UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

MARCIE HAMILTON et al.,

Plaintiffs,

v. No. 3:10-cv-355 MCR/ EMT

WENDELL HALL,

Defendant.

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PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

"General correspondence such as between the inmate, the family, and other persons should be encouraged."

Florida Sheriff's Association's Florida Model Jail Standards (2011), §9.03(a)[1]

Plaintiff MARCIE HAMILTON, on behalf of herself and a class of all others similarly situated, pursuant to Federal Rule of Civil Procedure 65(a), move the Court for a preliminary injunction enjoining Defendant Sheriff Wendell Hall ("Sheriff") from enforcing the Postcard-Only Mail Policy and states as follows:

[1] Available at http://www.flsheriffs.org/our_program/florida-model-jail-standards/

I. INTRODUCTION & BACKGROUND

Plaintiffs challenge the Sheriff's policy and practice of forbidding inmates of the Santa Rosa County, Florida, Jail ("Jail") from sending letters enclosed in envelopes to their parents, children, spouses, friends, other loved ones, or other correspondents ("Postcard-Only Mail Policy"). Instead, Jail inmates must write all of their correspondences on the single side of a postcard, with the exception of privileged or legal mail. This policy impermissibly restricts inmates' ability to exercise their rights to communicate with correspondents outside the jail and these correspondents' right to receive these inmates' communications and expressions, in violation of the First and Fourteenth Amendments to the United States Constitution.

Although inmates at the Jail have three ways to maintain relationships with friends, family, and loved ones, correspondence through the mail is many times the only practical and effective method of communication.[2] Telephone calls, which are always collect calls, are expensive. In-person visitation, while occasionally allowed, is limited to a given two-hour window per week, which many times is scheduled during a time that makes it impossible for a friend or family member to visit. Additionally, both telephone

[2] *See, e.g., Al-Amin v. Smith*, 511 F.3d 1317, 1333-34 (11th Cir. 2008) ("Indeed, given their incarceration and often distance from their attorneys, prisoners' use of the mail to communicate with their attorneys about their criminal cases may frequently be a more important free speech right than the use of their tongues.")

calls and visitations can be overheard by fellow inmates; neither provides for personal, intimate conversations with family, friends, or loved ones.

The Sheriff's Postcard-Only Mail Policy severely limits this vital channel of communication. Inmates can no longer discuss sensitive topics of health, finances, or intimate emotions without the likelihood that others will read these messages openly displayed on postcards. A single side of a 4.25" x 5.5" postcard does not provide sufficient space in which an inmate can fully develop and express ideas of complexity, nor can they convey issues of a confidential and/or sensitive nature. Inmates cannot transmit full-size pictures in postcards, which leave little room for anything beyond a caricature. Lastly, inmates cannot direct unique messages to one person (e.g., a child) without the other household member doubtlessly intercepting it. Because postcards cannot replace letters as a vehicle for these messages and communications, these communications simply stop.

Yet, as the U.S. Supreme Court observed, "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation."[3] "Access [to prisons] is essential … to families and

[3] *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (citing Federal Bureau of Prisons, Policy Statement 7300.1A ("Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process.") and Association of State Correctional Administrators, Policy Guideline (Aug. 23, 1972) ("Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community")).

friends of prisoners who seek to sustain relationships with [inmates]."[4] Through communication, inmates continue to have contact with the outside world. Not only does this better prepare them for life outside the jail walls, but it also gives them a sense of value and worth, which ultimately reduces security problems inside the penal institution.

The Sheriff's Postcard-Only Mail Policy violates both the spirit and letter of the U.S. Constitution by cutting off forms of expression and intimate connections. Further, it is just bad policy that further isolates inmates reducing security and increasing recidivism. Accordingly, Plaintiffs seek a declaration that the Postcard-Only Mail Policy violates the First Amendment, and an injunction that enjoins the Sheriff from enforcing it.

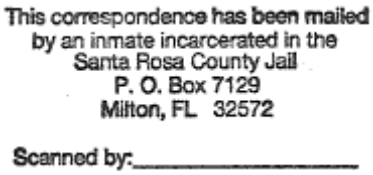
II. STATEMENT OF FACTS

1. In the summer of 2010, the Sheriff instituted the Postcard-Only Mail Policy. *See* Hamilton Decl. (DE 54-1), ¶ 2; *see also* Standard Operating Procedure No. 15.48 (Aug. 14, 2010) (DE 54-4), *authenticated as party admission by* Stevenson Decl. (DE 54-3). Pursuant to the Sherriff's Postcard-Only Mail Policy, all Jail inmates' outgoing mail, except legal or privileged mail, must be in a postcard form. *Id*.

