UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PRISON LEGAL NEWS,

Plaintiff,

v.

COUNTY OF SAN DIEGO, *et al*.,

Defendants.

Case No. 3:14-cv-2417-L-NLS

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION [DOC NO. 8]

Pending before the Court is Plaintiff's Motion for Preliminary Injunction ("Pl.'s Mot"). The Court finds this motion suitable for determination on the papers submitted and without oral argument under Civil Local Rule 7.1(d)(1). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's motion for preliminary injunction.

I. BACKGROUND

On October 9, 2014, Prison Legal News ("PLN") filed this action against the County of San Diego, Sheriff William D. Gore, Assistant Sheriff Rich Miller, and Commander Will Brown ("Defendants"). (Compl., ECF No. 1.) The Complaint seeks declaratory and injunctive relief as well as damages for violations of the First and Fourteenth Amendments. (*See generally id.*)

Prison Legal News ("PLN") publishes and distributes books, Informational

Brochure packets, and *Prison Legal News*, a monthly journal of corrections news and analysis to prisoners and law librarians in over 2,000 correctional facilities in the United States. (Declaration of Paul Wright in Support of Motion for Preliminary Injunction ("Wright Decl.") ¶ 4, ECF No. 8-7.) *Prison Legal News* provides information about legal issues regarding prisoners, jail and prison conditions, and prisoners' rights. (*Id.* ¶ 12.) PLN mails these publications both to subscribers and to inmates whom PLN believes may be interested in initiating a subscription. (*Id.* ¶ 19.)

In September 2012, Defendants implemented a postcard-only mail policy that requires all incoming mail addressed to an inmate at the San Diego County jails to be in postcard form, with the exception of legal mail. (Wright Decl. Ex. L.) Defendants' website explains that under the policy "the only acceptable form of incoming personal public correspondence will be postcards and electronic mail messages (e-mail). Personal incoming letters will no longer be accepted. Any incoming personal letters received will be returned to the sender." (*Id.*)

As a result of the postcard-only mail policy, Defendants have refused to deliver PLN's monthly journals, Informational Brochure Packets, subscription renewal letters, letters from PLN's Editor, and printouts of case law sent by PLN to inmates of San Diego County jails on at least sixty-one separate occasions since October 2012. (Wright Decl. ¶ 10.) Additionally, Defendants have refused to deliver at least 19 internet-based case law printouts that PLN mailed to inmates at the San Diego County jails. (*Id.* ¶ 22.) The rejected issues of *Prison Legal News,* informational brochure packets, and subscription renewal letters have been returned with markings of "Return to Sender" or "Only Postcards Accepted at the Facility" on the outside of the envelopes. (*Id.* ¶¶ 13, 16.)

Defendants also implement a size limitation on books mailed to inmates. (Wright Decl. Ex. L.) Hardcover books are not accepted, and soft-cover books must "be no larger than 6" x 9" x 2" thick." (*Id.*) On at least eight separate occasions Defendants have refused to deliver *The Habeas Citebook*, a book published by PLN which measures

8.25" x 10.5" x .5". (Wright Decl. ¶¶ 8, 16.) The rejected books were returned to PLN with notifications indicating various reasons for the rejection. (*Id.*) Plaintiff did not, and has not, contacted jail staff or administration to discuss a potential appeal of these rejections. (Declaration of Rich Miller in Support of Defendants' Opp'n ("Miller Decl.") ¶¶ 15, 17, 19, ECF No. 24-8.)

PLN's Complaint sets forth three primary claims upon which they seek an injunction. First, PLN claims that the post-card only policy violates PLN's First Amendment rights. (Compl. ¶ 49.) Second, PLN claims that the policy to ban books based upon a size limitation also violates PLN's First Amendment Rights. (*Id*.) Third, PLN claims that Defendants violate the Fourteenth Amendment by failing to give Plaintiff sufficient notice of the censorship of its written speech. (*Id.* ¶ 70.) PLN's pending motion for a preliminary injunction requests that the Court enjoin Defendants from continuing to enforce both the postcard-only mail policy and the soft-cover book size limitation as well as a mandate for Defendants to comply with due process requirements.[1] (Pl.'s Mot. 21-24.)

II. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council,* 555 U.S. 7, 22 (2008). A plaintiff seeking a preliminary injunction must show: (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. *Id.* at 20.

