

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

**Human Rights Defense Center,**

Plaintiff,

vs.

**MICHELLE LUJAN GRISHAM**, individually and in her capacity as Governor of the State of New Mexico; **ALISHA TAFOYA LUCERO**, individually and in her capacity as Cabinet Secretary of the New Mexico Corrections Department; **MELANIE MARTINEZ**, individually and in her capacity as Deputy Secretary of the New Mexico Correction Department; **GARY MACIEL**, individually and in his capacity as Deputy Secretary of the New Mexico Correction Department; **BRIAN R. EVANS**, individually and in his capacity as Chief Executive Officer of The GEO Group, Inc.; **WAYNE H. CALABRESE**, individually and in his capacity as President and Chief Operating Officer of The GEO Group, Inc.; **THE GEO GROUP, INC. d/b/a LEA COUNTY CORRECTIONAL FACILITY**, a corporation; **JOHN AND JANE DOES 1-20**, individually and in their official capacities; and **ENTITIES 1-10**,

Defendants.

**No. 1:24-cv-01091-JMR-KRS**

**PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

**NOTICE OF MOTION AND MOTION**

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **December 3, 2024, at 10:00 a.m.**, or as soon thereafter as the matter may be heard, Plaintiff Human Rights Defense Center (“Plaintiff”), pursuant to Federal Rule of Civil Procedure 65(a), will move this Court to issue a preliminary injunction enjoining Defendants Michelle Lujan Grisham, Alisha Tafoya Lucero, Melanie Martinez, Gary Maciel, Brian R. Evans, Wayne H. Calabrese, The GEO Group, Inc. d/b/a Lea County Correctional Facility, John and Jane Does 1-20, and Entities 1-10, (collectively “Defendants”) from implementing unconstitutional mail policies and practices and refusing to deliver Plaintiff, Human Rights Defense Center’s (“HRDC” or “Plaintiff”) publications and correspondence to incarcerated persons in Defendants’ custody in violation of Plaintiff’s rights to free speech and due process under the Constitution of the United States. Because this motion is being filed with the complaint, movant has not yet been able to confirm counsel for Defendants for the purpose of determining whether the motion is opposed. This motion is based on this Notice, the Memorandum of Points and Authorities filed herewith, the Declarations of Paul Wright, John Clark, and Marc J. Shinn-Krantz filed herewith, the pleadings in the above-captioned matter, and any oral argument or evidence permitted at any hearings on this motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**INTRODUCTION**

Plaintiff files this motion to enjoin the Defendants from unconstitutionally censoring HRDC’s books, magazines and correspondence mailed to incarcerated persons, and from failing to provide due process to challenge censorship decisions. HRDC’s mission is to provide incarcerated persons with reading materials with news and analysis relevant to their constitutional and human rights and options for accessing education while incarcerated. HRDC

publishes and distributes magazines and books and also mails them and other written communications to incarcerated persons.

Since at least February 2022, Defendants have engaged in at least one hundred fifty-two (152) separate instances of unlawful suppression of HRDC's speech without due process, by refusing to deliver books, magazines, and correspondence mailed by HRDC to persons incarcerated at the New Mexico Corrections Department ("NMCD"), including at NMCD's state-operated and privately operated prison facilities, in violation of the First Amendment, and have failed to provide HRDC adequate notice and opportunity to challenge the censorship decisions, in violation of the Due Process Clause of the Fourteenth Amendment. Defendants' current written mail policies and procedures are unconstitutional on their face and as applied to HRDC, as they allow censorship of HRDC's mailings with no rational connection to any legitimate penological interest, and do not provide the minimum procedural safeguards required to challenge the censorship.

HRDC's publications and correspondence pose no threat to the safety or security of the NMCD and, in fact, have been successfully mailed to incarcerated persons in thousands of jails and prisons across the United States for over thirty-four years without incident. Plaintiff repeatedly attempted to resolve these violations without litigation by mailing letters to Defendants on May 18, 2022 and June 8, 2023, but Defendants did not respond and the censorship only worsened.

As Defendants' censorship is not rationally related to any legitimate penological interest, and HRDC's free speech rights are being infringed without due process, Plaintiff's likelihood of success on the merits is great. The violations of HRDC's constitutional rights are causing irreparable harm, and the balance of hardships and public interest tips sharply in Plaintiff's

favor. A preliminary injunction should be granted.

### **FACTUAL BACKGROUND**

#### **A. HRDC's Publications**

The Human Rights Defense Center is a not-for-profit charitable organization under Section 501(c)(3) of the Internal Revenue Code. *See* Declaration of Paul Wright in Support of Plaintiff's Motion for Preliminary Injunction ("Wright Decl.") ¶ 2. For over thirty-four years, HRDC has focused its mission on public education, advocacy and outreach to incarcerated persons and the public about the economic and social costs of prisons to society, and to help incarcerated persons to educate themselves about their constitutional and human rights and to learn about accessing education. *Id.* HRDC accomplishes this through advocacy, litigation, and publication and distribution of books, magazines, and other information about correctional facilities and the rights of incarcerated persons. *Id.*

