidence at trial. If I hear evidence that there has
25 been failure to mitigate, then I will so instruct the

1 jury. If I don't hear evidence of failure to mitigate,
2 then I won't instruct the jury on that point. I am very
3 reluctant to throw out that affirmative defense at this
4 stage, and I'll tell you, in large part, because it is
5 just not clear to me what is and is not at issue in that
6 failure to mitigate.

7 I have a sense that after hearing the evidence,
8 hearing the opening statement and hearing the testimony,
9 it will become clearer. By the way, I have read all of
10 the briefing, and it is not clear to me. But I think it
11 will become clearer to me as we proceed to trial, and then
12 I will note, when I do my final jury instructions, whether
13 I'm going to give or not give a failure to mitigate
14 affirmative defense. That's my tentative thinking.

15 MR. WING: Your Honor, I think that if the jury
16 is allowed to hear from the defendants that Prison Legal
17 News had an obligation to write a letter, pick up the
18 phone, my own view from reading their briefs is that
19 that's going to be a big part of what they do. That's
20 going to be a big part of their argument. That's going to
21 imply, I believe, wrongly, as a matter of law, that PLN
22 somehow failed in its obligation, and the only way I could
23 see the Court, from our perspective, curing that would be
24 at the end to say: You know, all that you heard pummeled
25 into your minds again and again and again, I want you to

1 disregard that because PLN didn't have a legal obligation
2 to do that.

3 THE COURT: Well, let me jump in here. Nobody
4 is arguing whether anybody had a legal obligation to do
5 anything until closing argument. Nobody is arguing legal
6 obligations in opening statement. The opening statement
7 is going to be what are the facts going to show. I will
8 not let any witness talk about who does and who does not
9 have any legal obligation.

10 Then my general practice, and I don't plan on
11 changing it here, is I will give legal instructions before
12 closing argument, substantive legal instructions. I do
13 substantive legal instruction and then closing arguments
14 and then final process instructions, selection of a
15 foreperson and questions for the Court, stuff like that.

16 So I will decide probably the night before, the
17 day before you do your closing arguments whether there
18 will or will not be a failure to mitigate affirmative
19 defense allowed and what the instruction would be if it is
20 allowed. You will all know that the day before you do
21 your closing arguments. And then if I allow it, you all
22 make your closing arguments based upon what my instruction
23 is. You can say: Here is what the evidence showed during
24 trial and here is what Judge Simon has instructed you and
25 here is how we view it fitting together.

1 I don't see how it will affect the evidence that
2 comes in, and I totally agree with you. Nobody should be
3 allowed to argue in opening statement or through a witness
4 what somebody's legal obligation was, and I am going to be
5 the only one who tells the jury what the legal obligations
6 are. That's how I see it. Do you disagree?

7 MR. WING: Well, I would anticipate -- are you
8 able to hear me okay?

9 THE COURT: Yes.

10 MR. WING: I would anticipate the defense in
11 their opening statement saying: The evidence is going to
12 show that month after month Prison Legal News sent
13 materials in without picking up the phone, without sending
14 a letter, without making any effort to try to get this
15 matter resolved before bringing this to trial.

16 THE COURT: Right.

17 MR. WING: I think that is akin to the Miller
18 case and the Blackburn case that we cited in our brief.
19 If the woman was coming to court and saying: Yes, I went
20 through a strip search, and I went through a strip search
21 again, and I went through a strip search again, and the
22 implication through the presentation of testimony and
23 opening statement could be: Yeah, you really shouldn't
24 have exercised your rights until you got with the
25 government and tried to convince them to follow the law.

1 I, after litigating civil rights cases for 21
2 years, think that there is the imputation that government
3 officials must be right. They have a hard job. I think
4 this kind of argument unfairly allows the government to
5 put the burden on the plaintiff by suggesting that the
6 plaintiff had some obligation to inform the government of
7 the law. That's, I think, a real legitimate concern.

8 I will point out that, again, the defense had
9 the opportunity, in response to summary judgment, to give
10 you a scintilla of evidence that contacting them would
11 have made any difference. They have not offered you even
12 a scintilla of evidence, and I'll point out I don't see,
13 as a matter of law, how they could say to the jury: If
14 only you had called us up about the postcard-only policy,
15 we would have done something else. We have provided you a
16 raft of prisoner complaints. And as you know, in April,
17 they argued in front of you that they were not going to
18 drop their postcard-only policy, and they didn't until you
19 ordered it. I'm at a loss to understand how they could
20 present to the jury in argument that PLN should have just
21 picked up the phone.

22 I finally want to make the point that mitigation
23 of damages -- I know you have read the briefing so maybe
24 it is really unnecessary for me to point this out again.

25 THE COURT: Go ahead.

1 MR. WING: But from the Restatement to all of
2 the cases cited, it simply cannot affect what comes in the
3 future. Mitigation of damages is what did you do to stop
4 the harm from the past violations? The defense is all
5 about why didn't you pick up the phone, because then the
6 next violation would not have occurred.

7 THE COURT: That's not the way I read it. I
8 read your transcript cites from the sheriff. It wouldn't
9 have made a bit of difference if you picked up the phone
10 and told him what you thought he was doing was illegal. I
11 see that. I don't think that's in dispute. What I'm
12 hearing from the defendants, and maybe I'm not hearing it
13 right, but what I thought I was hearing was you multiply
14 the damages by having so many postcards sent instead of
15 bringing a lawsuit earlier; at least that's how I'm
16 hearing it. I don't think I'm misunderstanding it.

17 But that's what I thought their mitigation
18 argument is. If there were a hundred -- I know there is a
19 slight difference in the parties in terms of the instances
20 of postcards. But if there were a hundred postcards that
21 were sent, should they be allowed to argue that if you
22 would have brought a lawsuit earlier, then maybe instead
23 of after 20, 25, 30, or 50, you wouldn't have a hundred
24 instances, and shouldn't the jury consider that as part of
25 their damage calculations? That's what I'm hearing them

1 argue. I honestly don't know the answer to that right
2 now. I don't see it in the briefing that either side has
3 given me, but I'm thinking, perhaps unrealistically, that
4 the answer might be clearer after I hear all of the
5 evidence.

6 MR. WING: Well, I would submit to you that
7 there is a reason why it is not clear to you, and that's
8 because not a single case has ever decided that question
9 that somehow it is an obligation of a plaintiff to come to
10 court at a time that is more convenient or less avoiding
11 of damages. I have just never seen such a case. I think,
12 from my standpoint, that it would be error to allow the
13 defendants to argue that now this is a burden. Any given
14 time there are many, many reasons people don't bring
15 lawsuits. I think what you are going to find, from
16 practicing civil rights law, I have a very serious concern
17 about this.

18 What we see over the years is what started out
19 as a simple violation of constitutional rights becomes a
20 series of maneuvers that are designed to make it extremely
21 difficult for plaintiffs to be able to bring a simple
22 case. It happens in employment law. You have to be
23 qualified for the job, but you also have to be, under the
24 Americans with Disabilities Act, able to perform the job
25 but also have a substantial effect on your daily life

1 activities. It is like jumping over a hurdle and having a
2 low ceiling.

3 What we're hearing here is you should have
4 brought your lawsuit earlier and that means where you
5 might be in a position where you have not done enough
6 investigation or established that this is really a
7 practice. So now the plaintiff is going to have to show
8 that they didn't do it too early but they also didn't do
9 it too late.

10 I don't think that's the law, and I'm very
11 concerned about the law developing that way. I think a
12 jury could easily not be aware of the ramifications and
13 should not be entitled to consider and come out with that
14 kind of ruling.

15 THE COURT: So if I agree with you and grant
16 partial summary judgment dismissing their failure to
17 mitigate affirmative defense, what does that do for what
18 evidence may or may not come in? I am trying to visualize
19 now what your motions in limine would look like.

20 MR. WING: I think our motion in limine would
21 state that the defendants are not able to present evidence
22 or repetitious evidence that the plaintiff failed to
23 comply with a burden. Certainly the dates --

24 THE COURT: Failed to comply with what?

25 MR. WING: The plaintiff --

1 THE COURT: You are welcome to be seated.

2 MR. WING: I'm sorry.

3 THE COURT: That's fine. You either have to sit
4 or speak a bit louder.

5 MR. WING: Okay. I'll have to try to think more
6 how to frame that because I understand your question to be
7 asking me, does the plaintiff suggest that they can't
8 identify the dates that events occurred? I think they
9 need to be able to identify the date that events occurred.
10 I do think that perhaps it is under 403 analysis. There
11 are facts that can be stated in cases but certainly undue
12 emphasis or repetition of those facts leads to an unfair
13 bias. I think that that's the circumstance we would be
14 dealing with, and that's probably how it would be
15 articulated, and we would have to rely on your judgment
16 and discretion about whether they were overstepping those
17 bounds. That's the way I see that.

18 THE COURT: Thank you. All right. Anything
19 further for plaintiffs at this time? I promised both
20 sides we will keep going back and forth until you are all
21 talked out.

22 MR. WING: I believe that if you have more
23 questions, that's a great way to proceed. We have more to
24 say, but if we do it via your questions, it is perhaps
25 more effective.

1 THE COURT: All right. Let's right now go back
2 to defendant and hear what some of their responses are to
3 some of the things you have just been talking about.