The Ninth Circuit has adopted a "sliding scale approach" under which "[a] preliminary injunction is appropriate" where there are "serious questions going to the

[1]Additionally, it appears Plaintiff has requested injunctive relief regarding Defendants'"ban on unsubscribed magazines" for the first time in its Reply. (Pl.'s Reply 7, ECF No. 27.) This request is untimely, and therefore **DENIED**.

merits ... and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir.2011) (internal citation and quotation marks omitted). Under this "serious questions" test, "a 'likelihood' of success per se is not an absolute requirement" to securing a preliminary injunction. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1086 (9th Cir.2014), petition for cert. filed, 82 USLW 3624 (Apr. 11, 2014) (No. 13–1244). A stronger showing on the "balance of hardships element" may offset a lesser showing of "likelihood of success on the merits," so long as the other two elements of the *Winter* test are also met. *Alliance*, 632 F.3d at 1135. In other words, if the balance of hardships tips sharply in the plaintiff's favor, there is a likelihood of irreparable injury, and the injunction is in the public interest, then a preliminary injunction may issue so long as the plaintiff shows there are "serious questions going to the merits." *Id.* Such "serious questions" are presented where the movant "has a fair chance of success on the merits." *Sierra On–Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir.1984).

III. ANALYSIS

A. Post-Card Only Policy

1. Likelihood of Success on the Merits

To determine PLN's likelihood of success on the merits, the Court must analyze the constitutionally of the County's postcard-only policy. To do so, the Court must first "determine whether any First Amendment interest is implicated" by the County jails' ban on letter mail. *Hrdlicka v. Reniff*, 631 F.3d 1044, 1048 (9th Cir. 2011). The Ninth Circuit has repeatedly recognized "that publishers and inmates have a First Amendment interest in communicating with each other." *Id.* at 1049. 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 these walls 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). Because the postcard-only policy directly affects PLN's

ability to communicate with prisoners by mail, it implicates a well-established First Amendment interest. *Prison Legal News v. County of Ventura*, 2014 WL 2736103, *3 (C.D. Cal. June 16, 2014).

However, prison administration is an inordinately difficult task, that has been committed to the responsibility of the executive and legislative branches, and "separation of powers concerns counsel a policy of judicial restraint." *Turner,* 482 U.S. at 84-85. As such, PLN's well-established First Amendment interest is "subject to substantial limitations and restrictions in order to allow prison officials to achieve legitimate correctional goals and maintain institutional security." *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005). Thus, to ensure that any injunctive relief incorporates due deference for the exigencies of jail operation, the County's postcard-only policy must be evaluated under the four factors promulgated by the Supreme Court in *Turner*. 482 U.S. at, 84.

A prison regulation that impinges on inmates' constitutional rights may nonetheless be valid if it is "reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89. In *Turner*, the Supreme Court set forth four factors to determine whether a correctional regulation "passes constitutional muster." *Frost v. Symington*, 197 F.3d 354 (9th Cir. 1999). Those factors are:

> (1) whether the regulation is rationally related to a legitimate and neutral governmental 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.

Prison Legal News v. Cook, 238 F.3d 1145, 1149 (9th Cir. 2001) (citing *Turner,* 482 U.S. at 89-90).

a. Rational Relationship to Legitimate Penological Objective

Plaintiffs argue that the "postcard-only policy is not rationally related to any security concerns." (Pl.'s Mot. 7.) Defendants contend that the postcard-only policy is rationally related to (1) "significant security concerns" and (2) the efficient use of the

County jails' resources. (Opp'n 5, 7.)

Under the first *Turner* factor, the Court must determine whether "the governmental objective underlying the regulations at issue is legitimate and neutral, and that the regulations are rationally related to that objective." *Thornburgh*, 490 U.S. at 414. 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." *Turner*, 482 U.S. at 89-90. The initial burden is on the defendant to set forth "an intuitive, common-sense connection" between the challenged policy and its asserted objectives. *See Frost v. Symington*, 197 F.3d 348, 356 (1999). If the plaintiff presents evidence that refutes defendant's common-sense connection, then defendant "must demonstrate that the relationship is not so remote as to render the policy arbitrary." *Cook*, 238 F.3d at 1150.