2. Pursuant to a notice entitled "Effective July 15, 2010" (DE 54-8), the Sheriff required that the front of the postcard contain only the addressee's name and

[4] *Thornburg v. Abbott*, 490 U.S. 401, 407 (1989).

address, the sending inmate's name and return address, and postage. *See id.*, *authenticated as party admission by* Stevenson Decl. (DE 54-3). Only the back of the postcard may contain a substantive message. *Id*. However, the inmate must also leave an area of 1 inch by 2 inches blank so that Jail officials may stamp the following message (actual size) in the bottom, right corner:


This correspondence has been mailed
by an inmate incarcerated in the
Santa Rosa County Jail
P. O. Box 7129
Milton, FL 32572

Scanned by:_____

Id.

3. Jail inmates are only permitted to mail postcards either received from Jail officials or metered postcards that were purchased from the United States Postal Service (USPS). Hamilton Decl. (DE 54-1), ¶ 8. A common USPS postcard is depicted in Hamilton Exhibit A. *Id.* All postcards received from Jail officials are typically 4.25 inches by 5.5 inches. *Id.* A postcard received from Jail officials is depicted in Hamilton Exhibit A. *Id*.

4. Plaintiff Hamilton is a jail inmate. Hamilton Decl. (DE 54-1), ¶ 1. She would like immediately to send letters to friends and family. Hamilton Decl., ¶ 5; Hamilton Decl., ¶ 5. But for the Sheriff's Postcard-Only Mail Policy, she would send letters to friends and family. *Id.*

5. Hamilton has remained in the Jail as an inmate since March 5, 2010. Hamilton Decl. (DE 54-1), ¶ 1. Although she would like to correspond with her mother

about health and finances, she is unable to correspond with her mother regarding these sensitive topics because she does not want to expose such information on a postcard that may be read by a number of people, who would have been unable to read her mail prior to implementation of the Postcard-Only Mail Policy. *Id*. at ¶ 5. Although Hamilton would also like to give advice to her daughter about sexual development through written correspondence, she is similarly unable to discuss this information in postcard format because she believes her daughter would be horribly embarrassed if household members accidently read mail intended for her daughter and including such information. *Id*. She would similarly like to send full-page drawings, poems, and country songs to her children, but is unable to do so. *Id*. She is unable to fully develop her thoughts and ideas in the space provided in postcards. *Id*. Prior to the implementation of the Postcard-Only Mail Policy, Hamilton was able to – and did – correspond in the manner described above. *Id*.

6. Telephone calls from Jail inmates in the housing areas are limited to collect telephone calls, which are very expensive. Hamilton Decl. (DE 54-1), ¶ 6; Inmate Handbook (DE 54-10), at p. 21 (pdf p. 22), *authenticated as party admission by* Stevenson Decl. (DE 54-3). Fellow inmates may easily overhear these telephone calls, which are made in a common area in a row of telephones. Hamilton Decl. (DE 54-1), ¶ 6. Family and friends may only visit Jail inmates during a specific two-hour time period during the week. *Id*., at ¶ 7; Visitation Schedule (DE 54-9), *authenticated as party admission by* Stevenson Decl. When family and friends can visit a Jail inmate, they

speak over a telephone to each other in ways that may be overheard by other inmates or visitors. Hamilton Decl., ¶ 7.

7. Jail inmates deliver their mail by placing it on the bars of their cell or on the glass on the door leading from the dorms. Hamilton Decl., ¶ 4. Fellow inmates may view the contents of the postcard placed for delivery in this manner. *Id*.

8. Defendant Hall, as Sheriff of Santa Rosa County, Florida, is charged as a matter of law with the care, control, and custody of inmates at the Santa Rosa County Jail. *See* § 30.49(2)(a), Fla. Stat. (requiring the Sheriff to submit a proposal budget that includes "proposed expenditures for operating and equipping the sheriff's office and jail"); *Baugher v. Alachua County*, 305 So.2d 838, 839 (Fla. 1st DCA 1975) (concluding that the "operation of that [the jail] and the control and custody of the inmates therein incarcerated are in the hands of the sheriff"), *followed by White v. Palm Beach County*, 404 So.2d 123, 125 (Fla. 4th DCA 1981) and *Rolle v. Brevard County, Florida*, 2007 WL 328682 (M.D. Fla. 2007) (noting that jail operational "decisions are the province of the Sheriff").

9. Other secure penal institutions in Florida and elsewhere permit inmates to send full-page letters to friends and family. Martin Decl. (DE 54-2), ¶¶ 16-21.

10. Inspecting every piece of outgoing mail is not necessary or essential to maintaining jail order or security. *Id*. at ¶ 13.

11. The Sheriff's Postcard-Only Mail Policy is not necessary or essential to further any legitimate interests in security or order. *Id*. at ¶ 14. The policy unnecessarily limits inmate opportunities to engage in lawful and routinely accepted correspondence practices. *Id*.