4 MR. ROBERSON: Thank you, Your Honor. I want to
5 address standing.

6 THE COURT: One second. We have been going
7 about an hour and a half or so. Dennis, did you want a
8 break? How are you doing?

9 THE COURT REPORTER: I'm fine, Judge.

10 MR. ROBERSON: There is discussion that the
11 Court had already found that seek --

12 THE COURT: Could you sit down and talk a little
13 louder, please. By the way, I don't think I have a
14 hearing problem. I have had it tested fairly recently. I
15 don't think I do. I have had no trouble with jury trials.
16 I don't know if it is our sound system or what, but would
17 you both please speak up.

18 MR. ROBERSON: There is discussion that PLN --
19 that plaintiff has standing in its own right and that
20 issue has already been decided. We disagree with that.
21 On the summary judgment record, Your Honor still has to
22 find that there is standing.

23 THE COURT: But tell me specifically, what do I
24 have to find on that question? What do I need to look
25 for?

1 MR. ROBERSON: In the Ninth Circuit opinion that
2 PLN cited in its reply, the Clark opinion, stated you can
3 have standing on claim for damages, but not standing on
4 the claims for equitable relief. Here, you are only
5 presented with issues on their equitable relief claims.
6 So the question is whether PLN has standing on those
7 claims. So the prior briefing regarding the preliminary
8 injunction that Your Honor did find that PLN had standing
9 on its own right on the basis that the February inmate
10 mail policy, which the preliminary injunction was just a
11 facial challenge to that policy, that that could possibly
12 snag or have some of PLN's mail rejected under its terms.
13 That was your finding.

14 We are on the summary judgment record now. PLN
15 has not shown any evidence that under the January,
16 February or any other subsequent mail policy that their
17 mail has been rejected. So the issue is, have they
18 suffered an injury in fact under Article III?

19 THE COURT: But if we look at standing as of the
20 time of the filing of the complaint -- and I see your
21 point. Their motion is captioned "Motion for Partial
22 Summary Judgment on Claims for Declaratory and Injunctive
23 Relief." So you are not then going to be objecting to
24 their arguing to the jury, as part of monetary damages,
25 that their resources have been diverted; that their

1 mission has been frustrated; let them present proof of
2 that, and if the jury agrees, let them recover their
3 damages. Am I hearing you correctly?

4 MR. ROBERSON: We would phrase it slightly
5 different. On their claim for damages, you know, we agree
6 that they suffered some damages. What those are is
7 different than what we are going to call a dispute.

8 THE COURT: Sure. And whether they suffered
9 damages caused by defendants' conduct and what value to
10 place on them if they have been caused, that's for the
11 jury to decide.

12 All right. I'm not hearing really a
13 disagreement here.

14 Continue.

15 MR. ROBERSON: So on these equitable claims,
16 they have not suffered an injury in fact, and there is no
17 standing.

18 You've raised the issue of organizational
19 standing. In those fair housing cases, it is the
20 organization asking for damages. So equitable relief is
21 not at issue. So you raised a very good point of that
22 organizational standing, and I think you are correct. It
23 is just another variation of standing in our own right
24 under Article III.

25 THE COURT: Okay. Got it.

1 Let's talk a little bit about this failure to
2 mitigate. I read the portions of the sheriff's transcript
3 that plaintiffs quoted. There is no factual issue in my
4 opinion. There is no genuine issue that if they would
5 have informed the sheriff that they believed that the
6 postcard-only policy violated First Amendment, it would
7 have made a bit of difference. Are you challenging that
8 or disagreeing with that, and if so, what is your
9 evidence?

10 MR. ROBERSON: Just on the postcard policy?

11 THE COURT: The postcard-only policy.

12 MR. ROBERSON: No, I don't think there is
13 evidence that the jail would have dropped its postcard
14 policy in response to the phone call.

15 THE COURT: Then what is this failure to
16 mitigate affirmative defense really about? Is it simply
17 the number or quantity of instances? Is your position,
18 you know, instead of having a hundred instances of mail
19 that were either rejected or censored or whatnot, they
20 should have brought a lawsuit earlier. Is that what that
21 defense is all about?

22 MR. ROBERSON: They could have brought a lawsuit
23 earlier. That's part of it. The evidence shows that -- I
24 think this is a disputed fact, but why PLN's mail is
25 rejected. There is some evidence that it was because of

1 the postcard policy. We think it is because some of the
2 staff had a misconception as to whether magazines and
3 other correspondence should be delivered, because the
4 policy said magazines are allowed.

5 So when it comes to the failure to mitigate
6 defense, a reasonable publisher who has subscribers and is
7 getting their magazine back for whatever reason, whether
8 it is postcards, whether it is no magazines allowed at the
9 facility, whatever the reason is, PLN was not acting like
10 a reasonable publisher. They continued to send mail.
11 They were not curious what was going on with the jail
12 staff, and they didn't call Sheriff Dickerson or some
13 senior member of the jail to say anything.

14 THE COURT: Okay.

15 MR. ROBERSON: And they say that's what they do.

16 THE COURT: Okay. What else do you want to
17 respond to? The ball is back in your court.

18 MR. ROBERSON: On the failure to mitigate,
19 Your Honor?

20 THE COURT: On any topic that you want in these
21 pending motions.

22 I have already made my rulings on the
23 evidentiary rulings. Just so it is clear, I'm allowing in
24 the California declarations for Davidson, Martinez,
25 Hernandez, Wilkinson.

1 I'm allowing in the transition to postcards for
2 inmate mail. That's Docket 115-6.

3 You have withdrawn the Oregon Live news article.

4 You are not relying on, and I am striking the
5 Jeffrey Held declaration.

6 I'm striking, over objection, the Exhibit L
7 pages 10 to 15, the no name. So we don't need to talk
8 about that.

9 So now we have the two basic motions before us,
10 the declaratory and injunctive relief, Docket 85, and the
11 failure to mitigate motion, which is Docket 86.

12 This argument has been very helpful to me.
13 Things are jelling in my head, but you are now welcome to
14 talk about anything else you want relevant to those two
15 motions.

16 MR. ROBERSON: Mr. Wing stated that the jail
17 does not present -- excuse me -- the defendants have not
18 presented a scintilla of evidence on mitigation. I think
19 that is incorrect. Our answer alone shows our conduct.
20 We admitted liability.

21 Mr. Wing says that he doesn't like the way we
22 phrased it in the answer, but in support of his reply, in
23 their reply they said that we talked about the issues
24 involved in the motion for summary judgment for months,
25 and we wouldn't agree to anything. All of that is

1 incorrect.

2 Our answer admitted liability. There are
3 certainly e-mails and correspondence regarding what we
4 agree with. We had conversations about it. We changed
5 our policy within days. We changed our mail practice
6 within days, right when we got notice -- right when the
7 sheriff got notice that there was some problems.

8 THE COURT: Well, I see that you have changed
9 the due process issues fairly promptly, but you didn't
10 change the postcard-only policy until I issued my order,
11 right?

12 MR. ROBERSON: Right.

13 THE COURT: Yes.

14 MR. ROBERSON: Mr. Wing claims that the jury
15 won't understand your instructions. I think that's
16 somewhat insulting to our jury system.

17 THE COURT: I don't think that's what he meant.

18 MR. ROBERSON: There was some discussion
19 earlier, I think, when Ms. Chamberlain was speaking -- I'm
20 sorry -- both of them were speaking about the postcard
21 issue and the First Amendment. Mr. Wing said in 15 years
22 of cases none have gone to trial. That's totally
23 irrelevant. Certainly if there is questions of fact here,
24 we can have a trial. We didn't file our own motion for
25 summary judgment, because we believe there are questions

1 of fact.

2 THE COURT: Well, what evidence do I look to
3 that you filed that show me that the reasons for the
4 postcard-only policy rationally related to legitimate
5 penological interest?

6 MR. ROBERSON: The evidence that we submitted in
7 support of the rationality of the policy?

8 THE COURT: Yes.

9 MR. ROBERSON: We submitted the declarations
10 from Ventura County. We submitted Sergeant Cutright's
11 declaration. I think there have been two declarations
12 from Sheriff Dickerson.

13 THE COURT: Feel free to paraphrase the
14 material, the important portions. Tell me where you are
15 getting it from.

16 MR. ROBERSON: I actually don't have Sheriff
17 Dickerson's declaration from the preliminary injunction
18 briefing before me, but he explained in that declaration
19 specifically that personal mail has increased threats
20 compared to other types of mail. That was the intent of
21 the postcard policy, was to be limited to that.

22 We have also cited case law that has come out
23 even since your ruling, and we pointed out Supreme Court
24 case law, including Ninth Circuit case law, R.O. v. Papayo
25 (phonetic), in an effort to convince you to lift the

1 preliminary injunction and point out case law that we
2 think that the Court should consider before deciding this
3 issue.

4 THE COURT: Okay. That answers my question.

5 MR. ROBERSON: I think it is important to point
6 out that again that we are only here on the equitable
7 relief claims, not the claim for damages.

8 PLN -- we haven't discussed the permanent
9 injunction yet, but we could move to that next. I feel
10 like we have been totally discussing declaratory relief so
11 far, Your Honor, and standing.

12 THE COURT: You are correct, although I'm
13 planning on using a lot of what has already been said in
14 the analysis on the permanent declaration issue.