Defendants first contend that the postcard-only policy is rationally related to significant security concerns, specifically the introduction of contraband into the County jails via letter mail. Plaintiff counters that "[a]lthough security concerns can be a valid penological interest, the postcard-only policy is not rationally related to any security concerns." (Pl.'s Mot. 7.) The Court agrees with Plaintiff.

Assuming that Defendants initially established a common-sense connection between the policy and security concerns, PLN has presented evidence to refute this connection. John Clark, PLN's corrections expert with 40 years of experience, including as the Warden of a large federal detention facility, opines that the postcard-only policy "is contrary to widely accepted detention practices." (Clark Decl. ¶¶ 28, 35.) He further states that the County jails have a variety of methods through which they can stop contraband that might be sent to inmates through correspondence and that these techniques have been successfully used for decades. (Clark Decl. ¶ 29.) Defendants attempt to present counter-evidence demonstrating a connection between the policy and object. However, they fail to provide an "explanation why a postcard-only policy is more effective at preventing the introduction of contraband than opening envelopes and inspecting their contents." *PLN v. Columbia II*, 942 F. Supp. 2d 1068, 1083 (D. Or.

2013) (emphasis in original). The burden therefore shifts to the Defendants to show that the connection is "not so remote as to render the policy arbitrary or irrational." *Frost*, 197 F.3d at 357.

Defendants attempt to meet their burden by demonstrating that the postcard policy has resulted in a "reduction in contraband" entering the jails. (Opp'n 5; Miller Decl. ¶ 12.) Detective Byrne estimates that "[t]hrough the combination of the 'postcards only' policy, and the use of body scanners, the Sheriff's Department has been able to reduce the amount of drugs in the jails by an estimated 50%." ((Declaration of Thomas J. Byrne in Support of Defendants' Opp'n ("Byrne Decl.") 7, ECF No. 24-2.) However, Detective Byrne's statements fail to identify what proportion of this 50% reduction is attributable to the postcard-only policy as opposed to the use of body scanners. Further, Detective Byrne's estimated reduction is inconsistent with statements given by spokespersons from the San Diego Sheriff's Department showing an *increase* in drug and alcohol cases in the County's jails since 2012, when the post-card policy was implemented. (Clark Reply Decl., ¶ 9, Ex. A (a December 6, 2014 article from the San Diego Union Tribune citing Jan Caldwell, a spokeswoman for the Sheriff's Department), Ex. B (November 29, 2014 Associated Press article citing a statement from sheriff's Commander John Ingrassia.))

Defendants additionally contend that the concerns regarding the introduction of contraband are "well documented in the declarations filed" in opposition. (Opp'n 5.) However, these declarations fail to provide an explanation as to why the postcard-only mail policy is more effective at preventing the introduction of contraband. Instead, they offer statements that the improvement to the safety of the facility is based upon a reduction in the amount of time it takes to process the mail. Specifically, the Deputies state that the reduction in time is due to a reduced number of pages which must be inspected. (*See e.g.* Decl. Maeda ¶ 7; Decl. Lord ¶ 9; Decl. Gehris ¶ 8.) Taking Defendants evidence as a whole, the Court finds no evidence that the policy has actually reduced contraband. Therefore, the connection between the policy and the contraband prevention justification is "so remote as to render the policy arbitrary."

This is the fifth time a district court within the Ninth Circuit has addressed a preliminary injunction of a jail's postcard-only mail policy. The four other district courts to address the issue have enjoined the policy. *Prison Legal News v. County of Ventura*, 2014 WL 2736103 (C.D. Cal. June 16, 2014); *Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013); *Prison Legal News v. Lewis County, et. al.* 14-cv-05304 (W.D. Wash. 2014); *Prison Legal News v. Spokane County*, cv-11-029 RHW (E.D. Wash.) (*see* Wright Decl. Ex. J.) Defendants' attempts to distinguish these cases are unavailing. Defendants provide no evidence or cogent arguments as to why the application of the *Turner* factors would shift due to smaller or more rural county jails. (*See* Opp'n 6.)

For the above reasons, the first factor favors Plaintiffs. Although the first *Turner* factor is *sine qua non*, the other three factors confirm that PLN would likely prevail on thier constitutional challenge of the post card policy. *Cook*, 238 F.3d at 1151.

b. Availability of Alternative Avenues for Exercise of Asserted Right

The second Turner factor considers whether "other avenues remain available for the exercise of the asserted right." *Turner*, 482 U.S. at 90. In evaluating the second Turner factor, "the right in question must be viewed sensibly and expansively." *Mauro v. Arpaio*, 188 F.3d 1054, 1061 (9th Cir. 1999) "[A]lternative means [of exercising the right] need not be ideal; they need only be available." *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003).

