No. _____

In the Supreme Court of the United States

JOHN MCGINNESS, SACRAMENTO COUNTY SHERIFF,
Petitioner,

v.

CRIME, JUSTICE & AMERICA, INC.,
A CALIFORNIA CORPORATION, AND
RAY HRDLICKA, AN INDIVIDUAL,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether publishers have an independent First Amendment right to demand and require distribution of unsolicited publications to inmates in penal institutions.

2. Whether the *Turner v. Safley* factors should be reconsidered or clarified when a publisher, standing alone, seeks distribution of unsolicited publications to inmates.

PARTIES TO THE PROCEEDING BELOW

The petitioner is John McGinness, in his official capacity as the Sheriff of the County of Sacramento, California (Defendant and Appellee below).

The respondents are Ray Hrdlicka, an individual, and Crime, Justice & America, Inc., a California corporation (Plaintiffs and Appellants below).

Prior to oral argument, the Ninth Circuit Court of Appeals consolidated this case with the Respondents' similar lawsuit against Perry Reniff, in his official capacity as Sheriff of the County of Butte, California. See App. 1a. Sheriff Reniff is not a party to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John McGinness, in his official capacity as Sheriff of the County Sacramento, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The divided opinion of the Ninth Circuit Court of Appeals (App. 1a) is reported at 631 F.3d 1044 (9th Cir. 2011). The order of the court of appeals denying rehearing (App. 49a), and Circuit Judge O'Scannlain's opinion, joined by seven other Circuit Judges, dissenting from the denial of rehearing (App. 52a) are unreported, but are available at 2011 U.S. App. LEXIS 18218 (9th Cir. Sept. 1, 2011). The opinion of the district court granting respondent's motion for summary judgment (App. 29a) is unreported, but available at 2009 U.S. Dist. LEXIS 67054 (E.D. Cal., Aug. 3, 2009).

JURISDICTION

The court of appeals issued its opinion on January 31, 2011 (App. 1a). A petition for rehearing and rehearing en banc was denied on September 1, 2011 (App. 49a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

1. Respondent Ray Hrdlicka and Crime, Justice & America, Inc. filed suit against Petitioner Sheriff John McGinness claiming their First Amendment rights are being violated by McGinness' refusal to specially distribute, via one of Hrdlicka's chosen methods, unsolicited copies of their quarterly periodical *Crime, Justice & America* ("CJA") to inmates in the Sacramento County jail. The jurisdiction of the district court was invoked under the Civil Rights Act, 42 U.S.C. § 1983, and under 28 U.S.C. § 1331 (general federal question jurisdiction).

Crime, Justice & America, Inc. is a private company with the primary business purpose of publishing and distributing CJA. Ray Hrdlicka is the sole owner and publisher of CJA. The free publication's target audience is county jail inmates. CJA contains general articles about the criminal justice system, along with full-page advertisements for bail bond companies and criminal defense attorneys. It attracts advertisers by promising to promote their message to thousands of jail inmates. As of February 2011, CJA is

distributed to over 70 county jails in 13 states.[1] Hrdlicka does not rely on subscriptions or requests for distribution, but instead delivers unsolicited magazines to inmates by either (1) dropping off bulk quantities for jail staff to put in common areas, or (2) mailing to inmates through the United States Postal System, on a weekly basis at a ratio of one magazine for every ten inmates. For direct mailing, Hrdlicka obtains inmate roster information through California's Public Records Act and similar laws.

Petitioner John McGinness, as the elected Sheriff of the County of Sacramento, was responsible for managing the Sacramento County Jail.[2] On average, there are 2,340 inmates at the jail per day. There are over 700 pieces of incoming mail and 600 pieces of outgoing mail per day. Approximately 60 jail staff persons process the mail during the night shift 6 days per week. Control room officers open, review, and inspect commercial publications and personal mail both for content[3] and for contraband prior to distribution. Each day, at least 24 personnel hours are devoted to mail related duties at the jail.

2. Sacramento County Sheriff's Department ("SSD") has various regulations restricting the amount

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[1] See *Distribution of Crime Justice & America Magazine*, Crime Justice & America, (February 27, 2011) http://crimejusticeandamerica.com/distribution-of-crime-justice-america-magazine.

[2] Herein all references to the jail are intended to be the Sacramento County Jail unless noted otherwise.

[3] The jail's mail policy prohibits materials that contain obscenity, tend to incite murder, arson, riot, or racism, or otherwise compromise the security of the facility.

and type of materials that can enter the jail and be kept by inmates in their cells.

SSD's policies prohibit the distribution of unsolicited commercial mail at the jail. The policy does not consider the content of any unsolicited publications, nor the postage rate under which unsolicited publications are sent. The jail will not accept publications for distribution received on a "drop-off" basis or delivery that constitutes "bulk delivery." The jail considers "bulk mail" to be any mail, regardless of volume, not individually addressed and not individually posted with U.S. postage. The purpose of prohibiting unsolicited commercial mail is to maintain security and preserve resources. By controlling the volume of mail entering the jail, the Sheriff is required to commit less of his already modest resources to categorizing, searching, and distributing incoming mail. Further, the jail prohibits distribution of bulk mail due to the precedential significance of potentially having to accept other deliveries or drop offs of bulk mail.

SSD also controls the volume and type of personal property an inmate can keep in his cell at any given time. Inmates are limited to that which will fit within two copy-paper boxes. The policy further limits an inmate to no more than one newspaper, five periodicals, and five soft-cover books. This regulation does not discriminate between items based on the manner each was acquired.

Beyond SSD's policies, there are various regulations that govern the Sheriff's oversight of the jail. Pursuant to Title 19 of the California Code of Regulations, the Sheriff is required to maintain the jail

in a neat, orderly manner, and all places not open to continuous observation must be kept free from combustible litter and rubbish at all times. The California Building and Fire codes require a neat and orderly facility.

It is undisputed that the Sheriff denies distribution of bulk mail for two primary reasons: "(1) the precedential value of potentially having to accept other deliveries of bulk mail; and (2) the potential negative effect on the workload for the jail staff." App. 32a. The Sheriff also prohibits unsolicited publications for multiple reasons including: (1) to limit inmates' ability to conceal contraband; (2) to limit the amount of materials that inmates can use to clog toilets and flood their cells and pods; (3) to limit inmates' ability to place items over the lights and windows in their cells, allowing staff to perform mandated hourly welfare checks more efficiently; (4) to limit the means by which inmates can construct weapons; and (5) to enhance inmate safety by limiting the means by which they can communicate inappropriate and/or violent messages or instructions to each other.

Despite existing regulations, inmates still regularly use their possessions for nefarious purposes. Inmates routinely use paper materials to hide contraband, start fires, flood cells, make weapons, and cover lights and windows. Magazines, specifically, are more commonly used as weapons in the jail. According to jail administration, inmates are more likely to use documents they did not solicit for nefarious purposes because they do not have any personal attachment to or interest in the materials. Even without a regular stream of incoming unsolicited publications, jail staff spends a significant amount of time searching for

contraband and attempting to prevent disruptive and dangerous incidents. Hence, more paper more problems. Especially if that paper is the unsolicited kind to which inmates have no personal attachment.