HRDC publishes two monthly soft-cover magazines, and one soft-cover annual booklet, each printed on newsprint bound by two small staples. Wright Decl. ¶¶ 4-5, 7. HRDC publishes and distributes an award-winning monthly magazine titled *Prison Legal News*, which contains news and analysis about the conditions and management of correctional facilities, the rights of incarcerated persons, and other matters of interest to incarcerated persons. *Id.* ¶¶ 3-4. HRDC also publishes and distributes a monthly magazine titled *Criminal Legal News*, which contains news and analysis about individual rights, court rulings, and other criminal legal-related issues. *Id.* ¶ 5. HRDC's monthly magazines provide timely, in-depth coverage of judicial decisions and other recent events concerning the criminal legal system in a way that would be impossible through other means of communication. *Id.* ¶ 6. HRDC also annually publishes and distributes a soft-cover booklet, the *Annual Report*, regarding HRDC's activities and funding over a year-long

period. *Id.* ¶ 7. HRDC also publishes and/or distributes several different soft-cover books on criminal justice, health, and legal issues that are of interest to incarcerated persons and others. *Id.* Two of these books are pertinent to this case. First, HRDC publishes and distributes the book *The PLRA Handbook*, which is a detailed guide for litigants practicing under the Prison Litigation Reform Act. *Id.* Second, HRDC does not publish, but is the sole national distributor of *Protecting Your Health and Safety* (“PYHS”), which describes the rights, protections and legal remedies available to persons concerning their health and safety while they are incarcerated. *Id.* HRDC also communicates with incarcerated persons through the mail by sending and receiving letters with pertinent information and sending subscription renewal letters. *Id.* ¶ 9.

Since its creation in 1990, HRDC has sent its publications and books to incarcerated persons and law librarians in more than 3,000 correctional facilities in all fifty states, including at death row housing units and “supermax” prisons, including the federal Administrative Maximum Facility at Florence, Colorado—the most secure prison in the United States. Wright Decl. ¶ 12. The publications and books that HRDC distributes have been mailed to hundreds of persons incarcerated in New Mexico including in the NMCD facilities operated by the state and by the private companies Management & Training Corporation and The GEO Group, Inc., as well as in the Rio Arriba County Jail, Metropolitan Detention Center in Bernalillo County, San Miguel County Detention Center, McKinley County Jail, Valencia County Detention Center, San Juan Adult Detention Center, Dona Ana County Detention Center, FCI La Tuna operated by the US Bureau of Prisons, and the Torrance County Detention Facility and Cibola County Detention Center housing ICE detainees. *Id.*

**B. Defendants’ Unconstitutional Mail and Book Policies and Practices**

On December 29, 2021, the NMCD issued a memorandum addressed to “Offender Families” announcing that beginning February 1, 2022, “personal mail will no longer be accepted at state-run prison facilities.” *See* Declaration of Marc J. Shinn-Krantz in Support of Plaintiff’s Motion for Preliminary Injunction (“Shinn-Krantz Decl.”) ¶ 5 & Ex. A. The memorandum sets forth a procedure for sending personal mail to a third party company for “processing” for the eight adult facilities operated by NMCD while noting that the two NMCD facilities that are privately operated, “will continue to accept personal mail.” Shinn-Krantz Decl. Ex. A. The memorandum does not define “personal mail,” state what will happen to processed mail, or announce any changes about how publications mailed by a publisher or vendor will be treated. *Id.* The memorandum also provides that “[a]t all private and state-run facilities moving forward, mail will no longer be accepted that is comprised of cardboard or other rigid parchment incapable of running through the scanner. For example, USPS postal rigid express envelopes that lay flat but do not bend without creasing would not be accepted and magazines will not be accepted.” *Id.*

The publicly available NMCD Mail Policy appears to allow incarcerated persons to receive publications directly from a publisher or vendor. Shinn-Krantz Decl. at ¶ 3 (quoting 5-ACI-7D-04 “inmates will be allowed to receive publications when received directly from the publisher or vendor . . .”). However, since shortly after the December 29, 2021 memorandum, Defendants have censored books, magazines, and other correspondence mailed by HRDC to incarcerated persons held in custody in Defendants’ prisons by refusing to deliver the mailings to the intended recipients, and instead by returning the items to HRDC’s office via the Return to Sender service of the United States Postal Service (“USPS”), at Plaintiff’s expense. Wright

Decl. ¶¶ 21, 27. HRDC mailed outreach letters and publications to incarcerated persons at the NMCD to investigate the subscriber's claims that Defendants were censoring its mailings, and to further its mission of communicating with incarcerated people at the NMCD about their rights and about accessing education while incarcerated. *Id.* ¶22. In an effort to mitigate the loss of business goodwill and continue to investigate the scope of censorship, HRDC also extended subscriptions to *Prison Legal News* and *Criminal Legal News* for twenty-two (22) people incarcerated at the NMCD. *Id.* ¶ 24. Defendants refused to deliver many of these items to the intended recipients. *Id.* ¶ 26.

Since February 2022, HRDC has identified that Defendants have censored at least one hundred fifty-two (152) items of mail sent by HRDC to incarcerated persons at the NMCD, including one hundred thirty-nine (139) at facilities run by the state and thirteen (13) at a facility run by GEO. These include at least seventy-three (73) issues of *Prison Legal News*, forty-eight (48) issues of *Criminal Legal News*, twenty (20) copies of the book *PYHS*, nine (9) copies of HRDC's *Annual Report* booklets, one (1) copy of *The PLRA Handbook*, and one (1) renewal letter sent to a subscriber. Wright Decl. ¶¶ 26-36 & Exs. A-D.<sup>1</sup> In each case, HRDC's staff confirmed the intended recipient was still incarcerated at the NMCD at the time that the mailing was returned to HRDC. *Id.* ¶ 40.

---

<sup>1</sup> **Exhibit A** to the Wright Declaration contains spreadsheets of information kept in the normal course of business by HRDC showing all mail that was returned by NMCD that was intended for incarcerated persons who were still in custody at the facility to which the mail was sent at the time HRDC received the return from February 2022 to September 2024. Wright Decl. ¶ 26. **Exhibit B** contains true and correct electronic copies of representative samples of the front page of issues of *Prison Legal News* or *Criminal Legal News* returned to HRDC and of return to sender Postal Service notification cards received by HRDC. *Id.* ¶ 30. **Exhibit C** contains a true and correct electronic version of the cover page and table of contents for the book *PYHS* along with true and correct representative samples of scans of the return mailings for *PYHS* and *The PLRA Handbook*. *Id.* ¶ 35. **Exhibit D** contains a true and correct electronic copy of the renewal letter that HRDC mailed to an incarcerated person at the NMCD and the return mailing. *Id.* ¶ 36.

