Nos. 11-651, 11-653

In The Supreme Court of the United States

PERRY L. RENIFF,
IN HIS OFFICIAL CAPACITY AS SHERIFF
OF THE COUNTY OF BUTTE, CALIFORNIA,

Petitioner,

v.

RAY HRDLICKA, ET AL.,

Respondents.

JOHN MCGINNESS,
SACRAMENTO COUNTY SHERIFF,

Petitioner,

v.

CRIME, JUSTICE AND AMERICA, INC., ET AL.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Respondents' lack of standing to assert a First Amendment right to demand unsolicited contact with jail inmates deprives the Federal Courts of subject matter jurisdiction under Article III of the U.S. Constitution to determine the merits of Respondents' claim.

2. Whether the enhanced rational basis test of *Turner v. Safley* is properly applied to a First Amendment claim of a publisher seeking unsolicited contact with jail inmates, and whether the burden of proof may be reversed to require sheriffs to prove that their jail regulations actually serve their intended legitimate penological purposes with "quantifying" evidence.

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BRIEF OF *AMICUS CURIAE*

The California State Association of Counties respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

INTERESTS OF THE *AMICUS CURIAE*

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that these cases present matters affecting all counties.

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

The Ninth Circuit's consolidated decision in these cases opens the doors of county jails to members of the public who want to make unsolicited contact with inmates through mass mailings, and raises a host of executive and administrative concerns. California counties have an interest in preserving their sheriffs' executive authority to run county jails within appropriate discretion, and preventing unnecessary expenditure of county resources – both of which are implicated by the Ninth Circuit's decision. The Ninth Circuit reached its conclusions in these cases despite Respondents' lack of standing to assert a First Amendment claim, and erred in applying an incorrect enhanced rational relationship test and in reversing the burdens of proof to require the sheriffs to defend jail regulations with "quantifying" evidence. The impact of the decision will affect all California counties' ability to control their resources, and will affect their elected sheriffs' ability to maintain safety, security, and operational integrity in county jails.

SUMMARY OF ARGUMENT

In an unprecedented act, the Ninth Circuit has created a special First Amendment right in a context where none exists. Never before has this Court, or any other federal court, held that a publisher or other member of the public has a First Amendment right to demand a county sheriff to utilize jail resources to deliver unsolicited commercial publications directly to jail inmates within the locked confines of county jails.

By creating this unusual right, the Ninth Circuit has paved the way for an injunction that not only intrudes on the authority of county sheriffs to operate their jails, but also imposes on them and their counties an unnecessary duty to expend public resources to accommodate private business interests.

The Ninth Circuit's error in judgment stems from its initial failure to consider whether Respondents had standing to assert a First Amendment claim in the jail context sufficient to invoke federal court subject matter jurisdiction. A considered review of the issue demonstrates that Respondents do not have a First Amendment claim of right in that nonpublic forum, and lack standing to challenge the sheriffs' jail mail regulations. Respondents' lack of standing deprived the lower courts of subject matter jurisdiction to issue a decision on the merits, warranting a review and reversal of the Ninth Circuit's decision.

Compounding this error, the Ninth Circuit proceeded to misapply the enhanced rational basis test of *Turner v. Safley*, 482 U.S. 78 (1987) – which was designed to protect *inmates'* constitutional rights – to an *outsider's* challenge to jail mail regulations. In doing so, the Ninth Circuit rejected this Court's First Amendment jurisprudence and ignored the legitimate penological interests proffered by the sheriffs justifying their jail mail regulations. To reach this decision, the Ninth Circuit then proceeded to reverse the burdens of proof to require the defendant sheriffs (rather than the plaintiffs) to present "quantifying"

evidence to support their rational bases in establishing the regulations – which it found lacking.

The implications and negative affects of the Ninth Circuit's decision are numerous and far reaching. It disrupts the balance and separation of powers established within our National government, as it usurps a discretionary decision relating to jail operations that is properly exercised by county sheriffs as members of the executive branch. It also breaches the boundary of control properly exercised by the states and their counties, violating the principles of federalism.