Defendants argue that alternative means of communicating with inmates exist in the form of a free e-mail service or by reducing envelope mail to a postcard size. (Opp'n. at 2, 6.) Plaintiff argues that there are significant restrictions on the free e-mail service and that PLN is unable to reduce its correspondence to a small postcard. (Pl.'s Reply 6.) The Court agrees with PLN.

Defendants contend that the availability of "free e-mail service" is a viable means

by which PLN may exercise their First Amendment Rights. (Opp'n. 6.) In fact, Defendants state that "[e]-mail is the preferred and contemporary means of immediate communication." (*Id*.) Defendants claim that "[a]nyone can e-mail an inmate, at any time, seven days a week, for free." (*Id.*) But upon closer inspection, the "free e-mail service" provided by San Diego County jails places significant limitations on the expression of Plaintiff's First Amendment rights. Specifically, emails sent via the free service are limited to one page and 2,400 characters of plain text that can not be copied into the e-mail. (Miller Decl. ¶ 5; Wright Reply Decl. ¶ 4, Ex. A.) Further, the free e-mail service only allows for an author to send two emails per day, thereby capping the amount of text available to be sent by PLN at two pages of plain text per day. (*Id.*) While the e-mail system provides a separate medium of expression, the free service does not represent an alternative avenue to exercise PLN's First Amendment rights, as the limitations on the system prevent comparable freedom of expression as is found in a letter. The e-mail system is not a viable method for PLN to convey the information to inmates that was once sent via letter mail. Under the current rule, PLN would be limited to only two pages of correspondence per inmate and would be required to hand-type the email to each inmate, one at a time. (Wright Reply Decl. ¶ 4.) Because of these limitations, the free e-mail service fails to provide an alternative avenue for the exercise of PLN's First Amendment Right.

Defendants also offer a number of additional alternatives to envelope mail that PLN may utilize to communicate with inmates, such as reducing PLN's informational brochure packets to postcards or sending case citations to inmates who may then access case law via an off-site law library. (Opp'n at 2.) These alternatives fail to adequately allow PLN to exercise their First Amendment rights. Reducing a 3-page brochure to a postcard would likely strip it of a significant portion of its content, thus failing to serve as an adequate alternative. Likewise, the off-site law library services place limitations on the amount of access inmates have to case law. The service limits requests to four cases, totaling no more than fifty pages per month, and is available only to those with an

active criminal or civil case. (Pl. Reply 7; Woodfork Decl. ¶¶ 25-32; Jones Decl. ¶¶ 19-20; Marks Decl. Ex. A.) The Constitutional right at issue here is PLN's First Amendment right to communicate with inmates by sending copies of legal decisions that may notify inmates of, among other things, the existence of a potential cause of action. The availability of a law library does not serve as an alternative avenue for PLN to convey legal information to inmates. Thus, inmate access to the law library does not serve as an adequate alternative for PLN to send case law to inmates within the County jails.

Although Defendants have listed a number of alternative means of communication with San Diego County inmates, these methods so severely constrain the First Amendment rights of PLN to render them unviable alternative methods. Accordingly, the second *Turner* factor weighs in favor of PLN.

c. Impact of Accommodation on Guards, Prisoners, and the Allocation of Prison Resources

The third *Turner* factor assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. This factor weighs strongest where "accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or prison staff." *Id.*

Defendants contend that accommodating PLN's First Amendment right to send letter mail would double the time spent on mail inspection, thus necessitating significant allocation of the guards time to mail inspection. (Opp'n 7.) Defendants argue that an increased amount of time dedicated to mail inspection would detract from the deputies "responsibilities in all other areas of facility security and inmate attention." (*Id.* 8.) Plaintiff responds that the current policy offers an expedited processing time not because it takes significantly longer to inspect a letter than a postcard, but instead because regular enveloped mail no longer comes to the facilities. (Pl.'s Reply 4, 5.)