12. The Sheriff's Postcard-Only Mail Policy is antithetical to sound inmate governance. *Id*. at ¶ 15. Not only do restrictions on the means of maintaining family and community relationships and ties frustrate the inmates' reintegration into the community upon release, but such restrictions often lead inmates to feel isolated and humiliated, which make the inmates more difficult to control and secure. *Id*.

III. PRELIMINARY INJUNCTION STANDARD

A district court should grant preliminary injunctive relief when the movant establishes four factors: "(1) a substantial likelihood of success on the merits; (2) irreparable injury will be suffered if the relief is not granted; (3) the threatened injury outweighs the harm the relief would inflict on the non-movant; and (4) entry of the relief would serve the public interest." *Siebert* v. *Allen*, 506 F.3d 1047, 1049 (11th Cir. 2007) (citing *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225-26 (11th Cir. 2005)).

IV. ARGUMENT

A. There is a Substantial Likelihood that Jail Inmates Will Succeed on the Merits of Their Claims

The Jail inmates will ultimately prevail on the merits of their claim. The Sheriff's Postcard-Only Mail Policy restricts speech and infringes on the First Amendment. Under the applicable *Procunier* heightened scrutiny test, the Sheriff's policy fails because it neither furthers an important government interest nor is it narrowly tailored.

1. The Sherriff's Postcard-Only Mail Policy Implicates the First Amendment

The right to send and receive mail generally is protected by the First Amendment. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427 (1993) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights."). The U.S. Supreme Court has specifically recognized inmates' First Amendment right to correspond with friends and family outside a prison. *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (noting that both inmates and family and friends of prisoners who seek to sustain relationships with them enjoy First Amendment rights to do so). Free speech rights exist in jail as "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Therefore, the First Amendment applies to the Sheriff's Postcard-Only Mail Policy restricting inmate mail.[5]

[5] Indeed, the policy amounts to prior restraint on speech. "A prior restraint on

The Sheriff's Postcard-Only Mail Policy prohibits jail inmates from communicating through non-privileged letters. Although the restriction is not an outright ban of all mail—it still permits limited communication on the back of postcards—the availability of other limited forms or channels of communication does not alone justify the free speech restrictions or eliminate First Amendment implications. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005) (ruling a content-neutral time, place, and *manner* restriction must further a legitimate government interest, even if it "leave[s] open adequate alternative channels of communication"); *see also Procunier*, 416 U.S. at 413 (requiring a speech restriction be narrowly tailored to further an important or substantial government interest without regard to alternative channels of communication); *Turner*, 482 U.S. at 89-90 (requiring a restriction on incoming mail to be "reasonably related to legitimate penological interests," even if it leaves open "other avenues" of communication).

Furthermore, as a practical matter, the Sheriff's Postcard-Only Mail Policy necessarily restricts inmates' mail message and content. It does so in four ways. First, because many jail inmates understandably will not discuss sensitive issues like health, finances, religion, and intimate emotions in a postcard open to all to read, the Sheriff's

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expression exists when the government can deny access to a forum for expression before the expression occurs." *U.S. v. Frandsen*, 212 F.3d 1231, 1236-37 (11th Cir. 2000). The key feature of a prior restraint is it gives "'public officials the power to deny use of a forum in advance of actual expression.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n. 5 (1989) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). In this case, the Sheriff has simply denied all access to communication through the forum of letters.

Postcard-Only Mail Policy necessarily limits and chills discussion on these topics.[6] Second, the Postcard-Only Mail Policy effectively prohibits inmate expressions on full-sized (8.5" x 11") drawings and other artwork, which cannot be enclosed in a postcard, but could be – and were previously – enclosed in an envelope. Third, the Sheriff's Postcard-Only Mail Policy implicitly mandates all inmate mail communication be abbreviated and incomplete because a single side of a 4.25" x 5.5" postcard provides insufficient room to fully develop and communicate many of the inmates' thoughts and ideas. Fourth, the Postcard-Only Mail Policy prevents inmates from securely communicating on a one-to-one basis, when other third parties or household members may reasonably intercept and read such communications. Thus, the Postcard-Only Mail Policy restricts both the substance and form of communication.