15 MR. ROBERSON: I think the most important issue
16 on the permanent injunctive claim, if the Court gets
17 beyond standing and mootness issues, is the irreparable
18 harm aspect. We are only focused here on future imminent
19 harm. PLN has to make a showing of that, and none of
20 their mail has been rejected. They are not even
21 challenging what the current mail policy statement states.

22 THE COURT: But if you look at the criteria set
23 forth most recently by the Supreme Court in the Monsanto
24 case, which, frankly, quotes the eBay case that you are
25 both relying on, the requirement for a permanent

1 injunction is not a likelihood of future irreparable
2 injury. It is the establishment of past irreparable
3 injury. Am I right? I think the answer to my question is
4 yes. That's what Monsanto and eBay say. They refer to it
5 in the past tense.

6 MR. ROBERSON: It is irreparable harm that
7 cannot be remedied with a claim for damages.

8 THE COURT: Right, agreed. See, Winter tells us
9 for preliminary injunctive relief, I have to look to a
10 likelihood of future injuries. For permanent injunctive
11 relieve, the language of Monsanto, which frankly just
12 quotes eBay, the first element is, has there been
13 irreparable damage? And if there has been, assuming there
14 is a constitutional violation, I think there has been. It
15 occurred before my preliminary injunction order. But why
16 isn't that enough for permanent injunctive relief?

17 MR. ROBERSON: It is irreparable damage that
18 cannot be remedied with a monetary award. That's the key
19 part.

20 THE COURT: Right. But aren't there plenty of
21 cases that talk about the fact that monetary awards are
22 insufficient to remedy First Amendment violations?

23 MR. ROBERSON: There are cases that state that,
24 Your Honor.

25 Here, PLN's essential argument is that you just

1 can't believe the sheriff. They spend half of their
2 briefing on that issue.

3 THE COURT: Fair enough. I don't think I'm
4 going to make a decision, certainly not on summary
5 judgment, that you can't believe the sheriff. That is not
6 summary judgment material. But I don't think that I need
7 to make any conclusions about that. Let us assume that
8 this sheriff had total credibility, was completely
9 credible, and you were absolutely convinced that this
10 sheriff would never reinstitute that policy. Fine. So
11 what? Elections come -- what is the sheriff is elected
12 to? What's the term? Four years?

13 MR. ROBERSON: I believe so.

14 THE COURT: I know it is outside the record to
15 ask, but was he re-elected?

16 MR. KRAEMER: He was.

17 THE COURT: Fine. So four years from now what
18 if he is not re-elected? I don't think the credibility of
19 the sheriff is relevant. Maybe if he had a history of
20 violating past injunctions, that would be relevant. But
21 there is no evidence from the plaintiff that he does. I'm
22 just looking at the basic test of a permanent injunction
23 that eBay and Monsanto from the Supreme Court tell us, and
24 although I can't remember the last two elements, although
25 it is probably the basic stuff of injunctions, the first

1 element is, has there been past instances of irreparable
2 damage? "Irreparable" includes, by definition, that it
3 can't be remedied by monetary relief. Then I don't see
4 any requirement at all that you have to inquire whether it
5 is likely to be repeated. So now I don't see how the
6 credibility of the sheriff is even relevant to that issue,
7 at least absent evidence that we had someone -- strike
8 that. I just don't see how it is relevant in light of
9 what Monsanto and eBay tell us.

10 Now, that said, there is plenty of other
11 equitable balancing I need to do in deciding whether or
12 not to grant injunctive relief, and I have got to sort
13 through the Prison Litigation Reform Act. I understand
14 the arguments on the limitations of that and how it
15 applies to inmates. I am still sorting my way through
16 that. There is plenty of other equitable relief that I
17 need to balance, but I don't think part of that equation
18 entails any credibility analysis of the sheriff. By the
19 way, we don't make credibility determinations on summary
20 judgment anyway.

21 MR. ROBERSON: So the issue is if --

22 THE COURT: I'll save you a little bit of stress
23 on this because it will put it back on plaintiff. My
24 inclination is I don't see the value, the point, of making
25 a final decision now on a summary judgment record on

1 either equitable or declaratory or injunctive relief at
2 this stage. We will see at trial on this.

3 I think any decision, including my need to
4 balance the equities, will be better informed after I hear
5 trial witnesses and watch cross-examination. That's the
6 direction I'm planning on going. We will see what
7 plaintiff has to say about that.

8 MR. ROBERSON: We agree with that, Your Honor.

9 THE COURT: Okay. Mr. Wing or Ms. Chamberlain,
10 what do you say to that? I see your point that many of
11 the key facts really are not in dispute, but we are not
12 going to be asking the jury to decide on declaratory
13 judgment or permanent injunctive relief, but the jury is
14 going to be hearing an awful lot of the same evidence, and
15 I don't think it will significantly expand the scope of
16 the trial to include the evidence that I will then factor
17 in as I balance the equities.

18 MR. WING: I think, Your Honor, it would be a
19 much longer trial. I think, as we pointed out in our
20 brief, there are a whole series of acts and statements by
21 the sheriff which essentially show that the plaintiff is
22 entitled to preliminary -- excuse me -- to a permanent
23 injunction.

24 As a practical matter, I will also point out
25 that this is the kind of thing that either keeps the case

1 going or resolves the case. That is, if the Court enters
2 a permanent injunction, there is a reasonable chance that
3 this case will resolve. Otherwise -- and I will put this
4 in a broader light. The defendants say: Gee, you are
5 claiming a whole bunch of violations, and you took a whole
6 lot of time in bringing the lawsuit. They are now
7 fighting about everything, and they are wanting to add an
8 additional defense. They are adding late evidence. They
9 don't want you to make a decision.

10 So now we are going to have a much longer trial.
11 We are going to spend a lot more time on this case. There
12 is something that doesn't mesh. Of course, the jury
13 doesn't get to hear that part. The jury gets to hear
14 possibly the plaintiff took time, but they don't get to
15 hear all of the efforts that the defense put in this case
16 to keep it going and make it last longer. That's
17 inequitable right there.

18 But the public interest is not served by delay.
19 One of the things that the cases that we cited talk about
20 is the purpose of declaratory and injunctive relief for
21 education. We've submitted to you e-mails from the list
22 of the sheriffs' association, at least three different
23 e-mails, that show that there are sheriffs and jail
24 commanders all around the state waiting for your decision.

25 THE COURT: I will tell you one thing, and I

1 don't think they've asked me that. I'm not lifting my
2 preliminary injunction. It is not going anywhere. They
3 didn't ask, so I don't want to jump the gun on that. But
4 this preliminary injunction is in place. Let me be a
5 little bit more judicial on this. No one has moved for a
6 lifting of the preliminary injunction. So unless and
7 until such a motion gets filed and I get persuaded that
8 that should be the case, this preliminary injunction stays
9 in place. You may use my preliminary injunction order and
10 opinion for whatever educational purposes you want. I
11 assume you already have. But the injunction is not going
12 anywhere, that opinion is not going anywhere, unless there
13 is a motion and I'm persuaded it should be lifted. That's
14 not an invitation, by the way.

15 MR. KRAEMER: I should point out, Judge, I think
16 we are beyond the motion deadline.

17 THE COURT: Fine. Let me ask you this: I don't
18 know whether it is now or at trial -- but when I
19 eventually have to decide between permanent injunctive
20 relieve and declaratory injunctive relief, let's talk
21 about this. Let us assume that I have not changed my
22 evaluations of rationality from the preliminary injunction
23 and assume that nothing that I hear at trial persuades me
24 otherwise. That means you are going to get a declaratory
25 judgment. Why is not that sufficient? What extra benefit

1 is really needed or achieved with a permanent injunction
2 that would not be the case with declaratory relief?

3 MR. WING: I'm going to start with what I think
4 is a sort of a rhetorical point. Why ever give a
5 permanent injunction then? It would never be needed,
6 because under the circumstances, if the Court has said
7 "This is illegal," presumably people would listen and say,
8 "Oh, okay, then I'm not going to do that anymore." Why
9 ever enter a permanent injunction?

10 The reason to enter a permanent injunction
11 include finality and clear and direct prescription for
12 what should happen. I will tell you that my co-counsel
13 Ms. Chamberlain will talk to you in a bit more detail
14 about what needs to be in a permanent injunction for due
15 process. From our perspective, the defense didn't and
16 doesn't understand that.

17 The cases talk about the value of a permanent
18 injunction in terms of establishing the rights between the
19 parties. From our perspective, the defendants may well --
20 but suppose there is a declaration -- they may well try
21 other things, develop more evidence from waltzing back in
22 and say, "Well, now we have a contraband problem. So
23 that's why we adopted the postcard-only policy." Those
24 were different facts.

25 I think a permanent injunction says you need to

1 move on because this is not a constitutional policy or
2 practice. I think also for the public interest, a
3 permanent injunction tells the other jails in the state
4 that there are consequences for adopting a policy with an
5 irrational basis. I would point out that in each of the
6 cases that I cited a permanent injunction was entered and
7 upheld by the Ninth Circuit.