The Ninth Circuit's decision takes on an even greater significance in the context of the current legal, political, and fiscal climate. The current fiscal crises counties and their sheriffs now face, combined with the increased demands placed on sheriffs and their counties in the wake of *Brown v. Plata*, 131 S. Ct. 1910 (2011), dictate an even greater consideration of the limits of judicial jurisdiction and control. The Ninth Circuit's unprecedented decision extends beyond the bounds of its authority, and unjustifiably disrupts the counties' abilities to manage their finances and the sheriffs' ability to maintain safety and security within their jails. For these reasons, *amicus curiae* support the Petitioners' requests and urge this Court to review the Ninth Circuit's decision.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO CORRECT THE NINTH CIRCUIT'S ERROR IN GRANTING RESPONDENTS/PUBLISHERS A FIRST AMENDMENT RIGHT TO DEMAND UNSOLICITED ACCESS TO JAIL INMATES, CONTRARY TO THIS COURT'S PRECEDENT, AS IT HAD NO SUBJECT MATTER JURISDICTION DUE TO RESPONDENTS' LACK OF STANDING

Contrary to the First Amendment jurisprudence of this Court, the Ninth Circuit granted a First Amendment right to publishers in a jail context by making a single, but significant, error: it failed to recognize Respondents had no standing to challenge the jail mail regulations in the first instance. Those regulations are designed and implemented to maintain a proper balance between the constitutional rights of jail inmates *vis-a-vis* the interests of sheriffs in maintaining jail safety, security, and operational integrity. Respondents are outsiders to this relationship, and are thus prevented from challenging the jail mail regulations under the First Amendment due to their lack of standing.

Neither this Court nor any other federal court have previously recognized the First Amendment claim of right asserted in these cases. Respondents, as owner/publisher of the circular *Crime, Justice and America* ("CJA"), claim a special First Amendment right to compel the county sheriffs to use jail resources to deliver unsolicited copies of CJA directly to

inmates within the secured confines of county jails. Based on the lack of precedent to support such a claim, it was attendant upon the lower courts to consider in the first instance whether Respondents had standing to assert it under the rubric of 42 U.S.C. § 1983 ("§ 1983") to invoke federal court subject matter jurisdiction.

Whether a party has standing is "a threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Inquiry into a party's standing to bring civil suit in federal court involves both core "constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Id.* At its heart, standing is a function of judicial self-governance, and thus the "core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

The core and "irreducible minimum" requirements of standing mandate a party filing a civil action in federal court to demonstrate three elements: (1) an "injury in fact" based on an alleged violation of a legally protected interest; (2) a causal connection between the injury and the complained-of conduct; and (3) that it is likely that a favorable decision will provide redress. *Ariz. Christian Sch. Tuition Org. v. Winn,* 131 S. Ct. 1436, 1442 (2011), relying on *Lujan*, 504 U.S. at 560-561. In addition, prudential considerations implicating the exercise of federal court jurisdiction weigh against federal courts considering the

merits of a "generalized grievance" shared in substantially equal measure by all or a large class of citizens. *Warth*, 422 U.S. at 499.

Federal courts have an independent and ongoing obligation "to examine their own jurisdiction, and standing is 'perhaps the most important of [the jurisdictional] doctrines.'" *United States v. Hays*, 515 U.S. 737, 742 (1995), quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231 (1990). No party can waive standing, and this Court should "address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us." *Id.*

Yet, none of the lower courts in these related cases addressed whether Respondents had demonstrated standing to pursue their § 1983 claim; instead, they appear to have simply assumed standing based on Respondents' conclusory free speech allegations. This Court should accordingly grant review of these cases to consider the important constitutional and jurisdictional concerns created by the decision below.

A. Respondents Lack Standing to Pursue Their First Amendment Claim as They Are Not "Injured" by the Jail Mail Regulations

A superficial glance at the standing issue in these cases may create the impression that Respondents can satisfy standing requirements. After

all, Respondents can argue that they were "injured" because the sheriffs refused to deliver their unsolicited publications to jail inmates pursuant to jail mail regulations, the sheriffs caused such injury by adopting and enforcing the regulations, and the Court can redress such injury by ordering the sheriffs to deliver Respondents' publications to jail inmates. However, such an analysis is flawed and constitutionally deficient for two reasons: (1) Respondents do not have a legally protected right or interest allegedly violated by government officials; and (2) Respondents have not suffered an "injury in fact," as discussed below.