2. The Applicable First Amendment Test: *Procunier*'s Heightened Scrutiny

The U.S. Supreme Court has established that restrictions on outgoing mail are subject to heightened scrutiny. *Procunier v. Martinez*, 416 U.S. 396, 413 (1974). Although the applicable standard has been relaxed in the other contexts, including for *incoming* mail, *see Turner*, 482 U.S. at 89, heightened scrutiny continues to be applied

[6] The U.S. Supreme Court has recognized that the possibility that a third-party may read mail chills communication. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) (finding that prison officials' inspection of incoming attorney mail in the inmate's presence did not chill inmates' free speech because "the inmate's presence insures that prison officials will not read the mail").

categorically[7] to restrictions on inmate's outgoing mail. *Thornburg v. Abbott*, 490 U.S. 401, 413 (1989) (limiting the heightened scrutiny in *Procunier* "to regulations concerning outgoing correspondence")); *see also Johnson v. Smith*, No. 2:10-CV-236, 2011 WL 344085, *4 (N.D. Ga. Feb. 1, 2011) (holding jail inmate "stated a viable claim regarding the Jail's policy that inmates use only postcards for general outgoing mail" and citing the *Procunier* heightened scrutiny standard as the test to apply); *Nasir v. Morgan*, 350 F.3d 366, 371, 374 (3d Cir. 2003) (ruling the *Procunier* test applies to a regulation of outgoing mail); *Stow v. Grimaldi*, 993 F.2d 1002, 1004 (1st Cir. 1993) (same).[8] The Defendant recognizes that the *Procunier* standard applies to outgoing mail. Def.'s Mot. to Dismiss (DE 12) at 12 ("Defendant also recognizes that the standards applied to outgoing mail are different from the standards applied to incoming mail.")

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[7] The Supreme Court recognized that the activity at issue in *Procunier* "—outgoing personal correspondence from prisoners—did not, by its very nature, pose a serious threat to prison order and security" and were of a "categorically lesser magnitude" than the implications of incoming materials. *Abbott*, 490 U.S. at 411, 413.

[8] Accordingly, other postcard cases concerning *incoming* mail are simply inapplicable to this case. *Covell v. Arpaio*, 662 F.Supp.2d 1146 (D. Ariz. 2009); *Gambuzza v. Parmenter*, No. 8:09-cv-1891, 2010 WL 2179029 (M.D. Fla. May 28, 2010). Furthermore, court opinions, like these, where the court sides with legal arguments asserted attorneys instead of pro se litigants, have little persuasive value. A case similar to the one at hand like *Martinez v. Maketa*, which involves a Colorado jail's outgoing postcard-only mail policy and lawyers and evidence on both sides, is much more persuasive authority. No. 1:10-cv-02242 (D. Colo. Dec. 20, 2010) (Stipulated Order Granting Preliminary Injunction enjoining El Paso County Jail's postcard-only mail policy), available at http://www.aclu.org/files/assets/2010-12-20-MartinezvMaketa-OrderGrantingPI.pdf.

Pursuant to *Procunier*, a jail's restriction on an inmate's outgoing mail must meet two requirements. *Procunier*, 416 U.S. at 413. First, the limitations on a prisoner's First Amendment rights in his outgoing mail "must further an important or substantial governmental interest unrelated to the suppression of expression." *Id.* More specifically, the limitation must further "one or more of the substantial governmental interests of security, order, and rehabilitation." *Id.* Second, "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* The Sheriff's Postcard-Only Mail Policy fails both *Procunier* prongs.

3. The Postcard-Only Mail Policy does not Further an Important or Substantial Governmental Interest

Under the first prong of *Procunier*'s analysis, jailors may only restrict free speech in order to further an "important or substantial governmental interest." *Procunier*, 416 U.S. at 413-14. Concerned that officials might take advantage of the judicial deference often accorded to prison administrators, the Court delineated the specific interests that may trump fundamental constitutional guarantees: "preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Id*. at 412-13.

The Sheriff identified two justifications for his restrictions on the inmates' free speech: crime deterrence and security. *See* Def.'s Mot. to Dismiss (DE 12) at p. 2, ¶ 3. The Sheriff asserts the Postcard-Only Mail Policy avoids the possibility that inmates through mail communication will direct or plan crimes, including escapes and threats. *Id*.

at p. 1, ¶ 2. The Sheriff also believes prohibiting letters reduces the "intensive and time consuming task" of *removing* letters from unsealed envelopes to review mail for prohibited messages and thereby frees up personnel to provide greater security. *Id*. at p. 1-2, ¶ 2. (Importantly, the time savings the Sheriff identifies comes from the deputies no longer having to open and remove the letters from the envelopes, which takes a matter of moments. He misidentifies any time savings from *reading* the message, because whether on a postcard or in a letter, a message would take the same time to read. *See id*.)

Although the Sheriff has elsewhere argued that the general cost savings (e.g., one fewer person would be needed in the mail room) additionally justifies the restriction, the Sheriff did not assert this basis in his Motion to Dismiss (DE 12). Likely, the Sheriff appreciates that this is a losing argument.