The censored publications and correspondence were returned to Plaintiff either with no markings or with various combinations of crude handwritten notations such as “RTS,” “REF,” “Refused,” “Denied,” and/or “NOT AUTHORIZED,” and ink stamps. Wright Decl. ¶ 28. In all but four instances, Defendants did not note any reason why the mailing was rejected for delivery to the intended recipient—two cases indicating that magazines and newspapers are prohibited or not allowed, one case incorrectly indicating “Postage Due,” in one other case affixing a label stating only “REFUSED VIOLATES DOC MAIL RULE” without specifying the rule. *Id.* at ¶¶ 28-31, 41.

Defendants refused to deliver twenty-one (21) soft-cover books mailed by HRDC to incarcerated persons at NMCD facilities—including one (1) copy of the PLRA Handbook marked as “NOT AUTHORIZED.” Wright Decl. ¶¶ 29, 35 & Ex. C. The remaining twenty (20) books were copies of PYHS. *Id.* ¶ 29. Of these, four (4) were returned with no markings at all other than crossing out the mailing address, another eight (8) were returned with the markings “Denied Refused” handwritten on the outside of the mailing package, another seven (7) were returned with the handwritten abbreviation “RTS” and sometimes other unintelligible markings. *Id.* The remaining one (1) book was returned with the inaccurate handwritten marking “Postage Due” despite being properly addressed and metered. *Id.*

Defendants also refused to deliver at least one hundred and twenty-one (121) issues of HRDC’s monthly magazines, *Prison Legal News* and *Criminal Legal News*, and nine (9) *Annual Report* booklets to incarcerated persons. Wright Decl. ¶ 30. One (1) of these had no markings other than handwritten markings crossing out the mailing address. One (1) was marked “Newspapers/Magazines Prohibited,” one (1) was marked “Magazines Not Allowed Nor Newspapers.” The vast majority included one or more of the handwritten notations “RTS” and



“REF” and/or one of two styles of ink “return to sender” stamps. *Id.* In nine (9) of the instances, instead of receiving the returned publications HRDC received USPS return cards containing scans of the handwritten notations by Defendants and brief typed notations that appear to have been generated by the USPS rather than Defendants. *Id.*

Defendants refused to deliver one (1) renewal letter mailed by HRDC to a person incarcerated at the NMCD. Wright Decl. ¶ 31. The letter was returned with a label on the front of the mailing envelope stating “REFUSED VIOLATES DOC MAIL RULE” but did not include any information as to which rule was allegedly violated. *Id.*

HRDC is informed and believes that numerous additional publications and correspondence mailed to persons incarcerated at the NMCD have been censored by Defendants and are being censored on an ongoing basis. *See* Wright Decl. ¶¶ 21, 23, & Ex. G. HRDC has mailed over 1,000 individual copies of its monthly PLN and CLN magazines to NMCD subscribers during the relevant timeframe all of which presumably arrived in the mail as addressed even though HRDC has only received a fraction of those magazines returned to sender. *Id.*; *see also Clifford v. Dewbury Homes*, No. 22-4090, 2023 WL 2172323, at \*2 (10th Cir. Feb. 23, 2023) (quoting *Crude Oil Corp. of Am. v. Comm’r of Internal Revenue*, 161 F.2d 809, 810 (10th Cir. 1947)) (“When mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.”). At the same time, HRDC has received dozens of letters from incarcerated persons complaining of censorship, some of whom enclosed rejection notices from NMCD asserting that newspapers and magazines are prohibited. Wright Decl. ¶¶ 21, 23, & Ex. G

Some of Defendant NMCD’s written policies, procedures, and practices are available on

its public website including Policy CD-151200 Correspondence Regulations (the “Mail Policy”). *See* Shinn-Krantz Decl. ¶ 2 (current version revised September 27, 2023), and online via internet archives including the prior April 8, 2022 version and February 23, 2015 version. *Id.*

Defendants’ current Mail Policy is unconstitutional on its face and as applied, and is unduly broad and vague. This is especially true because HRDC’s books and magazines cover topics of great public concern and contain core protected speech, including political speech and social commentary, and educational information relating to the rights of incarcerated persons, pertinent legal cases, and incarcerated persons’ health and safety, Wright Decl. ¶¶ 2-8, 13, 46-47, and are thus entitled to the highest free speech protections afforded by the United States Constitution.

The grounds in Defendants’ Mail Policy for rejecting mail are too broad and vague for a sender to understand what is prohibited. Shinn-Krantz Decl. ¶¶ 3-4, (Mail Policy at Procedures § I. Rejection of Mail, Enclosures and Publications). The Mail Policy provides that “publications will be rejected if they are detrimental to internal security of the institution or other legitimate penological interests” and including a non-exhaustive list of seventeen broad categories of reference examples, some of which are so broad and vague as to give no notice of the prohibited conduct, including the following:

- a. Item contains contraband.
- b. Item facilitates criminal activity.
- d. Item depicts, describes, or encourages activities which may lead to the use of physical violence or group disruption.
- l. Item contains a pictorial depiction of nudity or a pictorial depiction of sexual activity, unless the item, taken as a whole, is literary, artistic, educational, or scientific in nature.
- n. Item contains written sexually explicit material which, by its nature or content, poses a threat to the security, good order, or discipline of the correctional facility.

q. Item violates facility rules and regulations.