1. Respondents have not, and cannot, demonstrate that they have suffered injury of a "legally protected right or interest" underlying their § 1983 claim sufficient for standing purposes. See *Ariz. Christian,* 131 S. Ct. at 1442. A determination of whether a party has standing under this first core standing requirement, "often turns on the nature and source of the claim asserted." *Warth*, 422 U.S. at 500. The source of Respondents' claim is the First Amendment, and the nature of their claim is a demand for unsolicited contact with county jail inmates, who have not in these cases requested or sought such contact, within the secured confines of the jails.[2]

[2] Respondents aver a private right of action against the sheriffs based on § 1983, pursuant to an alleged violation of the First Amendment. Respondents also allege underlying federal question jurisdiction by virtue of, *inter alia*, 28 U.S.C. § 1331, which provides the "district courts shall have original jurisdiction

(Continued on following page)

Nothing in the jurisprudence of this Court, or other circuit courts, supports the Ninth Circuit's holding that Respondents as publishers have a First Amendment "interest in distributing . . . unsolicited literature" to imprisoned inmates. *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011). This legal conclusion goes far beyond the parameters of the First Amendment to create, for the first time in history, a publisher's special right of access to jail inmates for the purpose of distributing unsolicited commercial mail to further their own private business interests. It therefore deviates from the well-established precedent of this Court, and creates an irreconcilable conflict in First Amendment jurisprudence.

The Ninth Circuit's error in rendering this decision stems from the fact that, despite its assertions to the contrary, *it failed to acknowledge that county jails are the ultimate nonpublic fora*. Instead, the Ninth Circuit looked for guidance to case law addressing First Amendment rights in *public fora*. See *Hrdlicka,* 631 F.3d at 1049, relying on *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009) (striking down ordinance restricting distribution of unsolicited

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of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. A case "arises under" federal law within the meaning of § 1331 if the complaint establishes, *inter alia*, that federal law creates a cause of action. See *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808, 817 (1986). Whether Respondents' conclusory allegations in this regard are sufficient to invoke federal question jurisdiction under 28 U.S.C. § 1331 is not addressed in this brief.

leaflets in *public places*), and *Martin v. Struthers*, 319 U.S. 141, 150 (1943) (striking down an ordinance prohibiting door-to-door distributing of publications.).[3] The Ninth Circuit believed these cases applicable because it saw "no reason" why a First Amendment right to distribute unsolicited publications in a *public forum* would be any different than a First Amendment right to distribute unsolicited publications in a *nonpublic forum*. The Ninth Circuit's belief that these distinctions were irrelevant has far reaching consequences in future case law regarding assertion of First Amendment rights not only in jail settings, but also in every other nonpublic forum.

It is the *nonpublic and secure jail* context in which Respondents demand free speech that deprives them of any First Amendment claim of right necessary to satisfy standing requirements in these cases. Whether the First Amendment grants a right of free speech to the public within a particular public property context, and the extent of any such right, depends upon the nature of the forum. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differently depending on the character of the

[3] In *Martin*, Mr. Justice Murphy noted that, "[p]reaching from house to house is an age-old method of proselyting," which has the consequence of making it an historical public forum. *Martin v. Struthers*, 319 U.S. at 150 (Justice Murphy concurring).

property at issue." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). Accordingly, the First Amendment jurisprudence of this Court recognizes three distinct fora: public fora, limited public fora, and nonpublic fora. *Id.* In addition, to properly define the nature of the forum, this Court has "focused on the access sought by the speaker," which may serve to limit the parameters of the forum at issue and the resulting constitutional considerations. *Cornelius v. NAACP Legal Defense & Educ. Fund,* 473 U.S. 788, 801 (1985).