First, a mere desire to save money does not satisfy the *Procunier* test, which requires that the restriction on First Amendment rights "furthers one or more of the *substantial governmental interests of security, order, and rehabilitation*." 416 U.S. at 413 (emphasis added). If a jailor tackles the same problems inherent to all management in any agency (like saving costs), jailors are afforded no deference.[9] *Procunier v. Martinez*,

[9] Even when a court should afford jail officials deference, courts have made it abundantly clear that the First Amendment analysis to be performed is not toothless, and that courts must not blindly defer to the judgment of prison administrators simply because institutional concerns are at issue. *Abbott*, 490 U.S. at 414; *Procunier*, 416 U.S. at 405-06 ("[A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims."); *Bradbury v. Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983).

416 U.S. 396, 404-405 (1974) (observing that jailors are afforded the deference because of the concerns unique to effective prison management); *see also Johnson v. California*, 543 U.S. 499, 510 (2005) (observing that reduced scrutiny and deference owed to penal officials, have *only* applied where the exercise of a right that is "'inconsistent with proper incarceration'"); *Cal. First Amendment Coalition v. Woodford*, 299 F.3d 868, 879 (9th Cir. 2002) ("[A] prison regulation that is not reasonably related to a legitimate penological interest, such as security or rehabilitation, will fail to satisfy even the most deferential analysis"). Indeed, where the inmate's First Amendment rights are "not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system," inmates retain them in full. *Pell v. Procunier*, 417 U.S. 817, 822 (1974).

Second, courts have refused to recognize cost savings as a government interest that would justify deprivation of constitutional rights of prisoners. *See, e.g., Monmouth County Corr. Institutional Inmates v. Lanzaro*, 834 F.2d 326, 346 (3d Cir. 1987) (holding that costs were not a "legitimate governmental interest sufficient to justify the County's policy" of refusing to provide inmates with abortion-related services); *see also Gates v. Collier*, 501 F.2d 1291, 1319 (5th Cir. 1974)[10] ("Where state institutions have been operating under unconstitutional conditions and practices, the defenses of fund shortage and the inability of the district court to order appropriations by the state legislature, have

[10] *See Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as binding precedent for the Eleventh Circuit all decisions of the Fifth Circuit handed down prior to close of business on September 30, 1981).

been rejected by the federal courts.") (citing cases); *Mitchell v. Untreiner*, 421 F.Supp. 886, 896 (N.D. Fla. 1976) ("'[l]ack of funds is not an acceptable excuse for unconstitutional conditions of incarceration'") (citations omitted); *Morrison v. Hall*, 261 F.3d 896, 902-03 (9th Cir. 2001) (holding that the efficient use of prison staff and resources could not justify an effective ban on subscription publications).

Therefore, general cost savings is not an important government interest sufficient to satisfy *Procunier's* first prong.

a. The Postcard-Only Mail Policy Does Not Deter Crime

Plaintiffs agree that preventing prisoners from using outgoing mail to commit crimes is an important governmental interest. *See Martinez*, 416 U.S. at 413. However, restricting prisoners' outgoing mail to postcards does not advance that interest. Both before and after instituting the Postcard-Only Mail Policy, the Sheriff instructed guards to "read/scan" inmate's nonprivileged outgoing mail. *Compare* Outgoing Mail Procedure, Standard Operating Procedure No. 15.48(II) (Effective August 14, 2010) (DE 54-4, p. 1)[11] *with id*. (Effective March 26, 2009) (DE 54-5, p. 1).[12] Because jail officials still "read/scan" the outgoing mail, the Postcard-Only Mail Policy that merely substitutes (postcard for letter) what is read or scanned does not "further" the goal of crime

[11] Authenticated as a party admission by Stevenson's Decl. (DE 54.4).

[12] Authenticated as a party admission by Stevenson's Decl.

deterrence. The change in the policy does not affect the reading or scanning of correspondence for criminal activity.

Furthermore, reading inmates' outgoing mail in many circumstances is unnecessary to further jail order or security. *See* Martin Decl. (DE 54.3), 11 (inspecting every piece of outgoing mail is not necessary or essential to maintaining jail order or security). Indeed, the Federal Bureau of Prisons generally permits minimum or low security level inmates to seal mail themselves, absent specific concerns. 28 C.F.R. § 540.14. Therefore, the Sheriff's continued policy directing deputies to read or scan all outgoing mail (whether in letter or postcard format) may be largely a waste of time.

b. The Postcard-Only Mail Policy Does Not Enhance Security

The Sheriff has stated that the Postcard-Only Mail Policy saves his deputies the time required to remove the letter from an envelope. This time saved, on a cumulative basis, he asserts, can be redirected to providing security—though the mechanics of this are unknown. Even assuming the removal of letters from envelopes would take a significant amount of time, the Defendant's security rationale is rebutted by numerous examples of well-run jails and correctional facilities that freely allow prisoners to write letters to friends and family members. A survey of the mail policies for state and federal prisons in the United States shows that no state restricts its inmates' mail to postcards.[13]

[13] *See* 28 C.F.R. § 540.14; **Ala**. Admin. Reg. 448, available at http://www.doc.state.al.us/docs/AdminRegs/AR448.pdf; **Alaska** Dep't of Corr. Policies & Procedures, No. 810.03, http://www.correct.state.ak.us/corrections/pnp/pdf/810.03.pdf; **Ariz**.