*Id.* These categories are open to a wide interpretation that invites censorship of materials, including HRDC's publications and correspondence, for which there is no legitimate penological reason to restrict access. *See* Declaration of John Clark in Support of Plaintiff's Motion for Preliminary Injunction ("Clark Decl.") ¶ 53. Indeed, HRDC has distributed over one million copies of its magazines and has been mailing publications to incarcerated persons at thousands of jails and prisons for decades, without ever causing a security incident. Wright Decl. ¶¶ 2, 11-12, 20.

Defendants' Mail Policy also does not clearly provide any requirement for notice of censorship to the senders of publications as is common in other correctional settings. Clark Decl. ¶¶ 54-55. Although the Mail Policy requires such notice for "mail items, enclosures, or packages" provided via the Mail Rejection form (CD-151201.1), the separate process for publications requires notice only to the intended recipient and not the sender as follows: "When publications are rejected, the inmate will be notified in writing on the Publication Review Panel Determination form (CD-151201.4)." Shinn-Krantz Decl. ¶ 3. Defendants did not provide HRDC with adequate notice why any of its specific mailings were rejected. Wright Decl. at ¶ 41. The Mail Policy also does not provide for any appeals process for a sender to challenge a censorship decision. Clark Decl. ¶¶ 54-55; Wright Decl. ¶ 45. Defendants also never provided notice to HRDC of a right to challenge the censorship, or whether or how they could appeal the censorship decisions. Clark Decl. ¶ 54; Wright Decl. ¶ 41.

HRDC attempted to resolve the censorship short of litigation by mailing a letter to the NMCD regarding its unlawful censorship on May 18, 2022 but HRDC did not receive any reply and the scope of the censorship subsequently increased. Wright Decl. ¶ 43 & Ex. F. In a further

effort to resolve the censorship, HRDC again mailed a letter to NMCD on June 8, 2023, but HRDC did not receive any reply and Defendants failed to remedy the censorship and to provide notice of the reason(s) for the rejections of HRDC’s mailings or an opportunity to appeal the censorship decisions. *Id.* at ¶¶ 43, 41-42 & Ex. E.

By its adoption and application of these policies and practices, Defendants are impermissibly interfering with protected expressive activities and chilling future speech from HRDC and others. Since HRDC continues, and will continue, to communicate with incarcerated persons confined at the NMCD, *see* Wright Decl. ¶ 44, Defendants’ current policies and practices, unless enjoined, will continue to violate HRDC’s constitutional rights, causing irreparable harm.

### **LEGAL STANDARD**

A preliminary injunction is appropriate where a plaintiff demonstrates “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Tenth Circuit precedent favors granting preliminary injunctions to a plaintiff who is likely to succeed on the merits of its First Amendment Claim because “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *See Planned Parenthood Ass’n of Utah v. Herbert*, 828 F.3d 1245, 1263 (10th Cir. 2016) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1975)); *see also Planned Parenthood*, 828 F.3d at 1251, 1266 (directing the district court to grant preliminary injunction against the state government in § 1983 claim alleging government violated organization’s First Amendment and Fourteenth Amendment rights); *Pryor v. Sch. Dist. No. 1*, 99 F.4th 1243, 1254 (10th Cir. 2024) (affirming preliminary

injunction against government school district in § 1983 First Amendment free speech clause action); *Reed v. Bryant*, 719 F. App'x 771, 780 (10th Cir. 2017) (holding 120 day suspension of incarcerated person's religious meals adequate to support preliminary injunction in First Amendment free exercise/RLUIPA claims.)

## ARGUMENT

### **I. HRDC is Likely to Succeed on the Merits of Its Claims.**

#### **A. Defendants Are Violating HRDC's First Amendment Right to Communicate With Incarcerated Persons.**

Defendants' policies and practices violate settled law on the First Amendment rights of publishers. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley*, 482 U.S. 78, 84 (1987), nor do they bar others "from exercising their own constitutional rights by reaching out to those on the 'inside,'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). Courts have long held that publishers and incarcerated persons have First Amendment rights to communicate with each other, subject only to limitations required by legitimate security concerns. "[T]here is no question that publishers who wish to communicate with those who ... willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Thornburgh*, 490 U.S. at 408. The interests of senders and their intended recipients are "inextricably meshed," and "censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners." *Procunier v. Martinez*, 416 U.S. 396, 409 (1974), *overruled in part on other grounds by Thornburgh*, 490 U.S. at 411-414. "Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech." *Procunier*, 416 U.S. at 408.

HRDC's speech covers topics of great public concern and therefore "occupies the highest

rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal marks omitted); *see also Pell v. Procunier*, 417 U.S. 817, 830 n.7 (1974) (“[T]he conditions in this Nation’s prisons are a matter that is both newsworthy and of great public importance.”). The Tenth Circuit has held “[HRDC, previously known as] PLN has a First Amendment interest in providing its magazine to inmates who subscribe to it.” *Jones v. Salt Lake Cnty.*, 503 F.3d 1147, 1162 (10th Cir. 2007); *see also Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) (speech contained in *Prison Legal News* is core protected speech).

To withstand First Amendment scrutiny, prison policy must be “reasonably related to legitimate penological interests,” *Turner*, 482 U.S. at 89, which turns on four factors:

(1) whether the regulation is rationally related to a legitimate and neutral government objective; (2) whether there are alternative avenues that remain open to the inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

*Cook*, 238 F.3d at 1149 (citing *Turner*, 482 U.S. at 89-90). While respectful of correctional officials’ expertise, *Turner*’s “reasonableness standard is not toothless.” *Thornburgh*, 490 U.S. at 414 (internal quotation marks omitted). HRDC is highly likely to prevail on each of the *Turner* factors.<sup>2</sup>

**1. Defendants’ Mail Policies And Practices Are Not Rationally Related To Any Legitimate Penological Objectives.**

The first *Turner* factor looks to whether there is “a ‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it.” *Turner*,

---

<sup>2</sup> While this case involves HRDC’s free speech rights (and not the rights of incarcerated persons), for purposes of this motion, HRDC assumes the Court will apply the *Turner* test to ensure that injunctive relief employs due deference to prison operations.