This Court has repeatedly held that penal institutions are nonpublic fora for purposes of the First Amendment, and it is error to treat them otherwise. See *Jones v. North Carolina Prisoners' Labor Union, Inc*., 433 U.S. 119, 133-134 (1977). The press' inability to access jails and the inmates locked within them has been found not to implicate rights the First Amendment was designed to protect. See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 844-850 (1974) (Federal Bureau of Prisons' regulation prohibiting personal interviews between newsmen and designated inmates "does not abridge the freedom that the First Amendment guarantees."); see also *Pell v. Procunier*, 417 U.S. 817, 834-835 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public."); see also *Houchins v. KQED, Inc*., 438 U.S. 1, 14 (1978) (The media has no First Amendment right to access jails and inmates to obtain information regarding jail conditions.). The First Amendment is not implicated

in such circumstances because the inmates' rights to receive ideas and information is not at issue. See *Houchins v. KQED, Inc*., 438 U.S. at 12.

In other types of nonpublic fora, such as military training bases, the Court has emphatically pronounced that the public does not have a First Amendment right of free speech within such fora merely because they are owned and operated by the government. *Greer v. Spock*, 424 U.S. 828, 836 (1976) (Politicians and pamphleteers have no First Amendment right to free speech on military training base). Unauthorized entry into such nonpublic fora may diminish people's opportunities speak or gather information, but "that does not make entry into the White House a First Amendment right." *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

For these reasons, Respondents simply do not have a First Amendment right to demand sheriffs to expend jail resources to distribute unsolicited publications to inmates within the confines of county jails. This Court has repeatedly rejected the contention that the First Amendment guarantees a constitutional right to express speakers' views "whenever and however and wherever they please." See, e.g., *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966) (Demonstrators had no First Amendment right to stay on jail grounds over the objection of the sheriff). Indeed, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley*, 385 U.S. at 47.

The Ninth Circuit's decision thus distorts the nature and purpose of a jail into a public forum for private business interests to reach a literally captive audience.

2. Respondents also fail to satisfy the first core requirement of standing because they cannot demonstrate an "injury in fact." See *Ariz. Christian,* 131 S. Ct. at 1442. Such "injury" must be individual and specific to the Respondents, as this Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Hays,* 515 U.S. at 743, and cases cited therein.

The "injury" Respondents aver is simply their inability to make contact with inmates locked inside county jails. The inherent characteristic of the jail as a facility closed to the general public cannot, in and of itself, be sufficient to establish an "injury" for standing purposes. If it could, then every member of the public is "injured" merely because they cannot walk through the locked doors of the jail to hold discussions with, or distribute literature to, individual jail inmates. The Court has never held this type of "injury" is sufficient to establish standing. See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 489-490, n. 26 (1982); *Saxbe*, 417 U.S. at 849 (The prison regulation challenged by the press was "no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate

whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate.").

Respondents' demand for the sheriff to distribute unsolicited copies of CJA to inmates because it is the cheapest or most convenient method to reach their intended audience is also insufficient to establish an "injury" under the First Amendment, and thus cannot confer standing. See *Cornelius*, 473 U.S. at 809 ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message."); see also *Jones*, 433 U.S. at 130-131 (Losing the cost advantages of bulk mailing rates "does not fundamentally implicate free speech values.").

Accordingly, Respondents have shown no actual "injury" – nor did the Ninth Circuit discover one – sufficient to demonstrate standing to invoke federal court jurisdiction in these cases. The Ninth Circuit's failure to address such standing requirements, and its own jurisdiction to consider the merits of the cases, warrants review.

B. Respondents Cannot Invoke Jail Inmates' First Amendment Rights as a Basis for Standing, Due to the Prudential Standing Rule

Prudential standing considerations also weigh heavily against invoking the subject matter jurisdiction

of the federal courts to resolve the merits of Respondents' First Amendment claims. As this Court has explained, the source of a plaintiff's claim to relief assumes critical importance when applying prudential considerations of standing, to limit the role of the court in resolving public disputes. *Warth*, 422 U.S. at 500. "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.* Accordingly, "[T]he prudential standing rule . . . normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Id.,* at 509.

Contrary to this prudential limitation on a federal court's jurisdiction, the Ninth Circuit's decision has the effect of granting Respondents third party standing because it applied a legal standard applicable only when reviewing prison regulations *vis-a-vis* the constitutional rights of the imprisoned *inmates*. Specifically, the Ninth Circuit utilized the enhanced rational relationship test of *Turner*, which was designed and intended solely to protect the constitutional rights of *inmates,* not members of the free public. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

Respondents do not claim that they brought this suit to vindicate the rights of county jail inmates, nor could they do so. Third party standing in these cases would be improper, because the claim should be brought only by the party "at whom the constitutional protection is aimed." *Kowalski v. Tesmer*, 543 U.S.