8 So one could also do the flip side, which is if
9 you didn't enter a permanent injunction, what message
10 would that send? And I think there would be a message
11 sent: Even though Monsanto and eBay say, essentially, the
12 party is entitled to a permanent injunction, I chose not
13 to. Granted, it might be within your discretion, and we
14 could argue whether it would be an abuse of discretion,
15 but I think it would send a message that either the Court
16 would not want to give to this sheriff or other sheriffs
17 around Oregon, which is I'm just going to trust that you
18 all make better decisions. I don't think that's warranted
19 here.

20 I do want to point out something that I found --
21 excuse me one minute.

22 THE COURT: Sure.

23 MS. CHAMBERLAIN: Excuse me, Your Honor. I
24 wanted to clarify that one of the reasons we need a
25 permanent injunction is that a declaratory relief -- you

1 declaring that the past policy and practices were
2 unconstitutional -- provides some clarity about what was
3 unacceptable in the past. But the defendants need a
4 permanent injunction so that the Court can tell them here
5 is what you need to do in the future.

6 THE COURT: Well, where I would be inclined to
7 go then, and tell me if my memory is incorrect, because I
8 was planning on re-reading my order and opinion before
9 this argument, but I forgot to do it. But I think I
10 remember what I said. Unless the evidence, whether it be
11 now or at trial, changes my evaluation, I think a
12 postcard-only policy violates the First Amendment for the
13 reasons I said in my original order and opinion, the one
14 that is dated May 29th, 2012.

15 I think that applies to both incoming and
16 outgoing mail, as I've said in that opinion. But if I
17 recall correctly, the policies that I looked at with
18 respect to the due process issue, I held did not violate
19 due process, at least that's how I recall my order and
20 opinion. I don't know whether I made these comments or
21 just thought it. They were not the model of clarity. I
22 think I actually said that. They weren't perfect, but I
23 didn't find them as rising to the level of due process
24 violation. And since then, we have the May revised
25 policies and the June and July revised policies, since

1 then they have only been getting better. So if I didn't
2 find a due process violation before, certainly it is not
3 sufficient to grant preliminary injunctive relief. I
4 wouldn't anticipate that I would find a due process
5 violation now, thus would not be giving declaratory or
6 injunctive relief with respect to the due process claim.

7 MS. CHAMBERLAIN: Your Honor, with regard to the
8 due process claim, you are correct that the opinion did
9 state that the defendants' prior policy did not provide a
10 model of clarity, but since it was the preliminary
11 injunction that was before you, you didn't make a decision
12 regarding the constitutionality of their due process
13 policies. We think declaratory relief regarding whether
14 the policy posted on the Web site, the policy in the
15 Cutright memo and the January and February policies with
16 regard to either statements about due process or the
17 omission of proper due process procedures, declaratory
18 relief is needed and is in the public interest to make
19 clear what was not sufficient.

20 THE COURT: Do I do that, or do I look at their
21 current, most recent policy and decide whether that's
22 sufficient?

23 MS. CHAMBERLAIN: For us to ask the jury to
24 award PLN damages with regard to the due process
25 violations, we are going to need a finding from the Court

1 that their past policies violated the Constitution.

2 THE COURT: That's fair. You might not get
3 that. Unless the evidence changes, you are going to get
4 the one on the postcard and the First Amendment. But at
5 least when I was taking a look at the preliminary
6 injunctive stage, it didn't seem to me that the due
7 process argument was, I guess as I put it in the
8 preliminary injunction motion, likely to succeed.

9 MS. CHAMBERLAIN: There are several stages --
10 not stages -- but policies that we are looking at here.
11 We are looking at policies that were in place prior to
12 January 13, 2012, before we filed this lawsuit, and the
13 policies that were made public and available also to the
14 inmates were both the policy on the Web site and the
15 policies in the inmate manual. We provided Your Honor
16 with many examples in the briefing about why those
17 policies were insufficient and did not provide due process
18 in a number of areas. So I think that declaratory relief
19 in that regard would be warranted and very appropriate.

20 THE COURT: All right. I'll take a closer look
21 at it. I'll tell you right now, the way I view this
22 case -- and it is an important case -- is the
23 postcard-only policy for incoming and outgoing mail
24 constitutional? I think that's a very, very important
25 issue. That's what I view as the thrust of this case. I

1 understand what you are saying. I will continue to take a
2 close look at the due process issues.

3 MS. CHAMBERLAIN: Thank you.

4 Your Honor, I also wanted to briefly touch on
5 the no magazines issue. At the time we were before you in
6 April regarding the preliminary injunction, we had just
7 barely starting discovery, and we now know a lot more. At
8 that time the policy before Your Honor was both -- there
9 was an October 2011 policy that we were not aware of at
10 the time the lawsuit was filed, and there was the January
11 and February 2012 policy and in that, the policies were
12 provided to you, it said that publications would be
13 received and were acceptable.

14 What we have learned through discovery though is
15 that piece of paper, those policies, that piece of paper,
16 were not available to the inmates. They weren't available
17 to the public on the Web site.

18 THE COURT: And a lot of the deputies didn't
19 even know about it.

20 MS. CHAMBERLAIN: That's correct, Your Honor.
21 That's because the document given to the deputies was the
22 two-page Cutright memo from 2010 that very clearly banned
23 magazines.

24 THE COURT: Right.

25 MS. CHAMBERLAIN: That's also an issue.

1 THE COURT: There was a failure to communicate,
2 I get that.

3 All right. Why don't we do this, let's take a
4 ten-minute break, and then I will give both sides an
5 opportunity to have any final words they want to say.

6 All right. We don't have Mary here, but let's
7 come back at ten to 4:00.

8 (Recess.)

9 (Open court; proceedings resumed:)

10 THE COURT: All right. So the plaintiffs are
11 the movants. Any final words from the plaintiff before we
12 hear from the defendants?

13 MS. CHAMBERLAIN: Yes, Your Honor. I just
14 wanted to follow up on a couple of things. One was
15 regarding the no magazines policy and practice. You and I
16 were briefly going back and forth about that. You said
17 you understand that there is a failure to communicate
18 about magazines. Actually, I don't think there was a
19 failure to communicate. I think that the evidence clearly
20 shows that there were multiple communications made to
21 inmates and to the jail staff. That communication clearly
22 said, "We don't accept magazines." It was on the Web site
23 for two years. It was in the Cutright memo for two years.
24 It was in the inmate manual until May of this year. If
25 there was also a part of the standard form for the

1 prohibited mail notice, which I understand wasn't used
2 very often; that is, the form wasn't used very often, but
3 there was a checkmark place that said, "We don't accept
4 periodicals."

5 THE COURT: Is there any evidence though in the
6 record that the people who were making those
7 communications were aware of this earlier written policy
8 that said magazines are allowed?

9 MS. CHAMBERLAIN: I don't know of any evidence
10 of that.

11 THE COURT: I didn't see any.

12 MS. CHAMBERLAIN: What the deposition testimony
13 did show is that the employees who have been there the
14 longest, Captain Carpenter, 22 years, and
15 Sergeant Cutright, 17 years, had never seen a magazine in
16 the jail. So I think that evidence corroborates the fact
17 that their policy, as stated on its Web site, the Cutright
18 memo, the inmate manual and the form was being followed.

19 I also wanted to follow up with you regarding --
20 I think we are in agreement that the major issue in
21 dispute, disputed by the parties, is the postcard-only
22 policy and whether it is constitutional.

23 But with regard to magazines and due process, in
24 defendants' answer and, again, in its amended answer, I
25 think it is Docket 80 that was filed in late July,

1 defendants repeatedly admit to the fact that magazines
2 were censored and the fact that they failed to provide due
3 process notice and an opportunity to be heard, but they
4 have not admitted that those policies and practices
5 violated the Constitution in any sort of clear manner.

6 I think that the -- I'm paraphrasing here. I
7 think the language that they repeat a few times in the
8 answer is that the defendants admit that some of its mail
9 policies violated some of plaintiff's constitutional
10 rights.

11 Since I believe we are in agreement that the
12 facts are not in dispute with regard to magazines and due
13 process, I think the issues is ripe before the Court to
14 make a determination that the no magazine policy and the
15 policy of banning magazines was unconstitutional, in
16 violation of First Amendment, and that the policy and
17 practice of failing to provide adequate due process notice
18 and opportunity to be heard violated the Fourteenth
19 Amendment.

20 So those issues will go to the jury on damages,
21 and we don't need to present evidence, which is already
22 undisputed at trial. I think that would be a waste of our
23 judicial resources.

24 THE COURT: Thank you.

25 MR. WING: If you don't mind, Your Honor.

1 THE COURT: I do not.

2 MR. WING: Thank you. I want to just follow up
3 that the only testimony about this in the record from the
4 sheriff is that he read his inmate manual when he first
5 started, and he saw that it banned magazines. So again, I
6 don't think there is any basis for concluding that this
7 was just a miscommunication. Everything that anybody else
8 saw or heard was that magazines were not allowed. The
9 prior policy didn't say they were allowed. It just didn't
10 ban them.

11 THE COURT: Right.

12 MR. WING: The policy that one man knows is not,
13 I don't believe, properly called a policy.

14 Okay. As to the other matters, I think that
15 there is quite a bit of undisputed evidence as to what
16 facts actually occurred, and we would ask that the Court
17 find those facts, and we would certainly be willing to
18 provide the format for that to set it all forth. But to
19 save everything for trial, when there are undisputed
20 facts, runs counter to summary judgment. The whole series
21 of facts that could be found to be true by the Court and
22 would save a great deal of time and preparation in calling
23 witnesses. Those facts would then be presented to the
24 jury, even if the Court decides that it wants to wait on
25 some form of injunctive or declaratory relief and that

1 would substantially reduce the time spent at trial.