If the Sheriff were to place bulk copies of CJA in the common areas of the jail, additional staff and resources would be required to monitor the copies of the publication, remove and replace the publication, and clean up any trash or excess created by placement of the publication. This burden would only increase if, and when, other organizations or publications decide they want the same arrangement as CJA. Although the Sheriff at one time subscribed to a newspaper for inmate use, he ceased that practice.[4] The Sheriff's prior subscription consisted of one copy of the newspaper per pod. Unlike CJA, only limited copies of the newspaper were sent to the jail and were sent at the request of the Sheriff. Hrdlicka, on a weekly basis, wants to send hundreds of copies of his magazine to random inmates that have not requested it, or have the jail staff distribute hundreds of copies throughout the common areas. Regardless, the Sheriff no longer subscribes to any publication, nor does he accept materials on a drop-off basis, for distribution at the jail.

In addition to receiving legal mail, personal mail, and approved solicited commercial mail, inmates have access to information via telephones, televisions, libraries, and bulletin boards. SSD's mail policy fully

[4] The Sheriff subscribed to the Sacramento Bee until early 2006, and then subscribed to USA Today for a short period. These were paid subscriptions of approximately one copy per pod.

respects an inmate's right to request and receive appropriate publications.

3. In September 2003, Hrdlicka contacted the Sheriff to inquire about distribution of CJA to inmates at the jail. Jail administration informed Hrdlicka that he could mail individually addressed copies of CJA to inmates, but that the jail would not facilitate general distribution. In December 2004, Hrdlicka began mailing hundreds of unsolicited copies of his publication to inmates via bulk-rate mail.

In May 2005, jail administration informed Hrdlicka that in accordance with SSD's policies it would no longer accept unsolicited copies of CJA. The jail has never refused to deliver CJA to an inmate who requested it.

4. On February 5, 2008, Hrdlicka filed a § 1983 suit for injunctive relief against Sheriff McGinness, alleging that the Sheriff's refusal to distribute unsolicited copies of CJA violates the First Amendment. App. 30a. Following limited discovery, Sheriff McGinness filed a motion for summary judgment. Citing a policy of judicial restraint, the district court assumed without deciding that Hrdlicka has a First Amendment right to distribute his unsolicited publication to inmates, and applied the four-factor test established in *Turner v. Safley*, 482 U.S. 78 (1987), to determine if SSD's policy is constitutional. App. 37a. The district court granted summary judgment holding that "the undisputed facts demonstrate that [the Sheriff's] regulation concerning bulk mail and drop-off distribution is logically connected to and advances the proffered legitimate penological concerns." App. 41a. The district court

additionally determined that Hrdlicka has alternative avenues available for inmates to receive his publication (App. 43a); that Hrdlicka's proposed distribution of his unsolicited publication would increase administration, staffing, and security issues within the jail (App. 45a); and that Hrdlicka failed to identify an alternative that would satisfy the Sheriff's concerns (App. 46a). Hrdlicka appealed.

Prior to pursuing litigation against Sheriff McGinness, Hrdlicka filed similar lawsuits against the Sheriff of Butte County, Perry Reniff, and the Sheriff of Sonoma County, Bill Cogbill, to challenge those Sheriffs' similar mail policies. In both cases, the district courts concluded that the challenged prohibition relating to unsolicited publications were rationally related to and advanced legitimate penological interests.[5] Hrdlicka also appealed the district court's decision granting summary judgment to Sheriff Reniff.

5. Prior to oral arguments, the appellate court consolidated Hrdlicka's appeals regarding Sheriff McGinness and Sheriff Reniff. In a joint opinion, Judges Fletcher and Reinhardt of the Ninth Circuit Court of Appeals reversed the grants of summary judgment and remanded to the district court. App. 1a-23a. Judge N.R. Smith dissented. App. 23a.

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[5] The opinion of the United States District Court for the Eastern District of California in *Crime, Justice & America, Inc. v. Reniff*, Case No. 2:08-cv-00343-GEB-EFB, is unreported but available at 2009 U.S. Dist. LEXIS 21976 (E.D. Cal. Mar. 18, 2009). The opinion of the United States District Court for the Northern District of California in *Hrdlicka v. Cogbill*, Case No. 3:04-cv-03020-MJJ, is unreported but available at 2006 U.S. Dist. LEXIS 66453 (N.D. Cal. Sept.1, 2006).

As an initial matter, the majority found that a publisher has a First Amendment interest in distributing unsolicited literature to inmates, and thus, the *Turner* test must be applied. *Id.* at 9a. The majority indirectly concludes that anytime an individual or organization wishes to engage in expressive conduct relating to an inmate, they have a special right to access those inmates unless a jail's regulation can survive *Turner* analysis. App. 13a. The court further stated that since publishers, or any outsider for that matter, cannot achieve distribution of unsolicited materials inside a jail that "the publisher needs some form of cooperation from jail or prison authorities in order to distribute its literature." App. 9a.

Analyzing the first *Turner* factor—whether there is a "valid, rational connection" between the regulation and the asserted legitimate governmental interest—the majority found that the Sheriffs' lack of specific evidence showing how acceptance of CJA would negatively impact security and jail resources, or would set an unworkable precedent, created genuine issues of material fact for trial. The court acknowledged that the Sheriff had various legitimate reasons for prohibiting unsolicited publications, but concluded he did not provide enough evidence of how the ban achieved those goals. App. 14a.

Sheriff McGinness' asserted goal of maintaining jail security was undercut because (1) at one time the jail distributed a few copies of a subscribed to newspaper, (2) the jail did not keep specific statistics of the type or origin of the paper used by intimates in past destructive acts, and (3) there is a separate regulation controlling the amount and type of materials an

inmate can keep in his cell. App. 15a. It was therefore "unclear the degree to which allowing distribution of CJA" would adversely affect jail security. App. 17a.

Despite evidence of the substantial amount of mail entering the jail and the considerable time already use to process that mail, it was not enough to support the goal of preserving jail resources because the Sheriff did not provide an "estimate of how many additional personnel hours would be required if CJA were delivered to the jail." App. 17a. The court found there was not enough evidence to support the Sheriff's legitimate concern that allowing CJA "would set an unworkable precedent" and "could obligate the [j]ail to accept any other publications" because jail administration could only "recall 'maybe three'" prior "requests to distribute unsolicited publications to inmates." App. 18a.

Analyzing the second *Turner* factor— "whether there are alternative means of exercising the right that remain open to prison inmates"—the majority acknowledged that both Sheriffs "will distribute CJA to inmates who request it." App. 19a. The court nevertheless believed that there was still "a material question of fact whether, as a practical matter, Plaintiffs can effectively reach county jail inmates if they can deliver CJA only upon request." *Id.* The court noted that CJA contains bail bond advertisements, and found it significant that if inmates could only receive CJA after submitting a request and waiting to receive it, "the advertising in CJA will be of little to no use." *Id.*

Analyzing the third *Turner* factor—"the impact accommodation of the asserted right will have on

guards and other inmates, and on the allocation of prison resources generally"—the court reasoned that since the Sheriffs' evidence regarding the first *Turner* factor was insufficient, there were "material questions of fact as to whether, and to what degree, the jails would be forced to expend significant additional resources if CJA is delivered by either of the two methods." App. 21a. Finally, the court analyzed the fourth factor—"whether there are ready alternatives that fully accommodate the prisoner's rights at a minimal cost to valid penological interests"—and opined that because CJA is distributed in other counties, "the response of the two jails in this case may be exaggerated." App. 22a.

The majority could not "determine as a matter of law that Defendants have justified banning the unsolicited distribution of CJA to county jail inmates," and reversed and remanded both cases. App. 23a.