482 U.S. at 89. Under this prong, “a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.” *Id.* at 89-90. “The legitimate governmental objective must also be neutral ... [and] operate without regard to the content of the expression. Where a regulation furthers an important or substantial government interest unrelated to the suppression of expression, the neutrality requirement is met.” *Jones*, 503 F.3d at 1153 (internal citations omitted).

Here, there is no “valid, rational connection” between Defendants’ censorship of HRDC’s mailings and any legitimate governmental interest. The asserted basis for Defendants’ censorship is unknown for all but several of the censored items. Wright Decl. ¶¶ 28-31, 41. The several items that had at least some additional information consisted of one renewal letter that was returned with a label affixed stating “REFUSED VIOLATES DOC MAIL RULE” without explaining what rule was allegedly delivered, one book returned with the handwritten word “Postage Due” even though the book had been properly metered, addressed, and had arrived at the institution, and two magazines that were returned with notes asserting “Newspapers/Magazines Prohibited” or “Magazines not Allowed Nor Newspapers.” *Id.*

Allowing neutral third-party publishers and distributors to send books and newspapers directly to incarcerated persons would *improve* prison security because receiving mail directly from such entities—rather than from family and friends—helps prevent contraband from being smuggled into the prisons and thereby lessens any administrative burden on prison personnel who inspect publications. Clark Decl. ¶¶ 56-58; *see also Jones*, 503 F.3d at 1158. There is no practical security risk to allow HRDC—a not-for-profit charitable organization that has been mailing publications to incarcerated persons at thousands of jails and prisons for over thirty-four years without incident—to send publications and other mail to incarcerated persons. Wright

Decl. ¶¶ 2, 11-12, 20; *see also* Clark Decl. ¶¶ 56-61.

The publications and correspondence that Defendants rejected comply with all other provisions of Defendants' Mail Policy. Clark Decl. ¶ 53. The censored publications are not "detrimental to internal security of the institution or other legitimate penological interests" nor do they run afoul of any reasonable interpretation of the Mail Policy rules. In short, there is no rational basis or penological justification for censoring HRDC's publications and correspondence. Clark Decl. ¶¶ 53, 65-66.

To the extent that Defendants may assert the censored publications run afoul of one of these categories, they are unconstitutionally too vague and overbroad in application for a publisher or distributor to know what is permissible and what is prohibited. *See Americans for Prosperity Found. v. Bonta*, 594 U.S. 595, 615 (2021) (quoting *United States v. Stevens*, 559 U.S. 460, 473, (2010)) ("In the First Amendment context ... a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."); *Frank v. Lee*, 84 F.4th 1119, 1151 (10th Cir. 2023); *Prison Legal News v. Ryan*, 39 F.4th 1121, 1129 (9th Cir. 2022) ("When a plaintiff presents such a facial challenge to a prison regulation, we evaluate it using the *Turner* framework, just as we would if the challenge were to a specific application of the regulation.").

Additionally, some intended recipients are still receiving HRDC's mailings even as many others are censored. *See* Wright Decl. ¶ 23 & Ex. G. This checkered approach of censoring some items while letting in others is arbitrary and capricious and not rationally related to any legitimate penological interest.

Banning reading materials actually threatens prison security, as reading can help people adjust to confinement and reduce the isolation, idleness, boredom and frustrations that can result



in aggressive or disruptive behaviors. Clark Decl. ¶¶ 27-28, 32-34, 46, 66; Wright Decl. ¶ 13. Since “most offenders will eventually return to society, a paramount objective of the corrections system is the rehabilitation of those committed to its custody.” *McKune v. Lile*, 536 U.S. 24, 36 (2002) (internal citations and alterations omitted). Further, “the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation ....” *Procurier*, 416 U.S. at 412; *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973) (citing the “well nigh universal belief that good books ... lift the spirit, improve the mind, enrich the human personality, and develop character ....”) (citations omitted). The information in HRDC’s books and newsletters facilitates the penological interest of helping prepare incarcerated persons for reentry into society. Clark Decl. ¶¶ 27, 34, 66; Wright Decl. ¶ 13.

Understanding the benefits of the availability of reading materials, corrections professionals recognize that any minimal security concerns associated with incoming publications are outweighed by the safety and security benefits they bring. *See* Clark Decl. ¶¶ 27-28, 32-37, 40, 43, 46, 50, 66.

## **2. Defendants Have Failed To Provide Alternative Means Of Exercising HRDC’s First Amendment Rights.**

The second *Turner* factor looks to whether alternative means exist to exercise the constitutional right. The absence of alternative means is evidence that the prison regulations in question are unreasonable. *See Beard v. Banks*, 548 U.S. 521, 532 (2006).