This fact alone weighs heavily against a finding that a postcard-only policy furthers the interest in security and crime prevention. *See Martinez*, 416 U.S. at 414 n. 14 ("While

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Dep't of Corr. Order Manual, § 914.05, available at http://www.azcorrections.gov/Policies/900/0914.pdf; **Ark**. Admin. Code 004.00.2-860; **Cal**. Code Regs. tit. 15, § 3138(a); **Colo**. Dep't of Corr. Admin. Reg. No. 300-38, available at http://www.doc.state.co.us/sites/default/files/ar/0300_38_1.pdf; **Conn**. Agencies Regs. § 18-81-31(d); **Del**. Dep't of Corr. Policy Manual, No. 4.0, available at http://www.doc.delaware.gov/pdfs/policies/policy_4-0.pdf; **Fla**. Admin. Code 33-210.101; **Ga.** Comp. R. & Regs. R. 125-3-3-.02; **Haw**. Dep't of Public Safety Corr. Admin. Policy No. 15.02, available at http://hawaii.gov/psd/policies-and-procedures/P-P/3-COR/CORR%20%20P-P%20FINAL/CHAPTER%2015/COR.15.02.pdf; **Idaho** Dep't of Corr. Standard Operating Procedure No. 402.02.01.001, available at http://www.idoc.idaho.gov/policy/int4020201001.pdf; **Ill**. Admin. Code tit. 20, § 525.130; **Ind**. Code § 11-11-3-5; **Iowa** Admin. Code r. 201-20.4; **Kan**. Admin. Regs. 44-12-601; 501 **Ky**. Admin. Regs. 6:020 (adopting Ky. Dep't of Corr. Policies & Procedure, No. 16.2, available at http://www.corrections.ky.gov/NR/rdonlyres/E20E4AEA-9C73-4E28-9CA4-0F02EF3881B9/181101/162.pdf); **La**. Admin Code. tit. 22, pt. I, § 313; **Me**. Dep't of Corr. Policy No. 21.2, available at http://www.maine.gov/corrections/PublicInterest/documents/21.2-PRISONERMAIL12-1-09R.doc; Code Me. R. 03-201 Ch. 1, § II.a (jail policies); **Md**. Pub. Saf. & Corr. 12.02.20.04; 103 **Mass**. Regs. Code 481.09; **Mich**. Admin. Code r. 791.6603; **Minn**. R. 2911.3300; **Miss**. Dep't of Corr. Standard Operating Pro. No. 31-01-01; **Mo.** Dep't of Corr. Family & Friends Handbook, available at http://doc.mo.gov/documents/FFWeb.pdf; **Mont**. Dep't of Corr. Policy No. 3.3.6, available at http://www.cor.mt.gov/content/Resources/Policy/Chapter3/3-3-6.pdf; **Neb**. Admin. R. & Regs. Tit. 68, Ch. 3, § 009; **Neb**. Admin. R. & Regs. Tit. 81, Ch. 9, § 002 (jail standards); **Nev**. Dep't of Corr. Policy No. 750, available at http://www.doc.nv.gov/ar/pdf/AR750.pdf; **N.H.** Code Admin. R. Cor 301.05; **N.J.** Admin. Code tit. 10A, 10A:18-2.25; **N.M**. Dep't of Corr. Policy No. 151200, available at http://corrections.state.nm.us/policies/current/CD-151200.pdf; **N.Y.** Comp. Codes R. & Regs. tit. 7, § 720.3; **N.C**. Admin. Code tit. 5, r. 2D.0307; **N.D.** Dep't of Corr. & Rehabilitation, Inmate Handbook, § 3, available at http://www.nd.gov/docr/adult/docs/INMATE_HANDBOOK_2010.pdf; **Ohio** Admin. CoDE 5420-9-18; **Okla**. Dep't of Corr. Operation Policy No. 030117, available at http://www.doc.state.ok.us/Offtech/op030117.pdf; **Or**. Admin. r. 291-131-0020; 37 **Pa**. Code § 93.2;R.I. Admin. Code 17-1-18:III; **S.C. -** no authority found (telephone call to Dep't of Corr. on Mar. 31, 2011, confirmed inmates can send and receive letters); **S.D.** Admin. R. 17:50:10:02; **Tenn**. Dep't of Corr. Admin. Policy No. 507.02, available at http://www.tn.gov/correction/pdf/507-02.pdf; Tenn. Comp. R. & Regs. 1400-01-.11 (jail standards); **Tex**. Dep't of Crim. Justice Policy No. BP-03.91, available at http://www.tdcj.state.tx.us/policy/BP0391r2_fnl.pdf; Tex. Admin. Code tit. 37, § 291.2 (jail standards); **Utah** Admin. R. 251-705; **Vt.** Admin. Code 12-8-21:965; 6 **Va.** Admin. Code 15-31-320; **Wash**. Admin. Code 137-48-040; Wash. Dep't of Corr. Policy No. 450.100, available from http://www.doc.wa.gov/policies/default.aspx; **W. Va.** Code St. R. § 90-7-3; W. Va. Div. of Corr. Policy No. 503.00; **Wis**. Admin. Code s DOC 309.04; **Wyo**. Dep't of Corr. Policy No. 5.401, available from http://corrections.wy.gov/policies/index.html.