Defendants have set forth declarations from deputies at each of the seven County jail facilities which purport to demonstrate that the time required to process incoming mail has been reduced since the implementation of the postcard-only policy. (Opp'n. 7, 8; McFadden Decl. ¶¶ 4-6, 10-11; Lord Decl.; Gallegos Decl.; Maeda Decl.) The declarations from the various deputies note that since the policy change, processing the mail takes approximately half the time. *Id.* The basis of this increased efficiency, however, is linked to a reduction in the number of pages subject to inspection, not to any increased speed derived from not having to open an envelope. With nearly identical language, the declarations fail to state that time is saved due to no longer needing to open envelopes. Instead, each of the declarations state that the reduction in time arises from a reduction in the number of pages needed to review. (*See e.g*. Decl. Gallegos ¶ 8.)

Thus, County jails derive an increased efficiency from the postcard-only policy because less pages of correspondence are coming into the facilities, thereby requiring less items to undergo inspection. Defendants have submitted no evidence that the policy would maintain a similarly efficient allocation of jail resources if the same amount of written material were to be received on postcards as was received under the old policy allowing letter mail. In fact, the Ninth Circuit has rejected the argument that burdens, such as these, are a valid rationale for limiting First Amendment protected publications sent to prisoners. *See*, *e.g.*, *Lehman*, 397 F.3d at 700 (rejecting regulation designed to reduce volume of mail); *Cook*, 238 F.3d at 1151 (9th Cir. 2001). Accordingly, the third *Turner* factor supports the conclusion that the postcard-only policy unreasonably infringes PLN's First Amendment rights.

d. Existence of Easy and Obvious Alternatives

The final *Turner* factor requires the court to determine "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. While *Turner* does not require that defendants adopt the least restrictive alternative, a ready alternative that accommodates

plaintiff's rights at *"de minimis* cost to valid penological interests" serves as evidence that the regulation does not satisfy the reasonable relationship standard. *Ventura*, 2014 WL 2736103 (citing *Turner*, 482 U.S. at 91.) Further, "[t]he policies followed at other well-run institutions are relevant to a determination of the need for a particular type of restriction." *Procunier v. Martinez,* 416 U.S. 396, 414 n. 14 (1974).

Plaintiff argues that the County jails' prior mail policy exists as an easy and obvious alternative. (Pl.'s Mot.12.) Defendants fail to directly address this contention, but argue that the policy is not an exaggerated response to prison safety concerns. (Opp'n at 8.)

Here, PLN argues that the County's prior mail policy of removing correspondence from its envelope, reviewing the contents for contraband, and delivering it to its intended recipient, is a ready alternative to the current policy. (Pl.'s Mot. 12.) The fact that the Federal Bureau of Prisons, as well as numerous other counties within California (including Los Angeles County Sheriff's Office, the largest jail system in the country) are able to accommodate letter mail without compromising the security of the institutions, suggests that the County jails' postcard-only policy is an exaggerated response. *See Morrison v. Hall*, 261 F.3d 896, 905 (9th Cir. 2001) (citing *Martinez,* 416 U.S. at 414) (noting that "the policies followed at othe rwell-run institutions" can swerve as evidence tha an easy and obvious alternative exits). Defendants argue that "policy has shown to be effective without limiting in any real manner communication with inmates." (Opp'n 9.) However, as previously noted, the policy does limit meaningful communication with County inmates. Thus, the final *Turner* factor strongly suggests that the County jails' postcard-only policy infringes on PLN's First Amendment rights.

Based on the foregoing, all four of the *Turner* factors weigh in PLN's favor. As such, PLN is likely to succeed on the merits with respect to its First Amendment claim regarding the postcard-only policy.

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2. Likelihood of Irreparable Harm

PLN claims it will suffer irreparable harm in the absence of preliminary relief. In opposition, Defendants suggest that "the only harm Plaintiff suffers is financial." (Opp'n 11.) However, both the Supreme Court and the Ninth Circuit have held that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Thalheimer v. City of San Diego,* 645 F.3d 1109, 1128 (9th Cir. 2011). Thus, PLN has established that the postcard-only policy presents a likelihood of irreparable harm because the policy prevents PLN from exercising its First Amendment freedoms.