125, 129 (2004), quoting *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955, n. 5 (1984). While there are exceptions to this general rule, none of them apply in this case. *Id.,* at 129-130.

The Ninth Circuit erred in failing to consider whether its jurisdiction was limited based on these prudential considerations. Because inmates can receive solicited copies of CJA, Respondents cannot stand on the rights of inmates to challenge the sheriffs' jail mail delivery regulations that were intended to address the rights of inmates, not the free public.

C. This Court Should Grant Review to Consider Whether the Ninth Circuit's Decision Breaches the Separation of Powers and Violates Federalism Principles

California has relegated the weighty responsibilities of running county jails to the elected sheriffs. Sheriffs are Executive Branch officials of the State of California; their discretionary authority to perform jail custodial functions is proscribed by the requirement that they comply with applicable laws. The Sheriff's authority emanates from the California Constitution (Cal. Const. Art. V, § 1, Art. V, § 13) and statutes which charge and authorize him/her to, *inter alia,* preserve the peace (Cal. Gov't Code § 26600), investigate public offenses (Cal. Gov't Code § 26602), and run the county jails (Cal. Gov't Code § 26605;

Cal. Penal Code § 4000). See also, *Venegas v. County of Los Angeles*, 32 Cal.4th 820 (2004).

Providing due deference to the decisions of sheriffs in running county jails acts to preserve the separation of powers among co-equal branches of government. This Court has repeatedly recognized that federal courts are "ill equipped" to deal with the difficult and delicate problems of prison management, requiring considerable deference to be afforded to jail and prison administrators who "in the interest of security, regulate the prison relations between prisoners and the outside world." *Thornburgh v. Abbott*, 490 U.S. 401, 407-408 (1989); see also *Jones*, 433 U.S. at 638-639 (Prison administrators are to be accorded "wide-ranging" deference based on "appropriate recognition to the peculiar and restrictive circumstances of penal confinement."). In addition, where a claimant challenges state prison or county jail regulations, "federal courts have further reason for deference to the appropriate prison authorities" (*Jones*, 433 U.S. at 639, quoting *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)), to preserve the principles of federalism.

Never has providing such deference to sheriffs in running county jails been more pressing or compelling than at present, as the demands on them have increased dramatically, while resources have concomitantly decreased. County sheriffs are being asked to do more with less, in a dynamic and ever-changing fiscal, legal and political environment.

This Court recently upheld an extraordinary injunction issued by the three judge panel in *Brown v. Plata,* 131 S. Ct. 1910 (2011) to reduce California's state prison population by 46,000 inmates. The three judge panel found that the intervenors (including a group of counties and county sheriffs) presented credible evidence that California's "law enforcement resources are currently overtaxed." *Coleman v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 67943, 344 (E.D. Cal. Aug. 4, 2009). California's county jails are, "for the most part, already overcrowded, resulting in adverse public safety and criminal justice effects." *Id.*, at 349. The three judge panel found that thirty-two of California's county jails are under some type of court-ordered population cap, and many that are not have inmate populations close to or above their design capacity. *Id.* Jail overcrowding is limiting the counties' "capacity to provide services in the jails or to maintain a safe correctional environment for the detainees, staff, and the community." *Id.*

This Court noted that during the appeal of *Brown*, the state began to implement measures to reduce the prison population, consistent with the three judge panel order. *Brown*, 131 S. Ct. at 1944. Such prison population reduction measures "will shift 'thousands' of prisoners from the state prisons to the county jails" by making certain felonies punishable in county jails only, and requiring parole violators to serve any remaining sentence terms in county jails. *Id.*

Against this backdrop of increasing jail populations and decreasing resources to maintain the safety and security of jail staff and inmates, the principles of separation of powers and federalism assume an even greater significance than usual.