Here, Defendants’ censorship of HRDC’s publications and correspondence leaves HRDC without any alternative means of exercising the First Amendment right at issue, *see Turner*, 482 U.S. at 90—the right to distribute its publications to incarcerated persons in furtherance of its mission to help incarcerated persons to educate themselves about their constitutional and human

rights and to learn about accessing education while incarcerated. *See* Wright Decl. ¶¶ 13, 47. HRDC cannot effectively or reasonably be expected to communicate its writings to incarcerated persons by telephone or in-person. *Id.* ¶ 48. Even if it had other practical ways of communicating with incarcerated persons, HRDC’s messages can be conveyed effectively only through print publications. *See Jacklovich v. Simmons*, 392 F.3d 420, 431 (10th Cir. 2004) (citing *Morrison v. Hall*, 261 F.3d 896, 904 & n.7 (9th Cir. 2001)) (even if incarcerated persons can obtain information from other means, such as television or radio, that “is not an adequate substitute for reading newspapers and magazines.”) The monthly issues of *Prison Legal News* and *Criminal Legal News* provide incarcerated persons with timely, in-depth coverage of judicial decisions and other recent events concerning our nation’s criminal justice system in a way that no other method of communication can match. Wright Decl. ¶¶ 6, 8, 48. The books that HRDC distributes through the mail similarly provide incarcerated persons with in-depth information about their rights, protections and legal remedies, and on enrolling at accredited higher educational, vocational and training schools, which could not reasonably or practically be communicated in any other form. *Id.* ¶¶ 8, 48. Under Defendants’ current policies and practices, HRDC is left with no practical way to reach its intended audience.

**3. Defendants’ Mail Policies and Practices Fail The Third and Fourth Prongs of the Turner Standard (Effect On Resources and Feasibility of Alternative Policies).**

The third and fourth *Turner* factors turn on whether accommodating the First Amendment right at issue will impose a significant burden on prison officials, and whether ready alternatives to the challenged policies exist. *Turner*, 482 U.S. at 90-91. Where a plaintiff “can point to an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy

the reasonable relationship standard.” *Id.* at 91. “[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.” *Id.* at 90.

Allowing the exercise of the First Amendment rights at issue here will create no significant burden on prison officials, other incarcerated persons, or the allocation of resources. Defendants would simply be required to deliver HRDC’s publications and correspondence along with the other mail delivered to incarcerated persons every day. Clark Decl. ¶¶ 30, 53. This is what thousands of other correctional facilities do with the very HRDC mailings that Defendants are refusing to deliver. Wright Decl. ¶¶ 11-12. HRDC does not send a high volume of mail to the NMCD facilities, but rather sends individually addressed mailings to a limited number of incarcerated persons who subscribe to its magazines or who place orders for books published and/or distributed by HRDC, or who are specifically identified by HRDC as potential subscribers or people likely to be in need of the information contained in the publications that HRDC distributes. *Id.* ¶ 14. Regardless, limited effects on staff time do not justify restrictions on First Amendment rights. *See, e.g., Prison Legal News v. Lehman*, 397 F.3d 692, 700 (9th Cir. 2005) (rejecting regulation designed to reduce volume of mail); *Cook*, 238 F.3d at 1151 (rejecting administrative burden justification for banning certain type of mail where lifting the ban would result only in “the addition of 15 to 30 pieces of mail” each day); *Clement v. Cal. Dept. of Corrs.*, 364 F.3d 1148, 1152 (9th Cir. 2004) (banning certain type of mail to reduce total volume is “arbitrary” method to reduce mail volume).

That thousands of correctional facilities nationwide allow incarcerated persons to receive all types of HRDC’s mail without creating penological problems highlights that ready alternatives to Defendants’ censorship are available. *See, e.g., Jacklovich*, 392 F.3d at 432 (in

evaluating ban on publications the policies in other state and federal institutions are relevant); *Hrdlicka v. Reniff*, 631 F.3d 1044, 1055 (9th Cir. 2011) (final *Turner* factor favored publisher where it was undisputed that publisher’s magazine was already distributed in other county jails); *Morrison*, 261 F.3d at 905 (looking to California mail policies to conclude Oregon prison mail policies were an exaggerated response). Distribution of HRDC’s publications to persons incarcerated in these other facilities demonstrates that Defendants’ censorship is unnecessary and unreasonable, and is an “exaggerated response” that cannot stand. *Turner*, 482 U.S. at 91.

HRDC is thus highly likely to succeed on the merits of its free speech claims.

**B. Defendants Have Violated The Due Process Clause By Failing To Provide HRDC With Notice And Opportunity To Challenge Censorship.**

A publisher’s right to communicate with incarcerated persons is rooted not only in the First Amendment, but also the Due Process Clause of the Fourteenth Amendment:

[T]he decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards. The interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a “liberty” interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment. As such, it is protected from arbitrary government invasion.

*Procunier*, 416 U.S. 417-18. The Tenth Circuit “recognize[s] that both inmates and publishers have a right to procedural due process when publications are rejected” *Jones*, 503 F.3d at 1163 (citing *Jacklovich*, 392 F.3d at 433). The Due Process Clause requires that each time a prison refuses to deliver a publication or other correspondence to the intended recipient, it must provide both the incarcerated person and the sender notice and an opportunity to challenge the censorship. *Jacklovich*, 392 F.3d at 433 (requiring “that an inmate be notified of the rejection of a letter written by or addressed to him, that the author of the letter be given a reasonable opportunity to protest that decision, and that complaints be referred to a prison official other than

the person who originally disapproved the correspondence.”). This requirement is clearly established and is not subject to the four-pronged *Turner* analysis. See *Jacklovich*, 392 F.3d at 433; *Krug v. Lutz*, 329 F.3d 692, 698 n.5, 698-99 (9th Cir. 2003); *Cook*, 238 F.3d at 1152-53.

Providing due process allows publishers to investigate and challenge violations of their First Amendment rights, and helps subscribers challenge such violations through the correctional grievance system. *Jacklovich*, 392 F.3d at 433 (citing *Montcalm Publ’g Corp. v. Beck*, 80 F.3d 105, 106, 109 (4th Cir. 1996)); see also *Montcalm* 80 F. 3d at 109 (notice to the incarcerated person alone is insufficient because “[a]n inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication”). Correctional facilities in other jurisdictions provide due process to publishers and incarcerated persons when refusing to deliver publications and other correspondence. Clark Decl. ¶ 55; Wright Decl. ¶ 45. The Federal Bureau of Prisons has an explicit policy requiring it to notify incarcerated persons and publishers, identifying the specific materials rejected and allowing independent review of a rejection decision. Clark Decl. ¶ 36; see also *Thornburgh*, 490 U.S. at 406.