2 I also want to point out that there are
3 prisoners and family members who could be called, and
4 that's quite a bit of time and energy in bringing people
5 from jail or finding them. This is a lot bigger of an
6 enterprise than simply there is a bunch of employees who
7 the employer might bring. We think the Court could
8 substantially reduce the scope of the trial and, quite
9 frankly, is called upon to do that under Rule 56 where
10 facts are undisputed.

11 Finally, I would like to make a point, which is
12 I think, intended or not, the delay in making a decision
13 has effect on the longevity of the case, on what the rest
14 of the jails in Washington likely perceive the judge is
15 having a hard time making a decision about. This is a
16 close call. There are facts that may be presented at
17 trial that could win the judge over on these topics. From
18 our perspective, that's both not a helpful message to the
19 community and also an unfair opportunity for the defense,
20 who has had the opportunity on the preliminary injunction
21 and now on these motions, to try to come back with other
22 things. We think at this point they have had two very
23 serious opportunities, and we have established what we
24 think is a very compelling case and would ask the Court to
25 enter declaratory injunctive relief that it deems to

1 believe probably will enter but only after perhaps a
2 seven-day trial.

3 We ask that the Court go ahead and make those
4 decisions now, make your findings. We thank you very much
5 for your time, and I would be happy to answer any
6 questions.

7 THE COURT: Thank you. Defendants' last words.

8 MR. ROBERSON: Thank you, Your Honor.

9 We think that the only remaining issues to
10 decide in this case is the rationality of the postcard
11 policy under the First Amendment and damages to PLN. We
12 think there are questions of fact on that rationality, so
13 we should have a trial. We don't think due process and
14 magazines are at issue on liability. Our briefing, our
15 answer makes that clear.

16 THE COURT: In what way? What's your answer?

17 MR. ROBERSON: Our answer and amended answer
18 admitted virtually every fact except for one and admitted
19 to violating the Constitution. Our briefing at the
20 preliminary injunction phase, our briefing now, our
21 conversations with PLN's attorneys have made clear what we
22 are considering the violations to be on due process and
23 magazines. We agree those magazines should have been
24 delivered to the inmates. So with an admission of
25 liability, that sets the legal relations between the

1 parties, and there is no need for declaratory relief on
2 that issue. It serves no practical purpose, which is
3 what -- the language the case law uses. I don't have
4 anything further, Your Honor.

5 THE COURT: Okay. Thank you. I am going to
6 tell you what I'm going to do, because I think it is
7 pretty clear in my head.

8 As I said, I think this case raises difficult
9 but important issues. I think that if it is not resolved
10 by the parties, and if you get an opinion from me, whether
11 it be now or after trial, I would fully expect it would go
12 up to the Ninth Circuit, as well it should, and let them
13 decide some of these issues.

14 Now, I think that the question, and I agree with
15 the defendant on this point of rationality in the sense of
16 that's what it really comes down to in terms of liability
17 issues. As I said in the preliminary injunction order and
18 opinion, based upon the evidence that I have seen at that
19 stage, I don't think it satisfies the rationality test,
20 and that's why I entered the preliminary injunction.

21 Now that I'm being called upon to issue a final
22 declaration and a permanent injunction, I have to weigh
23 very carefully the appropriate standard. The standard
24 before me right now on plaintiff's motion for partial
25 summary judgment is whether or not there is a genuine

1 issue of material fact, whereas at trial -- and I'm going
2 to put a footnote by the word "trial," and I am going to
3 come back to that in a minute or two. But the standard at
4 trial is simply preponderance, and I think that makes a
5 very big difference.

6 For that reason, I am denying both motions right
7 now, the motion for partial summary judgment regarding
8 declaratory relief and injunctive relief, Docket 85, and
9 the plaintiff's motion to dismiss defendants' failure to
10 mitigate affirmative defense. That's Docket 86.

11 But let me speak a little bit further. I think
12 that these are matters that will be best addressed after I
13 see trial evidence. As I said, I put a footnote by the
14 word "trial."

15 In a few minutes I am going to talk to you about
16 our pretrial conference and what has to be done leading up
17 to that, but one of the things that you all need to do,
18 and I will consider at the pretrial conference, is you
19 need to prepare very detailed witness statements and
20 present to me your documentary exhibits as well as any
21 objections to the opposing side's documentary exhibits,
22 also motions in limine, and we will talk about that in a
23 few minutes.

24 But I am entitled to base a decision, a trial
25 decision, using a preponderance standard based upon the

1 witness statements and the exhibits that I would receive
2 in evidence if I find that there is no genuine dispute at
3 that stage and a directed verdict or a motion for judgment
4 as a matter of law would be appropriate.

5 So I will revisit this issue with you at the
6 time of the pretrial conference. But even if I decide to
7 let it go forward for a trial, I will still then make
8 these decisions on declaratory relief and permanent
9 injunction relief, based on the trial record under a
10 preponderance standard as opposed to the summary judgment
11 standard.

12 Now, that said, let me tell the parties how I
13 intend to be looking at everything. I don't see any
14 difference today than the way I viewed it in my
15 preliminary injunction decision with respect to the
16 postcard-only policy, both incoming and outgoing. I do
17 see that there probably is a genuine dispute sufficient to
18 deny partial summary judgment, but on a preponderance
19 standard I don't think it is even that close of a call.

20 Now, I will weigh the evidence when we get to
21 trial. I will consider it very closely and very
22 carefully, but I'm going to let you all know how I look at
23 the postcard-only policy.

24 Same thing with the magazines policy, and I
25 think you all fleshed out the issues pretty nicely. It

1 doesn't matter if there was a document that said magazines
2 are allowed, if in fact they were not being allowed and
3 no one knew of that document. So the question is, what
4 was the real policy of the county at that time to allow
5 magazines or not to allow magazines? It sure looks from
6 the evidence that if one were to apply a preponderance
7 standard as opposed to a summary judgment standard, one
8 would say that the county had an unconstitutional policy
9 with respect to prohibiting magazines.

10 With respect to the due process issues, I made a
11 misstatement a few moments ago back before our break, and
12 I think you are right. I think plaintiff is right. When
13 I addressed the issue of due process at the time of the
14 motion for preliminary injunction, I was looking at the
15 policy that was in place, the due process policy in place
16 at that time and asking if there was a need to enter
17 preliminary injunctive relief pending final resolution,
18 and I concluded, no, there was not. I still think that
19 was the right decision.

20 But I don't think that's the question I need to
21 answer at trial. At trial, the question is going to be,
22 at least for declaratory relief, which would then probably
23 lead to permanent injunctive relief, is what was the state
24 of the due process afforded at the time the lawsuit was
25 filed? That is a different question from what was the

1 state of the due process procedures in place at the time
2 of the motion for preliminary injunctive relief, which
3 would then inform the question of, do I need to do
4 something preliminarily pending trial?

5 I think you all know that the due process
6 procedures were tremendously improved between the process
7 that existed at the time the lawsuit was in place versus
8 the time that I ruled on the motion for preliminary
9 injunctive relief.

10 I also think that I understand your point about
11 the censoring that took place, and my understanding is
12 that I would need to rule on for declaratory relief, which
13 would also inform permanent injunctive relief, was there
14 unconstitutional censoring that had taken place at the
15 time or before the time that the lawsuit was filed? And
16 if there was, then there should be a declaratory ruling to
17 that effect, and that may inform whether or not there
18 should be permanent injunctive relief to that effect going
19 forward.

20 But all of those issues, I think, will be better
21 informed upon the preponderance standard than a summary
22 judgment standard.

23 Similarly, with respect to defendants' failure
24 to mitigate affirmative defense, I am still having trouble
25 understanding exactly what defendant wants to present in

1 that respect and whether it should or shouldn't be
2 precluded for the reasons that the plaintiff articulates
3 in its second motion, Docket 86, or even for other
4 reasons, perhaps a 403 analysis. But that's going to be
5 better informed when I actually see what are the proposed
6 witness statements that defendant intends to present, what
7 are the exhibits that the defendant intends to present. I
8 understand that some of this may be coming out in
9 cross-examination of plaintiff's witnesses, so maybe I'll
10 deal with that when I see plaintiff's motions in limine on
11 some of those issues. But for right now, faced with an
12 affirmative defense and sufficient lack of clarity that
13 causes me to have concern under a summary judgment
14 standard, I'm denying that motion as well.

15 I'm not saying that the defendants have a right
16 to present an affirmative defense of failure to mitigate.
17 I'm saying I'm not going to grant a partial summary
18 judgment at this stage, and we will take a closer look at
19 the pretrial conference when we deal with the evidentiary
20 issues.

21 Now, speaking of pretrial conference and trial,
22 you all know that our trial date is Tuesday, February 5th.
23 It is set for a seven-day jury trial. I'm keeping clear
24 that period. I am moving our criminal cases before it and
25 after it, so I'm not going to interfere with the certainty

1 of that trial date for you all. You all have seen my
2 trial management order. It is Docket 79. To the extent
3 that you either haven't read it or don't have it fresh in
4 your memory right now, let me just sort of summarize a few
5 of the key points for you.