3. Balance of Equities

San Diego County jails have accepted letter mail in the past and have not demonstrated that reverting to such a policy will increase the security risk within the jail facilities or cause undue harm. Rescinding the postcard-only mail policy may result in an increase in the amount of time spent inspecting the incoming mail, however, when weighed against the ongoing, concrete harm suffered by PLN and others attempting to correspond with County inmates, the balance of equities tips in PLN's favor. *See PLN v. Columbia I*, 2012 WL 1936108 at *12 (D. Or. May 29, 2012); *PLN v. County of Ventura*, 2014 WL 2736103 *8.

4. Public Interest

The Court "must balance the competing claims of injury and must consider the effect on each party" and "should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winder*, 555 U.S. at 24. "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Judicial Ct.,* 303 F.3d 959, 974 (9th Cir. 2002), *abrogated in part on other grounds by Winter*, 55 U.S. at 24. The First Amendment furthers a public interest and courts have "constantly recognized the 'significant public interest' in

upholding free speech principles." *Klein v. City of San Clemente*, 584 F.3d 1208 (9th Cir. 2009) (quoting *Sammartano*, 303 F.3d at 974).

Defendants argue that "nothing about the jail policies affect dissemination of information or ideas; only the form is relegated, and only in a very minor manner." (Opp'n 11-12.) However, the postcard-only policy regulates the form of correspondence to such an extent as to severely limit the dissemination of ideas and information. By limiting correspondence to a postcard or one-page email, the County jails' postcard-only mail policy has effectively truncated the press and public's ability to disseminate and exchange meaningful information on issues of public concern. In light of the public's general interest in "upholding free speech principles," and because the injunction will directly benefit other members of the public who wish to send correspondence longer than a postcard to San Diego county inmates, this factor favors PLN.

B. **Book Size Limitation**

Plaintiff additionally seeks an injunction to prevent the enforcement of the County jails' size restrictions for mailed soft-cover books. Jail officials have rejected the delivery of *The Habeas Citebook*, a book published by PLN, on at least eight occasions due to the size restriction. (Wright Decl. ¶ 8.) Applying the four *Turner* factors set forth above, this Court finds that PLN has not demonstrated a likelihood of success on the merits and thus deny Plaintiff's motion for a preliminary injunction on this ground.

1. **Rational Relationship to Legitimate Penological Objective**

First, PLN argues that "[t]he 6" x 9" x 2" size restriction has no correlation to preventing the introduction of contraband into a correctional facility." (Pl.'s Mot. 14.) PLN states that the "arbitrary and irrational policy" is not rationally related to legitimate penological objectives of the County. (*Id.*) Defendants argue the size limitations is based on "experience of having books used as bludgeoning weapons." (Def. Resp. 9; Miller Decl., ¶¶ 13-16.) Specifically, the 6" x 9" x 2" size does not offer "sufficient size

and length for the book to be soaked, dried and hardened into a usable weapon." (Miller Decl., ¶¶ 13-16.)

Unlike the postcard-only mail policy, PLN has put forth no evidence challenging the constitutionality of the soft-cover book size limitation. In PLN's motion and supporting declarations, PLN only argues that the size restriction "has no correlation to preventing the introduction of contraband" into the facility. (Pl.'s Mot. 14; Clark Decl. ¶ 36:9-13.) This argument misses the mark, as Defendants justify this rule by pointing out that books of this size can be used as weapons. (Def. Resp. 9; Miller Decl., ¶¶ 13-16.)

In its reply, PLN attacks the weaponization justification by claiming that (1) it is unclear and contradictory and (2) such books do not pose a significant security risk. With respect to the first argument, the policy is not rendered contradictory if the Defendants reserve the right to waive the rule if they deem the book to be safe. Of course, books that exceed this size will differ in size and thickness, which could potentially serve as the basis for waiving the size restriction. Moreover, the type of material the book is made of, whether it be a more flexible cover, or thicker pages, may account for an alternative basis to waive the restriction. Indeed, as PLN itself notes, magazines of similar size to *The Habeas Citebook* are regularly allowed within the jails. In addition, the policy is very clear: it prohibits all books over 6" x 9" x 2".