Defendants failed to provide due process protections to HRDC when refusing to deliver its publications and correspondence to incarcerated persons at the NMCD, even after HRDC brought the problem to Defendants’ attention. Wright Decl. ¶ 43. To date, Defendants have censored at least one hundred fifty-two (152) items of HRDC’s mail, and HRDC did not receive meaningful notice or opportunity to challenge the censorship of any of them. *Id.* ¶¶ 27-31, 41, 43. The items of mail were merely returned to HRDC via the USPS Return to Sender service with no markings indicating why the items were rejected—except in the one case where Defendants inaccurately asserted that postage was due, in one other case where Defendants added a label saying only “REFUSED VIOLATES DOC MAIL RULE” without further

explanation, and in two cases where Defendants simply assert that magazines are prohibited or not allowed. *Id.* ¶¶ 28-31, 41. At no point did Defendants contact HRDC to provide notice that its mailings would be rejected or the reason(s) for the rejections other than in the case of one mailroom staff member who wrote without explanation and without tying the letter to any specific censorship decisions: “To whom it may concern, Inmates at the Penitentiary of New Mexico are not allowed to have any Publications.” *Id.* ¶¶ 41-42.

Rejecting HRDC’s mailings and returning them via the USPS Return to Sender service does not qualify as “notice.” First, none of the returned items contained any notice of a right to appeal the rejections, or any information on how HRDC could challenge the censorship, nor does Defendants’ Mail Policy contain any such process. Wright Decl. ¶ 42; Shinn-Krantz Decl. ¶ 4. Second, the returned mailings did not provide meaningful information to inform HRDC of why the mail was rejected. Wright Decl. ¶¶ 28-31, 41. HRDC is thus highly likely to succeed on the merits of its due process claims.

## **II. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.**

Defendants’ unconstitutional policies and practices prevent HRDC from carrying out its core function—to communicate with incarcerated persons about developments in the law and protection of their health and personal safety. Wright Decl. ¶¶ 13, 46-47. As the Supreme Court and Tenth Circuit have held, “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373; *see also Planned Parenthood*, 828 F.3d at 1263; *Pryor*, 99 F.4th at 1254; *Reed*, 719 F. App’x at 780. Courts have repeatedly found irreparable harm based on the denial of First Amendment rights in correctional settings. *See, e.g., Jones v. Caruso*, 569 F.3d 258, 277 (6th Cir. 2009) (affirming grant of preliminary injunction against prison mail policy); *Human Rights Defense Center v. Sw. Va.*

*Reg'l Jail Auth.*, No. 1:18-cv-00013, 2018 WL 3239299, at \*6 (W.D. Va. Jul. 3, 2018) (granting preliminary injunction against jail authority's ban on staples); *Prison Legal News v. Cnty. of Ventura*, No. CV 14-773-GHK (ex), 2014 WL 2519402, at \*8 (C.D. Cal. May 29, 2014) (granting preliminary injunction against jail's postcard-only policy); *Prison Legal News v. Betterton*, No. 2:12-CV-00699-JRG (E.D. Tex. Sept. 30, 2013) (granting preliminary injunction against jail's impermissibly vague and arbitrary policy on mail censorship and inadequate appeals process); *Prison Legal News v. Cnty. of Sacramento*, No. 2:11-CV-00907 JAM-DAD, 2012 WL 1075852, at \*1 (E.D. Cal. Mar. 8, 2012) (granting preliminary injunction against jail's ban on staples).

HRDC's magazines cover recent events and judicial decisions that affect the lives and legal cases of incarcerated persons, and its books provide incarcerated persons with in-depth information about their rights, protections and legal remedies, and educational opportunities. Wright Decl. ¶¶ 6, 8. The ability to deliver its publications and correspondence timely—and before news becomes stale or filing deadlines expire—is critical to HRDC's mission. *Id.* ¶ 47. If HRDC loses the opportunity to deliver these publications to incarcerated persons, it has lost precious opportunities to communicate with them at a time when the information will be most useful, in furtherance of its mission to help incarcerated persons access educational opportunities and educate themselves about their rights. *Id.* ¶¶ 6, 8, 46-47.

### **III. THE BALANCE OF EQUITIES FAVORS A PRELIMINARY INJUNCTION.**

Given the irreparable harm that HRDC will suffer if a preliminary injunction does not issue, the balance of equities here tips decidedly toward Plaintiff. The irreparable harm suffered by HRDC is concrete, severe and ongoing. *See* Section II, *supra*; Wright Decl. ¶ 44. HRDC is blocked from distributing its publications and correspondence to incarcerated persons in

Defendants’ custody, and without an injunction, Defendants will continue to censor HRDC’s communications without due process, banning its core protected speech. By contrast, any potential injuries to Defendants are minimal and speculative. No great cost or expenditure of time is required to deliver HRDC’s mailings to incarcerated persons and provide constitutionally mandated due process, as already happens in correctional facilities across the country. Wright Decl. ¶¶ 11-12; Clark Decl. ¶¶ 30, 35-36, 51-53. Given the penological benefits of access to publications, the injunction would likely improve security and promote rehabilitation. Clark Decl. ¶¶ 27-28, 32-34, 46, 66. The balance of equities favors Plaintiff.