6 The way I do my trial management order and
7 pretrial activities is all geared off of the pretrial
8 conference and things come in four waves or four stages.
9 The first is 28 days before the pretrial conference -- by
10 the way, everything I'm about to say now is set forth in
11 the trial management order, Docket 79. To the extent that
12 I say something slightly different than what's in there,
13 what's in the document governs, unless you ask me to
14 modify it, and then I will consider it.

15 But from recollection, we start by looking at
16 the first wave of 28 days before the pretrial conference,
17 and the pretrial conference, you know, is scheduled for
18 January 28th, 2013, 1:30 p.m. here.

19 So 28 days before that is New Year's Eve,
20 Monday, December 31st. That's when the first wave of
21 plaintiff's materials are due. CM/ECF never sleeps. So
22 even though the Court might be closed on that day, that's
23 when things are due. If you want to file it before that,
24 feel free, but that's when things are due.

25 Most of the burden, I think the entire burden of

1 the first wave, is on plaintiffs, on that first wave.
2 That includes such things as, with respect to the jury
3 portion here, your witness statements -- frankly, there
4 are other portions -- your witness statements. I do
5 expect very detailed witness statements.

6 Let me finish my criteria on these witness
7 statements. There shall be no unfair or unreasonable
8 surprise. You really don't need to put in every jot and
9 tittle of what a witness is going to say on direct
10 examination, but you do need to put everything that they
11 are going to say on direct examination that is necessary
12 in order to prevent unfair surprise or prejudice to the
13 other side.

14 So if the witness is being examined on direct
15 examination and the other side objects on the grounds that
16 it is not in the witness statement, we will take a look.
17 If it is not in the witness statement, I'll ask the
18 objector, how is this prejudicial to you? How are you
19 being hurt about not knowing about this? But I'll have a
20 fairly low threshold for that answer. If there really is
21 a legitimate argument: Well, if I would have known they
22 would be asking about such and such, I would have brought
23 these documents, or I would have prepared this line of
24 cross-examination. Then that line of direct examination
25 will not be permitted.

1 If there really isn't a material point, we won't
2 fuss about it. But if it is a material point that really
3 causes them some surprise, then that line of direct
4 examination will not be allowed. There is no way around
5 that by saying, "And I will ask the witness on direct
6 examination other questions consistent with his or her
7 deposition testimony." That doesn't count as giving fair
8 notice to the other side of what will be on direct
9 examination.

10 So did you have a question?

11 MR. WING: I do when you are done with that.

12 THE COURT: Go ahead.

13 MR. WING: When you use the phrase "direct
14 examination," the plaintiffs going first, does that
15 include for us to identify what we will be asking
16 witnesses using the term "hostile witnesses"? In other
17 words, the defense witnesses. I would like to understand.

18 THE COURT: Fair enough.

19 MR. WING: Yeah.

20 THE COURT: Fair enough. There is greater
21 leeway allowed with hostile witnesses, but only to the
22 following extent: You will need to disclose the topic
23 areas that you intend to inquire about on direct
24 examination from hostile witnesses. I recognize that with
25 a hostile witness, you are less able to predict the

1 answers; and hence, what the testimony will show. But
2 other than impeachment evidence, which I will describe
3 later, this is not the time for any surprises, including
4 the direct examination of a hostile witness or an adverse
5 witness.

6 So if there is going to be an adverse witness,
7 then what your witness statements will need to say is: I
8 will be asking the witness about this topic and that topic
9 and the other topic and why they did this or they didn't
10 do that. I understand that there is a little bit less
11 control over your ability to predict what their testimony
12 will be, but there is no restriction that you should face
13 or that I will allow on giving fair notice to what you
14 will be asking about in an adverse direct so that the
15 other side can appropriately prepare for cross-examination
16 of that witness and bring in whatever relevant documents
17 they need to bring in in order to explain their side of
18 the explanation.

19 Does that answer your question?

20 MR. WING: It very much does. I have a
21 follow-up question, if that's permitted.

22 THE COURT: Sure.

23 MR. WING: You mentioned that these detailed
24 witness statements can be considered by you on a
25 preponderance of the evidence. So I want to be respectful

1 to both your desire to have sufficient detail, but I also
2 want to know how much detail because in that respect, you
3 know, if I give you a ten-page disclosure of a witness,
4 that would be helpful for the preponderance decision, but
5 it might also irritate you if the purpose is to just
6 identify what the topic areas are. So I'm trying to
7 balance what you are asking.

8 THE COURT: It won't irritate me.

9 MR. WING: Okay.

10 THE COURT: I will read it all beforehand.

11 There is no need to include sort of the irrelevant
12 material or the flavor of or some of the color. But if it
13 is a material point, you should put it in there.

14 MR. WING: Thank you.

15 THE COURT: And so one thing that is due in this
16 first wave are witness statements. The other thing, of
17 course, that's due are exhibit lists and providing the
18 other side with a hard copy of the exhibits and the Court
19 with a binder of the exhibits.

20 By the way, I would also encourage both sides to
21 confer before this first wave even begins to make sure
22 that there is minimal duplication of exhibits. There is
23 no need to see the same document marked as a plaintiff's
24 exhibit and a defendants' exhibit. If a plaintiff
25 introduces a portion of an exhibit, and the defendant

1 wants the balance of it, just put the whole exhibit in if
2 that's what you agree on as part of the plaintiff's
3 exhibit. It will make it easy for the Court to follow but
4 also for the jury to follow and to minimize duplication.
5 If it is the same document, I'm not going to want
6 plaintiff referring to Plaintiff's 13 and defendant
7 referring to Defendants' 211. There is no point. It
8 confuses me and the jury.

9 So anyway, you will have to have witness
10 statements, exhibits.

11 Since you are going to be asking for declaratory
12 and injunctive relief, that means proposed findings and
13 conclusions for the bench portion of this.

14 Also, the first wave includes proposed jury
15 instructions, proposed verdict form. Feel free to consult
16 with each other beforehand to minimize the disagreements
17 over those things. I'll make you do that later anyway, so
18 you might as well do it before. But see if you can get as
19 much agreement as you can either on verdict form or jury
20 instructions. Frankly, I'm not hearing that much
21 disagreement for the questions that will be before the
22 jury, so maybe you can work that out.

23 Also in the first phase, a trial brief on any
24 other issues that you think would be helpful. You don't
25 need to repeat what's already there. If you want to add

1 additional points and arguments in law in a trial brief,
2 feel free.

3 Motions in limine, of course, are important.

4 With respect to proposed voir dire questions, I
5 will do the first phase of the voir dire. Feel free to
6 suggest to me whatever you want me to be asking the jury.
7 But then after that, I'm going to let the attorneys
8 conduct attorney-conducted voir dire. We will talk more
9 about what the appropriate limitations are on
10 attorney-conducted voir dire. My guess is that most
11 experienced trial lawyers as you all are know what's
12 appropriate and what's inappropriate. So do I. I will
13 keep an eye out for that. We will talk more about that in
14 the pretrial conference. I will let the attorneys conduct
15 reasonable attorney-conducted voir dire. So far nobody
16 has really gone beyond about 15 minutes or so.

17 If you are using your time wisely and well, you
18 can have more than 15 minutes for the attorney-conducted
19 voir dire portion of it. But attorney-conducted voir dire
20 is not to do a mini-opening statement. It is not to
21 elicit commitments from the jury. It is to learn relevant
22 attitudinal background issues, how they process and
23 receive information, any biases, things like that. You
24 know that.

25 If you are using your time effectively and

1 properly and you need more than 15 minutes, I'll be quite
2 flexible. But so far I have had four jury trials this
3 year. Nobody has gone beyond 15 minutes. But I will give
4 plaintiff an opportunity and defendant an opportunity to
5 do that. But if there are things that you would like me
6 to cover in the Court portion of the voir dire, put those
7 in your requested or suggested materials in the first
8 phase.

9 We will talk about demonstratives later, but I
10 don't require that until after the pretrial conference.
11 Because so many of the evidentiary objections will be
12 ruled on at the pretrial conference, I will pre-admit
13 almost everything or rule on objections, if there are
14 proper objections. After the pretrial conference, you
15 will know what's in, what's not in, and then you can
16 better formulate your demonstratives.

17 I think that covers the important stuff in the
18 first phase. If I've left anything out, go with what's in
19 the written material.

20 Then we go to the second phase. Now the burden
21 is on the defendants. Not only do they have to do exactly
22 the same thing plaintiff has just done, they have to
23 also -- and now we are talking about 21 days before the
24 pretrial conference, or January 7th -- they have to file
25 their objections to what they have just seen from the

1 plaintiff. Any objections to plaintiff's witness
2 statements, lay or expert. Any objections to plaintiff's
3 exhibits.

4 By the way, I did leave out any deposition
5 testimony that's intended to be used in lieu of live
6 witnesses or as substantive evidence, that needs to be
7 presented in the first phase.

8 Any objections that the defendants may have to
9 that. Any additional pieces of substantive deposition
10 testimony under the rule of completeness. Any responses
11 to the plaintiff's motions in limine as well as any
12 defendants' motions in limine. All of that burden is on
13 the defendant in the second phase.