In his dissent, Judge Smith adamantly disagreed with the majority's conclusion that publishers have a special right to demand distribution of unsolicited publications to inmates. App. 27a. In his view, the majority erred by failing to abide by the separation of powers and not according deference to jail authorities. App. 26a.He found that *Turner* should not have been applied in this case because the Court in *Turner* was focused on formulating a standard of review for "*prisoners*' constitutional claims," App. 25a. Judge Smith reasoned that just as members of the press have no "special right of access" to state prisons, Hrdlicka has no "special right to demand that a Sheriff accept one of his chosen methods of distribution." App. 27a. He explained that while it may be costly for Hrdlicka to generate an actual interest in his publication among

subscribers, "the loss of cost advantages does not implicate his First Amendment rights." App. 27a (quoting *Jones v. North Carolina Prisoners' Union, Inc.,* 433 U.S. 119, 130-131 (1977)).

Judge Smith also argued that the majority's *Turner* analysis demonstrated "the problems with finding a special First Amendment right for Hrdlicka's business model." App. 27a. He observed that in analyzing whether Hrdlicka has alternative means to express his rights, the majority reasoned that if inmates must request CJA, the bail bond advertising would lose its value, App. 28a, which was an improper consideration because the *Turner* test "simply does not accommodate valuations of content." App. 28a (quoting *Shaw v. Murphy*, 532 U.S. 223, 230 (2001)). Judge Smith explained that because of the court's failure to follow *Shaw*, jail and prison administrators must allow all unsolicited publications into their facilities, or evaluate the content of unsolicited publications on a case by case basis, which is "impossible under Supreme Court precedent." App. 27a-28a. Rather than place jail and prison administrators in an impossible position, he concluded that the "simpler and saner rule is that Hrdlicka has no special First Amendment right to demand that a prison agree to one of his distribution methods." App. 28a.

6. Both Sheriff McGinness and Sheriff Reniff petitioned the Ninth Circuit for rehearing or rehearing en banc. In a joint opinion, the full court of appeals denied the Sheriffs' requests for rehearing. App. 49a-52a. Judge Reinhardt, joined by Judge Fletcher, wrote a brief opinion concurring in the denial of the petition, and restating his belief that "because the value of CJA to inmates is greatest when they first arrive in the jail,

it is unrealistic to insist, as a condition for applying the *Turner* test, that inmates have already subscribed to CJA." App. 52a.

Judge O'Scannlain, joined by seven other judges, wrote a lengthy dissent, specifically noting that the panel's decision "is completely untethered from Supreme Court precedent," "in considerable tension with [Ninth Circuit] case law," further "complicates the 'difficult undertaking of prison administration,'" and "needlessly muddles our First Amendment jurisprudence." App. 52a-61a. He observed that the court committed a series of errors by wrongly applying *Turner* and in its application of the *Turner* factors. App. 51a-52a. For example, although the issue was whether the Sheriffs' content-neutral policies have a logical connection to a legitimate penological interest, the panel framed the issue as whether the Sheriffs were justified in their "refusal to distribute CJA." App. 23a, 52a. Judge O'Scannlain explained that because of that fundamental misapplication of *Turner*, the court failed to consider "the impact its ruling produces beyond these jails and this publication" and the "many practical concerns that will arise from requiring jails to distribute an unknown quantity of unsolicited mail." App. 52a. He noted that the court improperly considered the content of CJA, which placed jail and prison administrators in the impossible predicament of having to "allow all unsolicited publications to be distributed, or make a case by case determination of the quality of each publication." App. 52a.

Finally, Judge O'Scannlain recognized that although the burden was on Hrdlicka to demonstrate that the Sheriffs's policies are arbitrary or irrational, the court improperly shifted an "onerous burden" onto

the Sheriffs to justify their "refusal to distribute CJA" with heightened and exacting evidence, which conflicted with the decisions in *Beard v. Banks*, 548 U.S. 521 (2006) and *Overton v. Bazzetta*, 539 U.S. 126 (2003). App. 51a-52a.

7. This petition follows.

REASONS TO GRANT CERTIORARI

The Ninth Circuit decided an important and recurring issue of publishers' First Amendment rights in a manner that conflicts with Supreme Court precedent. The lower court resolved this case by expanding First Amendment rights beyond that recognized by this Court or any other circuit court. For the first time, publishers have a special right to require distribution of unsolicited publications to inmates. Review is warranted because the ruling conflicts with this Court's First Amendment precedents. This Court recognizes that the press does not have a constitutional right of access to inmates greater than that of the public, and that a publisher's First Amendment right to access an inmate in jail or prison is dependent upon an inmate's expression of interest in the publisher's message.[6] In this case, no inmate has been refused a requested copy of CJA.

Contrary to the view of the majority below, *Turner* does not apply to all prison regulations involving communications with inmates. Instead, "*Turner* decided only the standard of review to apply when a

[6] See *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989); *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Procunier v. Martinez*, 416 U.S. 396, 408 fn. 11 (1974).

prison regulation impinges upon *inmates'* First Amendment rights." App. 52a (citing *Turner*, 482 U.S. at 89). In morphing the test to evaluate whether a publisher's, and not an inmate's, constitutional rights were violated, the Ninth Circuit's application of the *Turner* test is inconsistent with accepted Supreme Court precedents, common sense, and public policy. Evaluating the jail's regulation, the lower court failed to accord deference to the undisputed professional judgment of jail authorities, shifted the burden of persuasion to the Sheriff, and considered the content of the publication along with the appeal and time-sensitive nature of the information to inmates.

Prompt resolution of this issue is critically important to prison and jail administration throughout the Ninth Circuit and the United States. The court of appeals' decision seriously impedes the government's ability to efficiently oversee penal institutions and paves the way for the already mounting flood of publications to require distribution of unsolicited materials in penal institutions. As the questions presented in this case are important, and the court of appeals erred in its decision, this Court should intervene to resolve the matter.

A. The Ninth Circuit Created A First Amendment Right For Publishers Where The Supreme Court Consistently Found None Existed.

This Court instructs that the initial step when considering a First Amendment claim is to determine whether the expressive activity in the applicable context is speech protected by the First Amendment. *Cornelius v. NAACP Legal Defense and Educational*

Fund, Inc., 473 U.S. 788, 797 (1985). In this case, the lower court skipped this first step, assumed the publisher had a First Amendment right to distribution, and jumped immediately to evaluating whether the regulation prohibiting distribution was reasonably related to legitimate penological goals. Prior to the majority's decision, no outsider (whether a publisher, news reporter, or other) had a First Amendment interest or freestanding right to unsolicited contact with inmates. *Pell v. Procunier*, 417 U.S. 817, 834 (1974). There existed no Supreme Court or circuit authority acknowledging a First Amendment right of a publisher to demand and require distribution of its unsolicited materials to inmates. Instead, Supreme Court precedent establishes that in the context of jails and prisons, it is the request of the inmate to receive the publication that creates the First Amendment right on behalf of the publisher.[7] Disregarding that precedent the Ninth Circuit held that "[a] First Amendment interest in distributing and receiving information does not depend on a recipient's prior request for that information." App. 9a. When an inmate has not requested the publication, the contours of the First Amendment should not extend so far as to grant a publisher the right to demand and require distribution of unsolicited materials to inmates,

[7] *Thornburgh*, 490 U.S. at 408 ("There is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."); *Martinez*, 416 U.S. at 408, fn. 11 (While personal correspondence between inmates and those who have a particularized interest in communicating with them implicates the rights of the sender, "different considerations may come into play in the case of mass mailings.")

especially when no other individual would be able to do the same.