Despite these compelling circumstances, it is apparent from the face of the Ninth Circuit's opinion that it did not accord the sheriffs' regulatory decisions proper deference, but instead substituted its own judgment on core jail management issues. In making these judgment calls, the Ninth Circuit's opinion requires sheriffs to work in "cooperation" with Respondents (and presumably other members of the public) to get their publications into the hands of jail inmates, and "work with CJA to establish distributions schedules that minimize the drain on jail resources." *Hrdlicka*, 631 F.3d at 1049, 1055. The expected consequences of delivering hundreds of unsolicited publications to jail inmates will also create safety and security hazards (papers used to flood toilets, start fires, etc.) and will thus require the sheriffs to devote even more resources to accommodate Respondents' business model.

The Ninth Circuit's intrusion into the sphere of the sheriffs' authority and control over jail management is unjustifiable in light of this Court's First Amendment jurisprudence. It breaches the separation of powers between the judiciary and the executive branches, and violates the principles of federalism by substituting the judgment of the federal courts for the well-reasoned and expert judgment

of the sheriffs in operating county jail facilities. This level of foray into jail management is outside the scope of Article III authority, and should be redressed by this Court.

II. REVIEW SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S INCORRECT APPLICATION OF THE ENHANCED RATIONAL BASIS TEST OF *TURNER V. SAFLEY* TO A FIRST AMENDMENT CLAIM BROUGHT AGAINST JAIL OFFICIALS BY OUTSIDERS, AND ITS ERROR IN REVERSING THE BURDENS OF PROOF

From the outset of its opinion in these cases, the Ninth Circuit took a wrong turn and applied the enhanced rational relationship test of *Turner*, which was designed to preserve inmate rights, to a constitutional claim asserted by a member of the free public. It then compounded its error by placing the burdens of proof on the sheriffs to prove their decisions to exclude unsolicited commercial mail in the jails was supported by "quantifying" evidence, rather than placing the burden on the Respondents where it properly resides. These errors changed the standards by which district courts will be required to review jail and other governmental regulations in the free speech context, and will thus have far reaching and detrimental impacts for government agencies. This Court should grant review of the Ninth Circuit's opinion to correct such errors and prevent future

misconstruction and misapplication of First Amendment jurisprudence.

A. The Ninth Circuit Erroneously Applied the Enhanced Rational Basis Test of *Turner v. Safley,* Designed to Protect Inmates' Constitutional Rights, to an Outside Publisher's Challenge to Jail Mail Regulations

At the start of its decision, the Ninth Circuit erred in turning to *Thornburgh* for the legal standards on which to base its review of Respondents' claim, which it found compelled the application of the four part *Turner* test. However, *Thornburgh* expressly stated that the *Turner* test was intended to review First Amendment claims with respect to "publishers who wish to communicate with those who, through subscription, willingly seek their point of view." *Thornburgh*, 490 U.S. at 408. Accordingly, it was the *inmates'* request for the publication – and their First Amendment rights – that created the constitutional consideration under review in *Thornburgh*.

This Court developed the *Turner* test for the purpose of addressing and vindicating "inmates' constitutional rights" that are not inconsistent with their incarceration. *Turner*, 482 U.S. at 89. The *Turner* test is an *enhanced rational basis test*, as it requires consideration of not one, but four separate factors designed solely to address the inmates'

constitutional rights *vis-a-vis* their jailors.[4] The *Turner* test was not designed to protect the rights of the free public, nor to provide a mechanism for the public to challenge jail regulations meant to accommodate inmate rights consistent with jail penological objectives.

This Court has never applied the *Turner* test to an outsider's challenge to jail regulations. Doing so subverts the nature and purpose of the test, because a member of the free public is not incarcerated by the sheriff. The act of incarceration requires a different standard of review for jail regulations because of the power and control the jail officials have over the inmates. Sheriffs do not have such power and control over the general public – they are free to communicate with other members of society not under lock and key.

Outsiders may challenge jail mail regulations, like any other act of the state, only if they are "arbitrary, capricious, or invidious" (*Lehman v. Shaker Heights*, 418 U.S. 298, 303 (1974)), unreasonable, or

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[4] The four part *Turner* test requires consideration of: (1) whether the regulation is rationally related to a legitimate and neutral governmental interest; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) the impact that accommodating the asserted right will have on guards and other inmates, and on the allocation of prison resources generally; and (4) whether the existence of easy and obvious alternatives indicates the regulation is an exaggerated response to prison concerns. *Turner v. Safley*, 482 U.S. at 89-90.

are not content-neutral. *Jones*, 433 U.S. at 130-131; *United States Postal Serv. v. Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 131 (1981); *Cornelius*, 473 U.S. at 800 (Access to a nonpublic forum can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression based on the speaker's view.).