14 The third stage, which will be 14 days before
15 the pretrial conference, or January 14th, a little bit
16 less burdensome on the plaintiff, but it is basically
17 responding to any objections that the defendants may have
18 to plaintiff's evidence. Responding to defendants'
19 motions in limine and the like. It is all set forth in
20 the order.

21 And then seven days before, which will be
22 January 21st, the defendants can respond to whatever is
23 then before them from the plaintiff's side. Also by that
24 a stage I have asked the parties to work together on a
25 prepared joint statement of what this case is about that

1 I'll read to the prospective jurors and an agreed-upon
2 neutral statement of the facts and to let you know what
3 disputes you have been able to resolve among yourselves.

4 By this fourth stage, seven days before the
5 pretrial conference, you will have seen each other's
6 objections to evidence, each other's responses to those
7 objections. You are directed to confer. Hopefully, you
8 can resolve many of those objections. Whatever you can't,
9 just let me know what's still on my plate for resolution
10 seven days later, which I will address at the pretrial
11 conference January 28th starting at 1:30.

12 I have had some pretrial conferences that take
13 an hour or less; some that go all day. It depends on how
14 much has been resolved beforehand and how much hasn't and
15 what we still need to resolve.

16 Also, we should have a sense at that pretrial
17 conference really what are the disputed issues, if any,
18 that a jury will need to resolve or that I will need to
19 have a trial to resolve before I can deal with the issues
20 of declaratory and injunctive relief.

21 A related issue that will come up in this case,
22 what do I tell the jury in terms of my conclusions about
23 what constitutional violations have taken place so the
24 jury will understand that their job is just to address
25 damages. What should I say about that? So if you can all

1 agree on that, fine. If you can't, I will see each side's
2 proposed positions, and I will deal with that and let you
3 know what my decision is at the time of the pretrial
4 conference.

5 Now, I did say in the course of exhibits and
6 witness statements, you don't have to give to each other
7 impeachment exhibits or tell them about impeachment
8 witnesses. You do have to give that to me. You do that
9 in a sealed fashion. Probably the easiest thing to do is
10 not file those electronically. Have those delivered in a
11 sealed envelope and call them impeachment exhibits.

12 Let me show you sort of my view of what an
13 impeachment exhibit is. If it goes to the substance in
14 any way, including any part or claim or defense, it is not
15 impeachment. What impeachment is, is why a witness is
16 less credible than might otherwise appear. A witness can
17 be less credible because he or she has some bias. A
18 witness can be less credible because that witness has a
19 conviction. That witness can be less credible because any
20 of the other 404(b) or -- 608(b) issues. A witness can be
21 less credible because of prior inconsistent statements.
22 None of that, if it is not offered for substantive
23 evidence, needs to be disclosed to the other side.

24 If it is true impeachment, it can be kept from
25 the other side. So keep in mind that there are relatively

1 few things that are true impeachment. One takes the
2 chance if one doesn't disclose to the other side that it
3 might not be admissible unless it really is true
4 impeachment. That's what my view of what impeachment
5 evidence is.

6 We can talk more about the trial day and how
7 that will work at the time of trial. We can talk more
8 about what to do with demonstrative evidence. We can talk
9 more about the trial day at the pretrial evidence. We can
10 talk more about demonstrative evidence and what needs to
11 be done and disclosed at the time of the pretrial
12 conference. I won't take up your time now unless somebody
13 has questions about that.

14 The last thing I'm planning on saying, and then
15 I'll open it up and take whatever questions you want. I
16 have disclosed an awful lot about how I tentatively view a
17 lot of these issues. It wouldn't be inappropriate now for
18 both sides to have discussions about do we read really
19 need to go through with trial, or are there things we can
20 do to streamline trial.

21 I don't know whether or not you have all gone
22 through a settlement conference or a mediation. I'm not
23 going to -- it is not my style to push anybody
24 particularly hard to do it. I'm not going to order you to
25 a settlement conference, but it is not a bad idea. The

1 reason I why I say it is not a bad idea is because if you
2 have to go to trial, one side or the other is going to be
3 disappointed with the outcome, and sometimes both sides
4 are disappointed with outcomes. That's just our business.
5 That's just our profession sometimes.

6 But at least if you have gone to the trouble of
7 talking with the other side about a settlement or even a
8 partial settlement -- whether that's lawyer-to-lawyer
9 communication or a settlement conference or a mediation --
10 you have at least tried. If you can't settle it, if you
11 can't resolve it, so be it. That's why we have courts
12 for. That's why we have trials for.

13 But if you haven't even tried resolving it in
14 that fashion, then you might be kicking yourselves if you
15 are disappointed at trial and you say: You know what,
16 there might have been a better outcome at trial. I wish
17 we would have tried to talk settlement.

18 By the way, before taking the bench, I tried
19 cases for 30 years; 25 years in private practice, five
20 years for the Government. In my opinion, and I feel very
21 strong about this, it does not show weakness to be the
22 first side to talk about the possibility of settlement
23 with the other side. If anything, it may show a little
24 bit of strength. So don't be reluctant to talk about
25 those issues with the other side based upon showing

1 weakness. It doesn't show weakness. I think that's an
2 unsophisticated view of the matter.

3 If you need the Court's assistance in finding a
4 settlement judge or a staff mediator from the Court, just
5 let Mary, my courtroom deputy, know. We will find a judge
6 for you or get you to the staff mediator.

7 Justice Susan Leeson is a former justice from the Oregon
8 Supreme Court. She is a superb mediator. She knows
9 Oregon law really well. She has excellent mediation
10 skills. She is available. If you need her, ask Mary. If
11 you want a settlement judge in the courthouse, let Mary
12 know. If you all can agree on who you think might be the
13 right Judge, let Mary know, and we will ask that person.
14 If you want to know who is available, she can send out a
15 general request to folks. That's if you want.

16 Realize that even if you can't settle the entire
17 dispute, if you settle pieces of it, that may or may not
18 be in your interest. It will certainly reduce what has to
19 be tried. I don't know whether there is any aspects of a
20 stipulated declaratory or stipulated permanent injunction
21 that you can all agree on. Maybe you can agree on some
22 issues but not others. Fine. I'm here to resolve
23 whatever you can't agree on. Maybe you can or can't agree
24 upon the jury portion of damages. Fine. Maybe you can
25 agree on everything but attorney fees. Fine. Agree on

1 what you can agree on. I'll deal with what you can't
2 agree on.

3 That's all I'm going to say about that. I don't
4 expect to raise the issue of settlement or mediation again
5 at the pretrial conference because, as I said, I really
6 don't strongarm people into settling their cases, but I
7 want to make sure they are aware of my view it is a good
8 idea to fully explore the issue before trial and to let
9 you know, if you need the Court's assistance -- other than
10 me serving as a mediator; that's not going to happen. But
11 if you need us to find someone for you, I'll do that.
12 Other than that, I don't expect to raise the issue again.

13 I think that covers all that I wanted to talk
14 about with you. I will now turn it over to you in case
15 you have any comments or questions. I will start with
16 plaintiff.

17 MS. CHAMBERLAIN: Yes, Your Honor. This was
18 helpful for you to go over your expectations. I do have a
19 question about the trial brief. You seem to be very well
20 informed about the facts and law and so forth, but I can
21 understand how a summary of the facts and law can still be
22 helpful. Can you provide us with a little bit more
23 specificity on what would be helpful?

24 THE COURT: Here is what is most helpful to me,
25 two points: First, I'm still having trouble visualizing

1 what our trial will look like. What's going to be for me
2 and what's going to be for the jury to decide? To the
3 extent you can all confer and reach agreement on that, let
4 me know. To the extent that you disagree, it would be
5 very helpful for me to know your differing perspectives.
6 I would like to know if what plaintiff thinks what the
7 trial is going to look like is this, and the defendant
8 thinks it is going to look like something else, that would
9 be helpful for me to know before we get to our pretrial
10 conference. So that's important.

11 And one of the big issues that is still
12 struggling in my mind, given the ruling I just made, is
13 what should I say to the jury and what do I need to do
14 before I say this to the jury in terms of what their
15 question is? When do I decide, especially if I decide I
16 want to hear all of the testimony, when do I tell the jury
17 that there is a violation of the Constitution and what it
18 is and now their job is to determine damages?

19 I'm not wedded to this particular view, but
20 maybe what I do if I need to hear the entire trial
21 testimony, maybe I explain to the jury right up front the
22 role of the Court and the role of a jury and say: One of
23 the things that's for me to decide is whether or not there
24 has been a violation of the Constitution, either the
25 First Amendment, the Fourteenth Amendment, the due process

1 issue, the free speech issue, the postcard issue, the
2 magazine issue, the due process issue, the censoring
3 issue, and I will let them know that in final jury
4 instructions. I'll tell them -- by the way, I'm not
5 saying this is what I'm going to do. I'm looking for your
6 feedback. And I tell them: If I find that there is no
7 violation, then there is nothing for you to do, which I
8 don't think I really want to tell them that.

9 But I'll give them more detailed and specific
10 instructions in terms of what areas they need to focus on
11 in those final instructions. That doesn't strike me as
12 all that satisfying or smart, but I don't know what else
13 to do.

14 So I would like you all to think about it. If
15 you can reach agreement, fine. If you can't reach
16 agreement, give me your respective differing views. But
17 I'm trying to visualize what I tell the jury and when I
18 tell them various things. So that's what I'm struggling
19 with.