No other circuit has recognized a First Amendment right of publishers to demand and require distribution of unsolicited publications to inmates.[8]

1."[P]risons are one of a few 'public institutions which do not perform speech-related functions at all... [where] the government is free to exclude even peaceful speech and assembly which interferes in any way with the functioning of those organizations." App. 24a (quoting *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978)).

In *Pell*, four inmates and three journalists brought suit challenging a prison regulation that prohibited media interviews with specific inmates. The court analyzed the journalists' First Amendment rights separate from the inmates' rights. 417 U.S. at 829. The Court affirmed that the First Amendment "bars government from interfering in any way with a free press," but elaborated that "[t]he Constitution does not, however, require government to accord the press special access to information not shared by members

[8] See *Jones v. Salt Lake County*, 503 F.3d 1147, 1162 (10th Cir. 2007) (A publisher "has a First Amendment interest in providing its magazine to inmates who subscribe to it."); *Montcalm Publ. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996) (Recognizing a publisher has a First Amendment interest in communicating with its inmate-subscribers, but specifically recognizing that the right may differ if mass mailings were involved.); *Prison Legal News v. Livingston*, Case No. C-09-0296, 2011 U.S. Dist. LEXIS 385, *24-25 (S.D. Tex. Jan 4, 2011) (Publisher seeking to distribute unsolicited books to prisoners could not state a valid First Amendment claim without demonstrating that at least one inmate willingly sought the publisher's books.).

of the public generally." *Id.* at 834. The Court also opposed the suggestion "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally." *Id.* at 834-35.

In accordance with *Pell*, publishers, as members of the press[9], should not have a special right of access to distribute their unsolicited materials, and the Sheriff should not have a duty to make available to publishers methods of distribution not available to the public. Members of the public cannot drop off materials, regardless of the amount, at the jail and demand that jail staff distribute it as requested. Instead, member of the public must send properly addressed and posted mail directly to individual inmates if they wish to communicate. Here, Hrdlicka demands a special right, as a publisher, not granted to the public. In the face of Supreme Court precedent to the contrary, the Ninth Circuit obliged.

"[T]he only time the [Supreme] Court has ever acknowledged a publisher's 'interest in access to prisoners' is when those prisoners 'through subscription, willingly seek their point of view.'"App. 55a (quoting *Thornburgh*, 490 U.S. at 408). In *Thornburgh*, three publishers joined a suit brought by inmates challenging the rejection of various incoming publications by prison officials. 490 U.S. at 403. The court held that the publishers had a First Amendment right to access prisoners ***who subscribed to their***

[9] See *Lovell v. Griffin*, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.")

publication because those inmates ***by subscribing*** had sought the publisher out and expressed interest in its message. *Id.* at 408. The court did not find that publishers have an unequivocal First Amendment right of access to prisoners.

Prior to the majority's ruling in this case, the Ninth Circuit evaluated a ban on non-subscription bulk mail and catalogs in the jail. *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005). In *Lehman*, the court specifically noted that each piece of mail sent by the publisher was the result of an inmate's request. The court further recognized that the publisher was not trying to send its publication to all inmates regardless of a request. *Id.* at 700-01 ("[I]t is the fact that a request was made by the recipient, and not the fact that the recipient is paying to receive the publication, that is important.")

Hrdlicka is not attempting to communicate with inmates who have expressed an interest in receiving his publication. No inmate's First Amendment rights are implicated. Instead, Hrdlicka seeks a special rule, under the First Amendment, granting him an automatic right to require jail administration to serve as a "*de facto* distribution arm" for his publication, or face burdensome litigation. App. 24a and 52a.

2. The Ninth Circuit supports its holding that "[a] First Amendment interest in distributing and receiving information does not depend on a recipient's prior request for that information" with case law regarding distribution of unsolicited advertisements in public fora. App. 9a (citing *Klein v. City of San Clemente*, 584 F.3d 1196, 1204-05 (9th Cir. 2009) and *Martin v. City of Struthers*, 319 U.S. 141, 143, 148-49

(1943)). The lower court sees no reason why the principles of those cases should not apply to a publisher's interest in distributing unsolicited materials within penal institutions. App. 9a. The Ninth Circuit fails to account for Supreme Court precedent distinguishing public from non-public fora.[10]

In *Klein*, activists challenged a city's anti-litter ordinance that prohibited placing leaflets on cars parked on city streets claiming that it violated their First Amendment free speech rights. The court undertook a time, place, and manner analysis because "placing leaflets with a political message on cars is expressive conduct," and that expressive conduct occurred in a public forum. 584 F.3d at 1201 fn. 2 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). In *Martin*, the court held an ordinance that prohibited individuals from knocking on residential doors for the purpose of distributing handbills invalid because it was "in conflict with the freedom of speech and press." 319 U.S. at 149.

This Court has expressed that in the context of a nonpublic forum, "[t]he guarantees of the First Amendment have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" *Greer v. Spock*, 424 U.S. at 838 (quoting *Adderley*, 385 U.S. at 48). "The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is

[10] *Cornelius*, 473 U.S. at 809; *Jones*, 433 U.S. at 130-31; *Adderley v. Florida*, 385 U.S. 39 (1966); *Greer v. Spock*, 424 U.S. 828 (1976).

lawfully dedicated." *Adderley*, at 47.[11] A main problem with the ordinance in *Martin* was that it substituted the judgment of the community for the judgment of the individual homeowner, an understandable injustice in the context of a public forum. However, in prisons and jails, the judgment of prison administration should take priority and should be substituted for the judgment of inmates in determining how mail will be received and distributed.[12] There is no general right of distribution in non-public fora.[13] Therefore, *Klein* and *Martin* are easily distinguishable from the circumstances of this case.

It is respectfully submitted that a publisher's distribution of unsolicited copies of its publication to inmates does not constitute protected speech under the First Amendment.

B. The Ninth Circuit's Misapplication Of The *Turner* Factors Demonstrates The Need For Clarification From This Court.

In *Turner*, this Court promulgated a reasonableness standard to judge prisoners' constitutional claims, holding that "when a prison regulation impinges on *inmates'* constitutional rights,

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[11] See also *Cox v. Louisiana*, 379 U.S. 559, 560-64 (1965).

[12] See *Turner v. Safley*, 482 U.S. at 84-85; *Procunier v. Martinez*, 416 U.S. at 406; *Beard v. Banks*, 548 U.S. 521, 529-30 (2006); *Overton v. Bazzetta*, 539 U.S. 126, 132 (U.S. 2003).

[13] See, e.g., *Cornelius*, 473 U.S. at 809 ("The First Amendment does not demand unrestricted access to a non-public forum…"); *Adderley*, 385 U.S. at 47; *Greer*, 424 U.S. at 838 (no generalized constitutional right to distribute leaflets at a military base).

the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89 (emphasis added). In determining reasonableness, the Court listed four relevant factors. First, whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89-90 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, "whether there are alternative means of exercising the right that remain open to *prison inmates*." *Id.* at 90 (emphasis added). Third, the impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources generally. *Id.* Finally, whether there are ready alternatives that fully accommodate the *prisoner's* rights at a minimal cost to valid penological interests. *Id.* at 90-91 (emphasis added).