With respect to the second argument, Mr. Clark's conclusion that "he has never heard of a book being soaked in the toilet and then used as a weapon" must be compared to Defendants declaration to the contrary. (Clark Reply Decl. ¶ 13; Miller Decl. ¶ 14 ("It is not uncommon for inmates to create weapons by rolling up magazines or paper, then soaking them in the toilet so they become heavy with water, drying them out, and then using the resulting dried roll of paper as a bludgeoning instrument.")) PLN does not dispute this directly, but instead attempts to gloss over the issue by pointing out that Defendants do not point to a specific instance where a book was turned into a bludgeoning instrument, while ignoring the fact that Defendants have presented evidence that it is "not uncommon." When taken as a whole, Defendants have set forth an

"intuitive, common-sense connection" between its asserted objective and the book size limitation, and PLN has failed to present evidence refuting that connection. *See Frost v. Symington*, 197 F.3d 348, 356 (9th Cir. 1999); *Cook*, 238 F.3d at 1150. Thus, the first *Turner* factor weighs in favor of the size limitation[2].

2. **Availability of Alternative Avenues for Exercise of Asserted Right**

Second, alternative avenues exist that allow PLN to exercise its First Amendment right. PLN argues that the book size restriction "leaves no reasonable alternative means of distributing the many titles printed in formats larger than 6" x 9" x 2"." (Pl.'s Mot. 14.) Defendants counter that many alternative means exist that allow PLN to communicate with inmates. By PLN's own admission, PLN publishes "approximately 50 books" and only one of these books, *The Habeas Citebook*, has been rejected by Jail officials for violation of the size restriction. (Wright Decl., ¶13.) PLN claims that publishing a special version of *The Habeas Citebook* for the County Jail would be "cost-prohibitive and infeasible." (*Id.* at ¶17.) However, the vast majority of books published by PLN fall within the permissible size regulations, demonstrating PLN's ability to publish books within the acceptable size for the County Jails. (*Id.* at ¶13.) Although the size restriction prevents PLN from sending books over 6" x 9" x 2", the existence of a waiver process, and the fact that 49 of the 50 books published by PLN fall within the restriction demonstrates that the County jails policy does not significantly limit First Amendment communication. The Court notes that there are likely costs associated with changing the format of a book[3], but "alternative means [of exercising the right] need not be ideal"; "they need only be available." *Overton*, 539 U.S. at 135. Accordingly, on balance, the second *Turner* factor favors the County.

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[2] PLN does not dispute that safety and security is a legitimate and neutral penological interest.

[3]PLN alludes to costs associated with changing book formats, but presents no evidence supporting this claim. Therefore, the Court is prevented from considering these costs in any detail in its analysis.

C. Impact of Accommodation on Guards, Prisoners, and the Allocation of Prison Resources

Third, allowing PLN to send books larger than the size restriction would place only a small burden on jail officials, other inmates, or the allocation of resources. Defendant has failed to directly address any of the claims made by PLN regarding the burden placed on the County jails by allowing the size restrictions to be altered. However, Defendants' Opposition implies that the potential use of larger soft-cover books as weapon increases the possibility of injuries to both guards and prisoners. The potential for these books to be turned into weapons additionally increases the vigilance necessary on the part of jail officials to ensure the books are used solely as reading material. In totality, the third *Turner* factor tips slightly in favor of PLN.

D. Existence of Easy and Obvious Alternatives

Fourth, PLN initially argues that Defendants need only inspect all incoming books for contraband as an alternative to the size restriction. As explained above, this argument does not address the weaponization justification that Defendants provide. Then, in the reply, PLN only argues that it "of course, cannot force publishers to change the size of books they publish, nor will publishers republish books in a different size on a account of a bizarre rule at one county jail," implying that it would be impossible to provide prisoners with the information in the book if the size limitation is enforced. (Reply 9.) Unfortunately, PLN provides no evidence to support this claim. Thus, the fourth *Turner* factor favors Defendants.

Based on the foregoing, three of the four *Turner* factors weigh in favor of the Defendants. As such, PLN has not established a likelihood of success on its claim that the soft-cover book size restrictions violate its First Amendment rights.

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IV. Due Process

PLN argues that Defendants have violated the Fourteenth Amendment Due Process Clause by failing to provide them with adequate notice and an opportunity to appeal their censorship decisions. (Pl.'s Mot. 16.) Defendants counter, suggesting that the "Sheriff has been in the process of developing a policy amendment adding a formal appeal procedure which will be in place before this injunction hearing." (Opp'n 10.) Thus, according to Defendants, there is no reason for an injunction because there is no threat that PLN will be harmed in the future. (*Id.*)

The "decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards." *Procunier,* 416 U.S. at 417. Guarantees of due process apply only when the interest at stake is a constitutionally protected liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). "The Supreme Court has held that '[t]he 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.' This liberty interest attaches not only to communications by letter, but also to a prisoner's receipt of subscription publications." *Krug v. Lutz*, 329 F.3d 692, 697 (9th Cir. 2003) (citations omitted).