#### **IV. A PRELIMINARY INJUNCTION SERVES THE PUBLIC INTEREST.**

Courts have consistently recognized the significant public interest in upholding free speech principles. The public interest is served by “protecting the core First Amendment right of political expression.” *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244 (10th Cir. 2001); *see also Herrera v. Santa Fe Pub. Sch.*, 792 F. Supp. 2d 1174, 1199 (D.N.M. 2011) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”). The public interest inquiry primarily addresses impact “on nonparties rather than on the parties.” *Herrera* at 1198-99; *McClendon v. City of Albuquerque*, 272 F. Supp. 2d 1250, 1259 (D.N.M. 2003) (“The public has an interest in [government’s] maintenance of prison facilities that provide the minimal conditions of confinement required by the Constitution and federal law.”).

Defendants’ mail policies and practices harm not only HRDC, but also other publishers and distributors—who presumably have been and will continue to be censored without due process absent an injunction—as well as incarcerated persons and staff at the NMCD and the general public outside of the NMCD. It is in the public interest to allow incarcerated persons access to reading materials, which enable them to engage in productive activity rather than



sitting idle, thus helping to avoid conflicts and incidents of violence. Clark Decl. ¶¶ 27-28, 32-34, 46, 66. By educating incarcerated persons about their rights and key legal developments that affect their lives and legal cases, HRDC encourages them to channel their energies into lawful methods of dispute resolution. Wright Decl. ¶ 13. Reading materials also help incarcerated persons keep their minds sharp and engage in productive activity and thereby reduce conflicts in prisons, and help them prepare to become productive citizens when released back into society. *Id.*; Clark Decl. ¶¶ 27-28, 32-34, 46, 66. This speaks to the hunger for expressive freedom that Justice Thurgood Marshall described in *Procunier*, 416 U.S. at 428 (Marshall, J., concurring) (“When the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas; his intellect does not cease to feed on a free and open interchange of opinions .... It is the role of the First Amendment and this Court to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit.”). An injunction serves the public interest.

#### **V. THE BOND REQUIREMENT SHOULD BE WAIVED.**

Under Fed. R. Civ. P. 65(c), district courts have wide discretion to set the amount of the bond accompanying a preliminary injunction, which includes setting no bond or only a nominal bond. *See Voter Reference Found., LLC v. Balderas*, 616 F. Supp. 3d 1132, 1204, 1274 (D.N.M. 2022), *appeal dismissed as moot sub nom. Voter Reference Found., LLC v. Torrez*, No. 22-2101, 2024 WL 3861750 (10th Cir. Apr. 2, 2024) (“A bond is not required to obtain preliminary injunctive relief when a plaintiff is seeking to prevent a government entity from violating the First Amendment [and] Courts in the Tenth Circuit have wide discretion under Rule 65(c) in determining whether to require security and may, therefore, impose no bond requirement.”) (internal markings and citation omitted); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203,

1215 (10th Cir. 2009) (bond was not required upon issuance of injunction); *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003) (no abuse of discretion where district court required no bond in the absence of proof showing likelihood of harm).

Further, HRDC is a small nonprofit organization with a staff of approximately thirteen employees, and does not have financial resources to post anything more than a nominal bond. Wright Decl. ¶ 49; *Colo. Wild v. U.S. Forest Serv.*, 299 F. Supp. 2d 1184, 1191 (D. Colo. 2004) (granting preliminary injunction and waiving bond requirement where non-profit environmental group was unable to post more than a nominal bond); *Prison Legal News v. County of Ventura*, 2014 WL 2519402, at \*10 (waiving bond requirement due to plaintiff’s “limited financial resources”). Requiring HRDC to post a bond would effectively deny access to prompt judicial review. *Utahns For Better Transp. v. U.S. Dep’t of Transp.*, No. 01-4216, 2001 WL 1739458, at \*5 (10th Cir. Nov. 16, 2001) (“bond must not be set so high, however, as to deny the moving party its right to judicial review of its claims.”). This is especially true because HRDC alleges violations of its fundamental constitutional rights, seeks to vindicate the public interest, and is likely to succeed on the merits. *See Voter Reference Found.*, 616 F. Supp. at 1274. The bond requirement should be waived.

///

///

///

///

///

///

///

**CONCLUSION**

For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction should be granted.

October 25, 2024

ROSEN BIEN GALVAN & GRUNFELD LLP

By: /s/ Marc J. Shinn-Krantz

Ernest Galvan, Cal. Bar No. 196065  
Marc J. Shinn-Krantz, Cal. Bar No. 312968  
Attorneys for HUMAN RIGHTS  
DEFENSE CENTER  
101 Mission Street, Sixth Floor  
San Francisco, California 94105-1738  
Telephone: (415) 433-6830  
Facsimile: (415) 433-7104  
\* *Pro Hac Vice* Application to be filed

October 25, 2024

HUMAN RIGHTS DEFENSE CENTER

By: /s/ Jonathan P. Picard

Jonathan P. Picard, Fla. Bar No. 105477  
P.O. Box 1151  
Lake Worth, Florida 33460  
Attorney for HUMAN RIGHTS  
DEFENSE CENTER  
Telephone: (561) 360-2523  
Facsimile: (561) 828-8166  
\* *Pro Hac Vice* Application to be filed

October 25, 2024

IVES & FLORES P.A.

By: /s/ Adam C. Flores

Laura Schauer Ives, SB# 12463  
Adam C. Flores, SB# 146686  
Attorneys for HUMAN RIGHTS  
DEFENSE CENTER  
925 Luna Circle NW  
Albuquerque, New Mexico 87102  
Telephone: (505) 364-3858  
Facsimile: (505) 364-3050

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon all counsel of record on the day of its filing via the CM/ECF electronic filing system.

/s/ Adam C. Flores

Adam C. Flores