1. The Test Established In Turner v. Safley Was Inappropriately Applied To a Prison Regulation That Did Not Affect Inmate Rights

Turner analysis was not justified in this matter because the four-factor test only governs prison regulations affecting inmate rights, not the rights of those seeking access to inmates standing alone. "*Turner* decided only the standard of review to apply when a prison regulation impinges upon *inmates'* First Amendment rights." App. 52a (citing *Turner*, at 89). The Ninth Circuit expanded the scope of the *Turner* test to apply to all prison regulations involving communications with inmates.

As the *Turner* test was established to deal with *inmates'* rights, significant issues arise when the test

is applied, as here, to evaluate only a publisher's rights. As Judge O'Scannlain points out in his dissent, "what does it mean to consider 'whether there are alternative avenues that remain open to the inmates to exercise the right' or 'the impact that accommodating the asserted right will have on other guards and prisoners' when no one contends that an inmate's rights are at risk?"App. 57a. In morphing the test to evaluate whether a publisher's, and not an inmate's, constitutional rights were violated, the Ninth Circuit flouts the purpose behind the *Turner* test, which was to balance prisoners' First Amendment rights and the government's ability to operate efficient and safe penal institutions. The lower court "inexplicably provides special rights to Hrdlicka because he was attempting to communicate with someone who has been incarcerated."App. 57a.

2. The Ninth Circuit Erred In Its Application of the Turner Factors by Failing to Give Deference to Jail Authorities, Shifting the Burden of Persuasion, and Making Content Evaluations

a. This Court stated that its task in *Turner* was "to formulate a standard of review for *prisoners'* constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" 482 U.S. at 85 (emphasis added) (quoting *Martinez*, 416 U.S. at 406). This Court specifically stated:

> "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of

> which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have…additional reasons to accord deference to the appropriate prison authorities."

482 U.S. at 84-85.

Although this Court's precedent requires substantial deference to the judgment of prison administrators, the Ninth Circuit disregarded the undisputed evidence and the Sheriff's judgment, and required the Sheriff to provide more exhaustive evidence regarding incidents of paper related problems and the amount of resources required to accommodate Hrdlicka's proposed distribution. It is undisputed that increasing the amount of paper in the jail increases the amount of materials available to inmates to use for improper and nefarious purposes. It is undisputed that in the jail administration's experience, inmates will use paper to clog toilets, cover lights, create weapons, conceal contraband, etc. It is undisputed that in the opinion of jail administration, inmates are more likely to use non-personal items for improper and nefarious purposes. It is undisputed that other jail regulations do not control an inmate's access to materials that he has no personal attachment to or interest in. It is undisputed that at the time the Sheriff denied distribution of CJA the jail's administration had concerns that distribution of unsolicited publications would pose a security threat. Contrary to Supreme

Court precedent, the lower court rejects the undisputed professional judgment of jail administrators and interjects its own.[14]

Despite the foregoing, the Ninth Circuit opined that it had a better solution than deny distribution of unsolicited materials. The Ninth Circuit implies that jail administration should work with publications to establish workable distribution methods and schedules. App. 21a. Essentially, the Ninth Circuit requires the Sheriff to powwow with publishers to accommodate the publisher's desire to send its materials to inmates that have not even expressed an interest in receiving them. Instead of requiring the publication to devote the time and effort to build its readership and expand its market, by shifting the burden to the Sheriff, it can now "commandeer" the jail for its "personal gain." App. 59a.

The Ninth Circuit has applied the *Turner* test now in five cases involving the distribution of literature to inmates. In each case, the circuit court found that that jail's regulations were unconstitutional.[15] For a court claiming to "evaluate the policies of a jail or prison with 'due regard for the inordinately difficult undertaking that is modern prison administration,' recognizing that 'certain proposed interactions, though

[14] See *Beard*, 548 U.S. at 529-30 (With regard to disputed matters of professional judgment, the court's inferences must accord deference to the views of prison authorities).

[15] See *Crofton v. Roe*, 170 F.3d 957, 960-61 (9th Cir. 1999); *Prison Legal News v. Cook ("PLN I")*, 238 F.3d 1145, 1151 (9th Cir. 2001); *Morrison v. Hall*, 261 F.3d 896, 898 (9th Cir, 2001); *Prison Legal News v. Lehman ("PLN II")*, 397 F.3d 692 (9th Cir. 2005); App. 1a-28a.

seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison,'" the Ninth Circuit has yet to find that a jail authority's regulation was reasonable. App. 11a (quoting *Thornburgh*, 490 U.S. at 407 (internal quotations omitted)). When dealing with "challenges to jail or prison regulations limiting outside contact with prisoners" this Court consistently recognizes the need to balance "constitutional imperatives," and practice judicial restraint. App. 54a (citing *Turner*, 482 U.S. at 84-85, and *Beard*, 548 U.S. at 528). Despite this precedent, the Ninth Circuit failed to accord deference to the undisputed professional judgment of jail authorities. As Judge O'Scannlain expressed in his dissent, "federal judges must allow prison officials to 'reach[] experienced-based conclusion[s]' about which 'policies help to further legitimate prison objectives.'"App. 60a.

b. Supreme Court precedent places the burden on Hrdlicka "to show that the regulations were not supported by any rational basis." App. 59a (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 547-51 (1983)).[16] According to *Overton v. Bazzetta*, when a prison regulation is challenged, "[t]he burden… is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." 539 U.S. at 132 (citing *Jones*, at 128).[17] Although at the summary judgment stage, the court was required to "draw 'all justifiable inferences' in [Hrdlicka's]

[16] See also *Beard*, 548 U.S. at 529 (citing *Overton*, 539 U.S. at 132 (the party challenging the prison regulation "bears the burden of persuasion.")).

[17] See also *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987); *Shaw*, 532 U.S. at 232.

'favor,'… [it] must distinguish between evidence of disputed facts and disputed matters of professional judgment." *Beard*, 548 U.S. at 529-530 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Concerning disputed matters of professional judgment, the court's inferences "must accord deference to the views of prison authorities." *Id.* at 530 (citing *Overton,* at 132). As the challenging party, Hrdlicka needed to offer evidence sufficient to rebut the overwhelming evidence that the Sheriff's regulation is rationally connected to the jail's need to maintain security, efficiency, and order.

The Ninth Circuit placed the burden on the Sheriff, and for the first time imposed upon "jail administrators the onerous burden of showing 'the degree to which the[] purposes [behind the regulations] are actually served by a refusal to allow' distribution" of unsolicited mail. App. 59a. Instead of evaluating whether the regulation rationally furthered a legitimate penological purpose, the Ninth Circuit required the Sheriff to show that the regulation had actually advanced the stated purpose. App. 14a-16a. This approach flatly contradicts *Shaw v. Murphy*, which required only that the connection between the restriction and the purpose behind it not be arbitrary or irrational. 532 U.S. at 239.