20 The second area of the trial brief that would be
21 helpful, if there is remaining disagreements with the
22 other side on certain legal propositions, you just
23 disagree with their interpretation of the law, I would
24 like to see sort of a little pinpoint articulation of what
25 those disputed issues are and what cases you want me to

1 read. If you really disagree in terms of how to interpret
2 and apply the case of X versus Y, tell me that's something
3 I need to pay attention to, and I should read closely
4 X versus Y. "Here is how you interpret it" and then see
5 how the other side interprets it, and we will talk about
6 that at pretrial conference.

7 Those are the two most important things for me
8 in a trial memorandum.

9 MS. CHAMBERLAIN: Thank you.

10 THE COURT: Other questions or comments?

11 MR. WING: Yes, Your Honor. We may cover this
12 in the pretrial conference. How many jurors?

13 THE COURT: Sure. In federal court civil cases,
14 it is a minimum six, of course, absent stipulation. What
15 we normally do, if it is a very short trial, probably only
16 have seven. When I have a week-long trial, I have eight.
17 With a seven-day trial like this, especially with some
18 prisoners, especially with some folks who might not --
19 well, I will probably know this in voir dire. I may go to
20 nine. When we have got gone to eight, it is our general
21 practice in this building to let all eight deliberate to
22 unanimous verdict so we don't have any alternates.

23 By the way, it is the opinion of more
24 experienced, older judges that I have heard and plus my
25 experience as a trial lawyer, it doesn't make a difference

1 whether it is a six-two, unanimous or eight. It really
2 doesn't. I have been hearing that for decades. I now
3 believe it from a trial lawyer's perspective, and I think
4 I have seen it as a trial judge in the cases that I have
5 tried earlier this year. Would 12 make a difference? I
6 don't know; maybe. But six versus eight don't.

7 Four for a seven-day trial, should we go to nine
8 in a case like this? Probably not, but I would be
9 interested in both of your opinions on that. But most
10 likely we will seat eight in the box. No one will be an
11 alternate, and they all have to deliberate. If we lose
12 one or if we lose two during the course of trial or during
13 deliberations, no big deal. It is not a mistrial as long
14 as we have six at the end of the verdict, which is a
15 unanimous verdict.

16 MR. WING: Thank you. I'm sorry.

17 THE COURT: Don't apologize. You can have as
18 much time as you need and ask anything you want.

19 MR. WING: Some judges have sort of a standard
20 set of jury instructions that they typically have. I
21 started putting things together. I didn't want to
22 duplicate. I would like to have any thoughts you have
23 about that. It is just use the ones you think need to be
24 used?

25 THE COURT: I have only been doing this about 17

1 months, but so far from the preliminary and
2 non-substantive instructions on the case, I have been
3 following just the basic Ninth Circuit model instructions.
4 For the 1983 claims here, I would anticipate using the
5 Ninth Circuit model instructions. Almost out of an
6 abundance of caution, unless both sides agree, if there is
7 an applicable Ninth Circuit instruction, I will probably
8 use that model. If there is not a model instruction, then
9 I will do it the old-fashioned way. I will look at what
10 both sides have to say and carve out something with
11 clarity and precision and understandability is of
12 paramount importance.

13 I will probably put together sort of -- I always
14 have. It is a work in progress. I will send to you all
15 by e-mail what my general voir dire comments look like,
16 what my general preliminary instructions look like. You
17 don't need to spend your time on that. Work on the
18 substantive stuff of what you want for the jury.

19 And again, to the extent that you can all agree,
20 1983, especially damages only, shouldn't be all that
21 complicated. Where I think it will be more complicated
22 and where you all should spend the greatest part of your
23 time hopefully agreeing, but if not, send me your best
24 thinking on it, is what I should be saying to this jury
25 this case is about and what their job is. If you all can

1 agree on that, fine. If you can't agree on it, that's
2 where your efforts could be best spent because that's
3 where I am going to be spending a lot of time and
4 attention and thought on, telling the jury what this case
5 is about from their perspective. Did I answer that
6 question?

7 MR. WING: I think so. The follow-up is, do you
8 typically want to receive jury instructions with
9 authorities at the bottom and then a separate set that
10 don't have authorities?

11 THE COURT: This is set forth in the trial
12 management order.

13 MR. WING: I'm sorry.

14 THE COURT: No problem. Go ahead and put
15 authorities on the bottom of one set. I don't need a
16 clean set. Just send them to Mary by e-mail in Word
17 format. Therefore, we don't need a second set because we
18 cut and paste. So give me your authorities and show me
19 where you are modifying from any models, if that's what
20 you want to propose. But as long as you send it to us by
21 e-mail in Word format, it is very easy for us to cut and
22 paste.

23 What I normally do, by the way, I normally do
24 this in two phases. I will take the jury instructions
25 that you all agree on or disagree on and come up with one

1 sort of master set. Then probably the day before final
2 conference, I'll send it to you as the tentative state of
3 my thinking, let you sleep on it, think about it, and then
4 give me your arguments of where I'm making a mistake
5 substantively or typographically the next day.

6 MR. WING: Thank you.

7 THE COURT: Other questions, comments, issues?

8 MR. KRAEMER: Nothing, Your Honor.

9 THE COURT: Okay. If you think that you are
10 going to need substantially less than seven days, let Mary
11 know please, and we will release that for other
12 activities.

13 If, in light of my ruling and your further
14 thinking, you think you need substantially more than seven
15 days, let Mary know that as soon as possible.

16 Oh, by the way, one of the things that I expect
17 to see in the witness statements are realistic time
18 estimates of direct examination. Keep in mind the
19 following is just not going to be acceptable -- a
20 seven-day trial we should be okay. But I have seen
21 circumstances where, let's say, a case is scheduled for a
22 three-day trial, and you add up all of the time of let's
23 say plaintiff's direct examinations, not even counting
24 opening and closing and instructions and voir dire, and it
25 adds up to about five trial days, not even counting

1 cross-examination. That doesn't work.

2 You have got seven days set aside for this. I'm
3 assuming that since probably most or many of the
4 plaintiff's witnesses might be -- I don't know about
5 most -- a fair number might be called adversely. I would
6 expect defendants, if they wanted to, could go beyond the
7 scope of the direct and get out their testimony in
8 plaintiff's case, if they wanted to, so they didn't need
9 to call someone back. If they wanted to call someone back
10 instead in their case, I would let them do that. But then
11 I wouldn't let them say the same thing and get out the
12 same story twice. I would sustain a cumulative objection.
13 But on the other hand, if it is someone called adversely,
14 and they just don't want that person to come back to trial
15 three days hence, I would let them go beyond the scope of
16 direct but then be limited to non-leading questions.

17 Anyway, that being said, I would like to see in
18 the witness statements, a realistic assessment of direct
19 examination times. I think a rough rule of thumb that
20 errs on the side of caution is a one-to-one correspondence
21 between time for direct examination and time for
22 cross-examination. And if that rule of thumb on both
23 plaintiff's and defendants' is applied and we're within a
24 seven-day window, we don't have a problem. If it adds up
25 to 14 days, we have got a big problem, and we will need to

1 figure out what to do about that at the pretrial
2 conference. It might be that I'll start striking
3 witnesses as cumulative or for some other reason. So you
4 all need to figure that out beforehand.

5 By the way, just for your general knowledge, I
6 do think six hours of trial testimony per day is
7 reasonable. We will generally start trial at 9:00, end at
8 5:00, a 15-minute break mid-morning and a 15-minute break
9 mid-afternoon. Unless we are really pressed for time, an
10 hour and a half for lunch. If we are pressed for time, an
11 hour for lunch. I will see how that progresses.

12 I generally do not allow sidebars. I do not
13 generally return the jurors to the witness jury room so we
14 can talk about something outside their presence. If you
15 need to be heard outside the presence of the jury while
16 the jury is here, most likely I will tell you to save it
17 for our next break; move on to another topic. I really
18 want to make maximum use of the jury's time while we have
19 them so we really can get in six hours per day of jury
20 time while they are here.

21 The corollary, of course, if there is anything
22 you need, let me know in advance. We will make ourselves
23 available before trial starts, during any of the breaks,
24 after the trial days end. I will listen to whatever you
25 want to say outside the presence of the jury, but during

1 break time: Mid-morning break, afternoon break, lunch
2 break, before or after trial. We are not going to have
3 the jury coming back and forth or whispering sessions at
4 the bench.

5 Anything else? I have probably covered a lot
6 and exhausted you. By the way, you are always welcome, if
7 you have any more questions of this sort or anything else,
8 just send Mary an e-mail. Copy the other side, of course,
9 and we will get you a response.

10 We are here to try to facilitate this process.
11 I know it is very burdensome on you all. I also recognize
12 the calendar that you have here and the holidays, but
13 that's life. But whatever we can do to answer your
14 questions and make things as easy as appropriate, we will
15 do.

16 I do think that these are important issues, and
17 I'm treating them as such. That said, if you want to
18 resolve them without my assistance, feel free.

19 MS. CHAMBERLAIN: Thank you, Your Honor.

20 MR. WING: Thank you.

21 THE COURT: All right. Very good. We will be
22 in recess. It was excellent argument and excellent
23 briefing.

24 Thank you.

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

November 26, 2012
DATE