not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction"). Therefore, the Postcard-Only Mail Policy does not advance or maintain the jail's interest in security and order.

Furthermore, the restriction of inmate mail is antithetical to maintaining proper security. Restrictions on inmates' communications with family and friends often lead to a feeling of isolation, which may make the inmate more difficult to control. *See* Martin Dec, ¶ 14-15. Also, arbitrary restrictions like these undermine the respectful relationship between inmate and guard. *Id.*

4. The Postcard-Only Mail Policy is not Narrowly Tailored to Protect Government Interests

The Postcard-Only Mail Policy similarly fails the second, narrow-tailoring prong of *Procunier*. As the U.S. Supreme Court explained, "a restriction on inmate correspondence that furthers an important or substantial interest of penal administration will nevertheless be invalid if its sweep is unnecessarily broad." *Procunier*, 416 U.S. at 413. Even if the Court were to find that the Postcard-Only Mail Policy actually furthers security or crime deterrence, the policy's broad and sweeping reach is not narrowly tailored to prohibit only that correspondence that might be thought to represent criminal activity or threaten internal security. Instead, the Postcard-Only Mail Policy applies to *all* correspondence and chills the communications of *all* inmates, regardless of whether the Sheriff suspects that the communication represents a threat to the public or the institution in any way. The Sheriff cannot demonstrate why this blanket policy of

requiring postcards for all outgoing mail is necessary, as opposed to a more narrowly drawn policy of requiring certain inmates at certain times to write on postcards. As a result, the Postcard-Only Mail Policy does not involve a limitation of First Amendment freedoms no greater than necessary or essential to the protection of the particular governmental interest involved, and necessarily fails *Procunier*'s exacting standard.

In analyzing prison regulations under *Procunier*'s second prong, courts have also looked to see whether reasonable alternatives exist to prison officials to protect their asserted interests. *See Spradley v. Sistrunk*, 1996 WL 467511 at *3 (M.D. Fla. 1996) ("[W]e take the terms 'necessary' or 'essential' to mean that there is no alternative means of protecting [the asserted interest] that is reasonably available to prison officials."). If such reasonable alternatives are found to exist, the regulation may sweep more broadly than necessary, and must necessarily fail *Procunier*'s constitutional analysis. *See id.* Here, all of the Sheriff's concerns regarding crime deterrence and security are already covered by existing rules and statutes which combat against inmate crime and fraud. His policies already require Jail officials to open and read every piece of mail. *See* Outgoing Mail Procedure, Standard Operating Procedure No. 15.48(II) (Effective August 14, 2010) (DE 54-4, p. 1). This satisfies the Sheriff's concerns regarding crime deterrence and security, and clearly establishes that the Postcard-Only Mail Policy involves a limitation of First Amendment freedoms greater than necessary or essential to the protection of the

particular governmental interest asserted. Indeed, no state or federal prison similarly limits inmate mail to postcards.[14]

B. Jail Inmates Will Continue to Suffer Irreparable Injury Unless this Court Issues an Injunction

Under the current Postcard-Only Mail Policy, Jail inmates may not freely and completely communicate with friends and loved ones. They cannot discuss in their correspondence sensitive issues, include full sized pictures, fully develop ideas, or direct communication to just one household member. The policy infringes on the free speech rights secured by the First Amendment. This infringement constitutes a de facto irreparable injury because, as the Supreme Court has noted, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 (citation omitted), *followed by KH Outdoor*, 458 F.3d at 1271-72. Preliminary injunctive relief is essential to safeguard Jail inmates' constitutional rights during the pendency of these proceedings.