Again, it is undisputed that increasing the amount of paper in the jail increases the amount of materials available to inmates to use for improper and nefarious purposes. It is undisputed that in the jail administration's experience, inmates will use paper to clog toilets, cover lights, create weapons, conceal contraband, etc. It is undisputed that in the opinion of jail administration, inmates are more likely to use

non-personal items for improper and nefarious purposes. It is undisputed that other jail regulations do not control an inmate's access to materials that he has no personal attachment to or interest in. It is undisputed that at the time the Sheriff denied distribution of CJA the jail's administration had concerns that distribution of unsolicited publications would pose a security threat. Still, the Ninth Circuit determined it was "unclear the degree to which allowing distribution of CJA in the jails would produce additional clutter in inmates cells or otherwise adversely affect jail security."App. 17a. Because the jail did not keep records of the origin or type of paper inmates used to clog toilets, cover lights, etc., the Sheriff had not done enough to show that unsolicited publications had a higher potential of being used for nefarious purposes, even though the undisputed professional judgment of jail administration established otherwise. App. 15a.

In the Sheriff's professional judgment processing and distribution of unsolicited commercial publications, whether mailed in bulk or dropped off, constitutes an inefficient use of his limited and varying resources. The more copies of unsolicited publications arriving at the jail for distribution, the more time and resources that are used to process and distribute those publications, leaving fewer resources available to manage the jail and maintain security. Despite evidence of the tremendous amount of time already needed to inspect incoming mail, not including unsolicited copies of CJA or other unsolicited publications, the Ninth Circuit demanded specific evidence of "how many additional personnel hours would be required if CJA were delivered to the jail…"App. 17a.

It is undisputed that jail administration had concerns that allowing unsolicited copies of CJA would "set an unworkable precedent for the [j]ail and could obligate the [j]ail to accept any other publications that appeared on the doorstep."App. 18a. The Ninth Circuit disregarded these concerns and the jail administration's professional judgment because the administration could only recall three prior incidents of unsolicited publications requesting distribution in the jail. *Id.* Apparently, three was not enough to make the concern legitimate.

Contrary to this Court's precedent, the Ninth Circuit imposed its judgment for that of jail administration and required the Sheriff to do far more than show "a valid, rational connection" between the regulation and his interests in preserving resources and maintaining an efficient, secure facility. See *Turner*, 482 U.S. at 89; *Shaw*, 532 U.S. at 239.

c. The second *Turner* factor evaluates "whether there are alternative means of exercising the right that remain open to *prison inmates*." *Turner*, 482 U.S. at 89-90 (quoting *Block v. Rutherford*, 468 U.S. at 586). Despite the Supreme Court's direction to look at whether alternative avenues remain open to inmates, the lower court only considered the alternatives available to Hrdlicka for communicating with inmates. App. 19a-20a. Further, the Ninth Circuit considered not only whether alternative avenues existed, but also whether those alternatives were the least restrictive;

precisely the type of decision-making the *Turner* Court wanted to avoid.[18]

Despite the requirement to evaluate the alternative avenues available to *inmates*, the lower court disregarded the undisputed fact that inmates could at any time request to receive CJA. Further, inmates had access to the type of information contained in CJA through phone books, the jail's libraries, television, bulletin boards, and unlimited interaction with their attorneys. App. 33a. In regard to Hrdlicka's alternative avenues, the Ninth Circuit recognized the following: (1) Hrdlicka could mail the publication directly to inmates if individually addressed to specific inmates and properly posted by the U.S. Post Office; (2) if inmates subscribed to or requested CJA the Sheriff would not deny its delivery; and (3) Hrdlicka could advertise his publication in the phone book or on television to gain readership, both of which are available to inmates. App. 19a-20a. The Ninth Circuit simply decided that those alternatives were not good enough. *Id.* at 20a. That type of analysis directly conflicts with this Court's precedent that "[w]here 'other avenues' remain available for the exercise of the asserted right...courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials... in gauging the validity of the

[18] See *Turner*, 482 U.S. at 89 ("Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand.")

regulation.'" *Turner* at 90 (quoting *Jones,* 433 U.S. at 131 and *Pell,* 417 U.S. at 827).

d. The Ninth Circuit's decision conflicts with *Shaw v. Murphy*, which established that the level of constitutional protection cannot be based upon the content of the communication and that the *Turner* test "does not accommodate valuations of content." 532 U.S. at 230. The lower court's decision grants special rights to publications sent to inmates that contain time sensitive content appealing to the inmate population. App. 20a.

Instead of accepting the undisputed alternatives for communication available to Hrdlicka and inmates, the lower court considered the time sensitive nature of the publication's advertising. App. 20a ("Inmates typically want information about bail bonds and attorneys as soon as they arrive at the jail. For those who receive CJA only after a significant wait, the advertising in CJA is of little or no use.") The Ninth Circuit defies Supreme Court precedent by inviting jail administration to consider the content of a publication and "make a case by case determination of the quality of the publication" when deciding whether to allow it within jail walls. *Turner*, at 90 (citing *Pell*, 417 U.S. at 828 and *Bell v. Wolfish*, 441 U.S. 520, 551 (1979)).[19] Public officials may not constitutionally prohibit the exercise of First Amendment rights according to their own conception of what may be the socially beneficial course.[20] Despite significant Supreme Court precedent

[19] See also *Shaw*, 532 U.S. at 230 (the *Turner* test "does not accommodate valuations of content.").

[20] See *Cox*, 379 U.S. at 557-58; *Saia v. New York*, 334 U.S. 558 (1948).

to the contrary, the Ninth Circuit holds prison administration to stricter standards for publications sent to inmates that contain time sensitive content appealing to the inmate population. App. 20a.

C. The Questions Presented Are Important And Recur Frequently.

This issue is critically important to administration of penal institutions in the Ninth Circuit and will have nationwide implications for the First Amendment rights of publishers and other sources of news and information in non-public forums, specifically jails and prisons. The court of appeal's decision, if allowed to stand, will hinder the ability of jail authorities to control the quantity of mail entering its facility, thus placing an undue burden on the jail's limited and varying resources, ultimately resulting in greater security risks. The decision threatens to open the floodgates to all unsolicited publications (subscription based or not), the press, and free citizens seeking to target the inmate audience. It will result in a dramatic increase in litigation over which materials deserve distribution, by what means, and when. This will result in an uncontrollable snowball effect that will bury jail resources.

1. According to jail authorities, inmates are more likely to use paper and other materials that they have no personal attachment to or interest in for nefarious purposes. The lower court's decision forces Sheriff McGinness and sheriffs of all other counties within the Ninth Circuit to furnish inmates with exactly the type of materials more likely to be used for improper acts simply because a publisher unilaterally decides it wishes to communicate with inmates. Every item that

enters the jail is one more item that can be used as a tool of destruction. Regulations, such as the one in question, that seek only to limit unnecessary, unrequested, and unwanted materials are no longer lawful. This exposes penal institutions to unknown quantities of unsolicited mail. Now, jail administration must not only consider inmates' rights and the welfare of the facility, but also the interests of third party solicitors.

2. The lower court's decision exposes jails and prisons to the demands of not only Hrdlicka but to those of already existing and future publishers seeking to expand their readership and grow their business. Over the past decade, penal institutions have been introduced to the recurring trend of newsletters and other publications geared to inmates. These types of publications lure advertisers who specifically target incarcerated individuals (e.g., criminal defense attorneys and bail bonds agents) with the ability to access a literally captive audience. While containing some information that may aid inmates, the overwhelming purpose is to solicit business for both advertisers and the publication in general.