The parties have not presented any Ninth Circuit or Supreme Court authority, and the Court is not aware of any, that identifies the "minimum procedural safeguards" that publishers seeking to distribute their materials to prisoners are entitled to. However, other circuit courts have addressed this issue. Specifically, courts have held that "publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate-subscribers." *Montcalm Publ'g Co. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996); *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004).

Here, upon rejection, items were stamped "RETURN TO SENDER;" "RTS;" or

"UNACCEPTABLE MAIL." (Wright Decl., Ex. B-I.) In other cases, *The Habeas Citebook* was returned for being too large, and in other instances because it did not come from the publisher, despite the fact that PLN is the publisher of the book. (*Id.*) PLN presents unrefuted evidence that hundreds of other items were rejected without any notice to PLN. (*Id.* ¶ 11.) Plaintiff has never contacted the jail staff or administration regarding the distribution of its material. (Miller Decl. ¶¶ 15, 17, 19.) Additionally, Defendants are currently in the process of modifying the appeal procedure. (Miller Decl. ¶ 15, Ex. B.)

Given the evidence presented, the Court finds that Defendants provide insufficient notice to PLN regarding the rejection of their materials, if they provide notice at all. The information that Defendants have allegedly provided ("RETURN TO SENDER," "UNACCEPTABLE MAIL," etc.) provide no notice to PLN as to why the materials were rejected. This renders it impossible for PLN to challenge the basis of the refusals. Defendants muster no argument as to why this would amount to sufficient notice.

Instead, Defendants focus on the fact that they are currently working on developing an appeal procedure for these rejections. By making this argument, Defendants essentially concede that they have not provided an adequate appeal process for PLN. Defendants attempt to deflect this problem by suggesting that PLN has never contacted them regarding their materials, and that the Defendants are working on a new policy. These arguments miss the mark.

First, the fact that Defendants are working to amend the appeal process does not obviate the possibility that the amended appeal process will still be constitutionally insufficient. *Friends of Earth, Inc. V. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190 (2000) (holding that "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur"). Second, absent an injunction, Defendants could theoretically revert to their unconstitutional behavior. *FTC v. Affordable Media, LLC,* 179 F.3d 1228, 1238 (9th Cir. 1999) (explaining that injunctive

relief is appropriate where the "defendant is free to return to its illegal action at any time"); *see also Ventura*, 2014 WL 2519402, at * 9 (injunction not obviated by discontinuance of policies).

In light of the foregoing, the Court finds that PLN has established a likelihood of success on the merits of their due process claim. The analysis of the remaining *Winter* factors parallels the same above. Therefore, the Court **GRANTS** PLN's motion for preliminary injunction with respect to its Fourteenth Amendment claim.

V. CONCLUSION & ORDER

In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's motion for preliminary injunction, and **ORDERS AS FOLLOWS**:

1. Defendant County of San Diego (the "County") and individual Defendants GORE, MILLER, BROWN, and their successors, officers, agents, servants, employees, and attorneys, and all others in active concert or participation with them who receive actual notice of this injunction by personal service or otherwise (hereinafter referred to collectively as "Defendants"), SHALL suspend enforcement of the postcard-only policy for incoming mail no later than **May 21, 2015.** Defendants shall not refuse to deliver correspondence sent to inmates at the County's jails on the ground that correspondence is not written on a postcard.
2. Defendants shall provide written notice and an administrative appeal process to senders and inmates when Defendants refuse to deliver publications and correspondence to inmates at the County's jails. Although the Court denied PLN's motion to enjoin the size restriction, the County's implementation and enforcement of the size restriction must still comply with due process. Within 30 days of issuance of this order, the parties shall confer regarding the specific policy, procedure, and forms for providing notice and an appeal process.

3. This injunction in no way prohibits the Department from enforcing the size restriction.

4. The bond requirement is waived.

5. No person who has notice of this injunction shall fail to comply with it, nor shall any person subvert the injunction by any sham, indirection or other artifice.

IT IS SO ORDERED.

DATED: May 7, 2015

M. James Lorenz
United States District Court Judge