C. The Threatened Injury to Jail Inmates Outweighs Whatever Harm the Preliminary Injunction Could Cause Defendant

The next factor the Court should consider when deciding whether to grant preliminary relief involves an evaluation of the severity of the impact on the defendant should the temporary injunction be granted and the hardship that would occur to the plaintiff if the injunction should be denied. Defendant cannot show that the entry of a preliminary injunction will harm it in any way. Indeed, the Santa Rosa County jail

[14] See Note 13, *supra*.

operated just fine for years without the Postcard-Only Mail Policy. Yet, the hardship to Plaintiffs if the preliminary injunction is denied, as set out in the preceding section, would be the continued violation of their First Amendment right to engage in constitutionally protected speech.

D. Entry of the Relief Sought by Jail Inmates Will Serve the Public Interest

Permitting Jail inmates to freely and fully communicate in letters with friends and family promotes security at the Jail, reduces recidivism, and champions a rule of law in favor of free speech. *See Procunier*, 416 U.S. at 412 ("inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation"); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("The vitality of civil and political institutions in our society depends on free discussion"); *see also KH Outdoor*, 458 F.3d at 1272; *Iowa Right to Life Comm., Inc.* v. *Williams*, 187 F.3d 963, 970 (8th Cir. 1999) ("[T]he public interest favors protecting First Amendment freedoms."); *ACLU* v. *Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996) ("No long string of citations is necessary to find that the public interest weighs in favor of having access to a free flow of constitutionally protected speech."). Thus, entry of the relief sought by Plaintiffs will serve the public interest. The equities weigh in favor of enjoining the Sheriff's Postcard-Only Mail Policy for the time being and returning to the mail policy in place until last summer.

E. No Security Should Be Required

Federal Rule of Civil Procedure 65(c) states that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant." As noted by a well-recognized treatise, however, "the court may dispense with security altogether if grant of the injunction carries no risk of monetary loss to the defendant." Charles A. Wright, Arthur R. Miller, Mary K. Kane, 11A Fed. Prac. & Proc. Civ. § 2954 (3d ed. 2009). The Eleventh Circuit has accepted this position. *Carillon Importers v. Frank Pesce Int'l Group*, 112 F.3d 1125, 1127 (11th Cir. 1997) (citing *Corrigan Dispatch Co. v. Casa Guzman*, 569 F.2d 300, 303 (5th Cir. 1978) (affirming no security bond)). Because Defendant would suffer little harm, economic or otherwise, from the entry of the preliminary injunction sought by Plaintiffs, no security should be required. Further, Plaintiffs are indigent and are represented by pro bono counsel; requiring the posting of a bond would therefore pose an insurmountable financial hardship.

V. CLASSWIDE RELIEF IS APPROPRIATE

Preliminary injunctive relief on behalf of the Plaintiff Class is appropriate here, where Plaintiffs have filed a Motion for Class Certification (DE 7) which is currently pending before the Court. The Court may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equity powers. *See Brantley v. Maxwell-Jolly*, 656 F. Supp.2d 1161, 1178 n. 14 (N.D.

Cal. 2009) ("District courts are empowered to grant preliminary injunctions 'regardless of whether the class has been certified.") (citations omitted).

Where, such as here, the activities of the Defendant are directed generally against a class of persons, the lack of formal class certification does not create an obstacle to class wide preliminary injunctive relief. *See Robertson v. Nat'l Basketball Ass'n*, 389 F. Supp. 867 (S.D. N.Y. 1975) (preliminary injunction entered five years before class certification); *Leisner v. New York Tel. Co.*, 358 F. Supp. 359, 371 (S.D. N.Y. 1973) ("[R]elief as to the class is appropriate at this time even though when the preliminary injunction motion was heard, the class had not yet been certified.").

Indeed, "when the determination of the class action issue is delayed, a suit brought under Rule 23 should be treated as a class action … until there is a determination that the action may not proceed under the rule." *N.Y. State Nat'l Org. for Women v. Terry*, 697 F. Supp. 1324, 1336 (S.D. N.Y. 1988), citing to 7B Wright, Miller & Kane, Federal Practice and Procedure § 1785, at 106-07 (1986); *see also Joyce v. City & County of San Francisco*, 864 F. Supp. 843, 854 (N.D. Cal. 1994) (permitting class wide relief before class certification). Because a determination has not yet been made whether the Jail inmates can proceed as a class, it is appropriate at this stage that the Court considers the injuries alleged to all individuals within the proposed class. *Id*.

VI. CONCLUSION

Applying relevant law to the undisputed material facts, the Plaintiffs are entitled to a preliminary injunction enjoining the Sheriff from enforcing the Postcard-Only Mail Policy.

WHEREFORE, Plaintiffs request that the Court enjoin the Sheriff from the following:

A. Continuing to enforce the Postcard-Only Mail Policy; and

B. Restricting the Jail inmates' outgoing mail to postcard format.

Further, Plaintiffs request that they be excused from posting a security bond.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered for this case, including the opposing counsel.

Dated: April 15, 2011

Respectfully Submitted,

s/ Benjamin James Stevenson
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