Shortly after the Ninth Circuit's decision, another prominent publisher and litigator in this arena, Prison Legal News ("PLN"), filed suit against the Sacramento County Sheriff, in part, over the Sheriff's refusal to distribute PLN's unsolicited brochures to inmates. Since 1999, PLN has filed lawsuits all over the country challenging jail regulations that affect distribution of its publication. In its recent action against the County of Sacramento and another action in a Texas District Court, PLN seeks to distribute materials not requested

by inmates.[21] Further, following the Ninth Circuit's refusal to hear this case *en banc*, the publisher of *In Your Defense Magazine*, whose goal is to assist criminal defense attorneys in advertising to inmates[22], cited the court's decision in its demand that the Riverside County Sheriff distribute its unsolicited publication.

Various other publications throughout the nation are also marketed to inmates, and the lower court's decision is not limited to CJA, or even written publications. Although the Ninth Circuit's opinion discusses only publishers' rights, the scope of the rule actually applies to all outsiders who seek access to inmates, because "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."App. 52a (quoting *Pell*, 417 U.S. at 834 and citing *Houchins v. KQED, Inc*., 438 U.S. 1, 11-12 (1978)).

The decision is far-reaching and will unnecessarily burden and confuse penal institutions. The Ninth Circuit implies that jail administration should work with publications to establish workable distribution methods and schedules. App. 21a. It imposes on the administration the burden of assisting publications like CJA in building their reader base and getting out their message. App. 9a ("the publisher needs some form of cooperation from jail or prison authorities in order to distribute its literature.") This time it is

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[21] See *Prison Legal News v. Jones, et al.,* Case No. 2:11-cv-00907, filed April 5, 2011; *Prison Legal News v. Livingston*, Case No. C-09-296, 2011 U.S. Dist. LEXIS 385 (S.D. Tex. Jan 4, 2011).

[22] See *Home Page*, In Your Defense Magazine, http://inyourdefensemag.com.

Hrdlicka asking the court to create a special rule protecting his chosen method of distribution, but he is sure not be the last or even the least demanding. There is nothing to prevent organizations or individual citizens from demanding distribution of their message in the jail and requiring authorities to work with them to develop a means to achieve their goals. App. 52a.

Additionally, the Ninth Circuit's decision implies that certain publications may be more worthwhile of distribution due to their appeal to inmates and the time sensitive nature of their information. Therefore, the jail must either allow and distribute all unrequested publications or make a case-by-case determination of the quality of the publication, which would expose the jail to additional constitutional claims for failing to apply restrictions in a neutral fashion. App. 27a-28a.[23] Jail administration will need to review the type and content of the publication, beyond the typical screening out of materials that are obscene, violent, etc., to determine if it has particular relevance to its facility before imposing a regulation. Due to the burden placed on jail administrators, jails will be forced to distribute and wait to see how their facilities are affected before they can adequately support a regulation. This confusing and unworkable standard has the potential to result in additional and frequent litigation for jail administration.

[23] See also *Turner*, 482 U.S. at 90; *Pell*, 417 U.S. at 828; *Bell*, 441 U.S. at 551.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 22, 2011

Counsel for Petitioner

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed January 31, 2011]

No. 09-15768
D.C. No. 2:08-cv-00343-GEB-EFB

RAY HRDLICKA, an individual; CRIME, JUSTICE & AMERICA, INC., a California corporation, *Plaintiffs-Appellants,*	)
v.	)
PERRY L. RENIFF, in his official capacity of Sheriff of the County of Butte, California, *Defendant-Appellee.*	)

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, United States District Judge,
Presiding

No. 09-16956
D.C. No. 2:08-cv-00394-FCD-EFB

RAY HRDLICKA, an individual; CRIME, JUSTICE & AMERICA, INC., a California corporation, *Plaintiffs-Appellants,*	)
v.	)
JOHN MCGINNESS, Sacramento County Sheriff, *Defendant-Appellee.*	)

OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, Senior United States
District Judge, Presiding

Argued and Submitted
May 13, 2010—San Francisco, California

Filed January 31, 2011

Before: Stephen Reinhardt, William A. Fletcher and
N. Randy Smith, Circuit Judges.

Opinion by Judge William A. Fletcher;
Dissent by Judge N.R. Smith

COUNSEL

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Paul R. Coble, Martin J. Mayer, JONES & MAYER, Fullerton, California, for Amicus Curiae.

OPINION

W. FLETCHER, Circuit Judge:

Plaintiffs, Ray Hrdlicka and his publication Crime, Justice & America ("CJA"), brought two suits claiming that their First Amendment rights are being violated by the mail policies at two county jails in California that refuse to distribute unsolicited copies of CJA to inmates. The district courts in each case granted summary judgment to defendants after applying the four-factor test of *Turner v. Safley*, 482 U.S. 78 (1987).

In these related appeals, we conclude that questions of material fact preclude summary judgment to defendants. On this record, we cannot hold as a matter of law under *Turner* that defendants have sufficiently justified their refusal to distribute

unsolicited copies of CJA to jail inmates. We therefore reverse and remand to the respective district courts.

I. Background

Ray Hrdlicka, a former bail bondsman, began publishing CJA in 2002. CJA addresses criminal justice topics relevant to jail inmates. One recent issue of the publication included, for example, a section describing the steps between a felony arrest and conviction, an article on firearms enhancements to sentences, and a page of humor. Approximately three-fourths of each publication contains such content. The remainder contains advertisements for bail bond agents and lawyers. CJA attracts advertisers by promising to get their message in front of thousands of jail inmates who are in immediate need of their services. Since 2002, CJA has published 14 editions and over 1 million copies. CJA is currently distributed in jails in more than 60 counties in 13 states, including 32 county jails in California.

The Principal Librarian for the California Department of Corrections has recommended CJA as an acceptable donation to the California Department of Corrections Law Libraries. Fortune Small Business described CJA as a "surprisingly professional-looking 40-page upstart quarterly with articles written by lawyers and other criminal-justice-system professionals and spotlighting issues most glossies prefer to avoid." The record contains over 100 letters of appreciation from inmates who have found the publication valuable.

CJA does not rely on subscriptions or requests for distribution. Instead, CJA delivers unsolicited

magazines to inmates through one of two methods. If a jail agrees to accept general distribution, CJA delivers weekly supplies of magazines that jail staff then leave in common areas of the jail. If a jail declines to accept general distribution, CJA mails individually addressed issues directly to some inmates after obtaining inmate roster information. Under either method, CJA is typically delivered weekly at a ratio of about one copy for every ten inmates.

A. *Hrdlicka v. McGinness*

In September 2003, Plaintiffs contacted the Sacramento County Sheriff's Office to inquire about distributing CJA to inmates in the jail in Sacramento County, California. Captain Scott Jones initially responded that individually addressed copies of CJA could be delivered to jail inmates, but that the jail would not facilitate general distribution. Plaintiffs made several requests for electronic copies of the inmate roster. These requests were denied, but Captain Jones informed Plaintiffs that a daily list of inmates was available in the jail lobby. Using that list, in December 2004 CJA began mailing individually addressed unsolicited copies to inmates at a ratio of one copy for every ten inmates.

In May 2005, Captain Jones informed Plaintiffs that the jail would no longer permit delivery of unsolicited copies of CJA. Captain Jones cited the jail's Operations Order, which prohibits the distribution of unsolicited publications regardless of content or postage rate. According to Captain Jones, the jail has never refused to deliver CJA to an inmate who requested it. The jail has a separate policy limiting the personal property an inmate can keep in his cell to the

amount that can be held in two copy-paper boxes. An inmate may keep up to one newspaper, five periodicals, and five soft-covered books in his cell at any given time.