Respondents in these cases have never claimed that the sheriff's jail mail regulations are arbitrary, capricious, or invidious, nor that they were an effort to suppress expression based on the speaker's view. The Ninth Circuit's misapplication of the *Turner* test in these cases thus improperly required the sheriffs to "be put to the test of defending" their jail regulations based on First Amendment claims of the general public demanding access to this nonpublic forum. See *United States Postal Serv*., 453 U.S. at 132-133. The distortion and misapplication of the *Turner* test in these cases strongly warrants this Court's review.

B. This Court Should Grant Review to Address the Ninth Circuit's Decisions to Reverse the Burdens of Proof and Require Jail Officials to Provide "Quantifying" Evidence Supporting the Legitimate Penological Interests Served by Their Jail Mail Regulations

Because the jail is "most emphatically not a 'public forum,'" (*Jones*, 433 U.S. at 136), the reasonable beliefs of prison officials that the mail regulations serve a legitimate penological objective is

sufficient to satisfy constitutional mandates. A district court commits firm error when it imposes on the prison authorities the burden to prove that the regulation actually serves its intended objective. *Id.* Doing so "is inconsistent with the deference federal courts should pay to the informed discretion of prison officials." *Id*.; see also *Overton v. Bazzetta,* 539 U.S. 126, 135 (2003), relying on *Turner*, 482 U.S. at 90.

Under the traditional rational relationship test, the court's inquiry is limited to whether the regulation is rationally related to a conceivable legitimate government interest. *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313-314 (1993) (Equal protection challenge). Accordingly, "[t]he burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Overton,* 539 U.S. at 132. Thus, where there are "plausible reasons" supporting the governmental regulation, "our inquiry is at an end." *Beach Comm.,* 508 U.S. at 313, quoting *United States R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

The Ninth Circuit ignored these fundamental precepts of rational basis review, and instead placed the burden of proving the four *Turner* factors squarely on the sheriffs. For example, in reviewing the second *Turner* factor regarding allocation of jail resources, the Ninth Circuit found that the sheriffs' proffered evidence regarding the burden on resources to deliver unsolicited copies of CJA to jail inmates was insufficient because a Sacramento County official "gave no estimate of how many additional personnel hours

would be required if CJA were delivered to the jail once a week at a ratio of one issue for every ten inmates." *Hrdlicka*, 631 F.3d at 1052. The Court further found that the Butte County officials "provided no information quantifying the additional resources that would be required to distribute CJA." *Id.*, at 1052-1053.

The Ninth Circuit's demand for the sheriffs to prove, by objective and "quantifying" evidence, that complying with Respondents' required methods for distributing unsolicited junk mail to inmates was unduly burdensome served to flip the burden of proof from Respondents to the sheriffs. Reversing the burden of proof improperly placed an unduly high "evidentiary burden" on the sheriffs to substantiate the reasonableness of their regulations. See *Beard v. Banks,* 548 U.S. 521, 536 (2006).

Each of the Petitioners Butte and Sacramento County Sheriffs proffered reasonable and legitimate governmental interests underlying their jail mail regulations. Imposing a high evidentiary burden on the sheriffs to prove that the regulations actually furthered such interests, in the absence of any evidence to the contrary, was an improper exercise of judicial authority, which alone warrants this Court's review.

CONCLUSION

The Ninth Circuit's decision below improperly creates a First Amendment right for a publisher to push past the locked doors of county jails to seek unsolicited contact with inmates, in a manner that requires county sheriffs to divert resources to accommodate private business interests. The Ninth Circuit's incorrect analysis and application of the *Turner v. Safley* test in these cases, which establishes a precedent that is irreconcilable with the First Amendment jurisprudence of this Court, has a myriad of negative and far reaching impacts for California counties. *Amicus Curiae* the California State Association of Counties respectfully urge this Court to accept review of the Petitions in these two related cases to remedy these errors.

Respectfully submitted,

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