On February 5, 2008, Plaintiffs filed a § 1983 suit for injunctive relief against Sacramento County Sheriff John McGinness, alleging that the jail's refusal to distribute unsolicited copies of CJA violates the First Amendment. The district court granted summary judgment to Sheriff McGinness under *Turner*.

Plaintiffs timely appealed.

B. *Hrdlicka v. Reniff*

In August 2004, Plaintiffs contacted the Butte County Sheriff's Department to inquire about distributing CJA to inmates in the jail in Butte County, California. Plaintiffs proposed a general distribution of CJA. Alternatively, they requested a list of inmates so that Plaintiffs could mail individually addressed issues of CJA. Plaintiffs proposed weekly distribution of one issue for every ten inmates. Sheriff's Department officials informed Plaintiffs that the jail would not allow delivery of unsolicited copies of CJA to inmates through either method. They explained that the jail's mail policy prohibits distribution of unsolicited commercial mail through either general or individually addressed delivery.

The Butte County jail's mail policy is contained in a Departmental Order. That order was issued on September 23, 2004, one month after CJA contacted the Sheriff's Department. The order prohibits the

distribution of all unsolicited commercial mail to inmates, regardless of content or postage rate. The Butte County jail has policies limiting the amount of written materials inmates can keep in their cells and prohibiting inmates from leaving items in common areas.

On February 5, 2008, Plaintiffs filed a § 1983 suit for injunctive relief against Butte County Sheriff Perry Reniff, alleging that the jail's refusal to distribute unsolicited copies of CJA violates the First Amendment. The court granted summary judgment to Sheriff Reniff under *Turner*.

Plaintiffs timely appealed.

II. Standard of Review

We review *de novo* a district court's order granting summary judgment. *Bamonte v. City of Mesa*, 598 F.3d 1217, 1220 (9th Cir. 2010). Viewing the evidence in the light most favorable to CJA and Hrdlicka, we must determine whether there are any genuine issues of material fact and whether the district courts correctly applied the relevant substantive law. *See id.*

III. Discussion

A. First Amendment

[1] Defendants argue categorically that the First Amendment does not protect distribution of a publication to inmates who have not requested it. The proper analysis, however, is more nuanced. In examining regulations that restrict communications with inmates, we first determine whether any First

Amendment interest is implicated. If such an interest is implicated, we apply the four-factor *Turner* test to decide whether that interest gives rise to a protected First Amendment right.

[2] The Supreme Court applied this two-step analysis in *Thornburg v. Abbott*, 490 U.S. 401, 408 (1989). The Court began by stating that "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." *Id.* at 408. Having found such a "First Amendment interest," the Court then turned to the question of whether the publishers had an actual First Amendment right to send, and the inmates to receive, the particular communications at issue. Applying *Turner*, the Court held that regulations prohibiting certain communications were valid despite the unquestioned First Amendment interest. *Id.* at 419. Similarly, in *Pell v. Procunier*, 417 U.S. 817 (1974), the Court wrote that "restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system." *Id.* at 822. The Court noted that inmates might have a "constitutional interest" in the particular form of communication they sought, but ultimately held in that case that the interest did not give rise to a protected First Amendment right because of the strong countervailing interests of prison administration. *Id.* at 823-24, 827-28.

[3] In this case, we first decide whether a publisher has a First Amendment interest in distributing, and inmates have a First Amendment interest in receiving, unsolicited publications. We have repeatedly

recognized that publishers and inmates have a First Amendment interest in communicating with each other. *See, e.g.*, *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) ("*PLN II*"); *see also Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). A First Amendment interest in distributing and receiving information does not depend on a recipient's prior request for that information. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1204-05 (9th Cir. 2009) ("The mere fact that an unwilling recipient must take the unsolicited leaflet from her windshield and place it in the garbage cannot justify an across-the-board restriction."); *see also Martin v. City of Struthers*, 319 U.S. 141, 143, 148-49 (1943) (striking down as unconstitutional a municipal ordinance that made it unlawful to go door to door distributing handbills, circulars, or advertisements). We see no reason why this well-established principle does not apply to a publisher's interest in distributing, and an inmate's corresponding interest in receiving, unsolicited literature.

[4] Because a publisher cannot deliver unsolicited communications to an inmate by distributing handbills on the street, or by leaving unsolicited leaflets on cars, the publisher needs some form of cooperation from jail or prison authorities in order to distribute its literature. (Indeed, some cooperation is needed for solicited communications as well.) However, jail or prison authorities cannot be required to distribute unsolicited communications irrespective of the burdens such distribution might place upon them. Whether the First Amendment interest in unsolicited communication with inmates gives rise to a First Amendment right thus implicates very different concerns from such communication in public fora. The

Supreme Court's opinion in *Turner* addresses precisely those concerns.

The Court in *Turner* upheld a prison policy that restricted the exchange of non-legal mail between inmates in different institutions who were not family members. The Court stated that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84. The Court recognized, however, that "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85. The Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

The Court in *Turner* provided a four-factor test for evaluating the reasonableness of a prison or jail regulation impinging on a constitutional right. The Court ultimately accepted the government's justification that correspondence between unrelated inmates at different institutions facilitated gang activity and could be used to coordinate escape plans or violent acts. 482 U.S. at 91. It concluded that the policy "is content neutral, it logically advances the goals of institutional security and safety . . . , and it is not an exaggerated response to those objectives." *Id.* at 93.

[5] The four-factor *Turner* test considers:

> (1) whether the regulation is rationally related to a legitimate and neutral governmental objective, (2) whether there are alternative avenues that remain open . . . 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.

PLN II, 397 F.3d at 699 (citing *Turner*, 482 U.S. at 89). We evaluate the policies of a jail or prison with "due regard for the 'inordinately difficult undertaking' that is modern prison administration," recognizing that "certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison." *Thornburgh*, 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 85).

We have applied the *Turner* test in four cases involving the distribution of literature to inmates. In each case, we have held unconstitutional prison policies that placed restrictions on the distribution of gift and solicited publications. In *Crofton v. Roe*, 170 F.3d 957, 960-61 (9th Cir. 1999), we struck down a regulation that prohibited a prisoner from receiving a book that had been ordered for him by his stepfather. We held that "although the state has had ample opportunity to develop a record, it has offered no justification for a blanket ban on the receipt of all gift publications." *Id.* at 960-61. In *Prison Legal News v.*

Cook ("PLN I"), 238 F.3d 1145, 1151 (9th Cir. 2001), we struck down a ban on bulk-rate mail as applied to subscription non-profit publications. We noted that "the receipt of such unobjectionable mail [does not] implicate penological interests." *Id.* at 1149. In *Morrison v. Hall*, 261 F.3d 896, 898 (9th Cir. 2001), we extended the holding in *PLN I* and struck down a similar regulation as applied to "pre-paid, for-profit, subscription publications." We recognized that "the number of subscription *for-profit* publications that enter the [prison] may be greater than the number of subscription *non-profit* publications," *id.* at 902 (emphasis in original), but we noted that the government provided no evidence "regarding the impact that processing pre-paid, for-profit subscription publications would have on prison resources." *Id.* at 903 (emphasis omitted). Finally, in *Prison Legal News v. Lehman ("PLN II")*, 397 F.3d 692 (9th Cir. 2005), we struck down a prison ban on "non-subscription bulk mail" (publications that inmates request but do not pay for). We affirmed the district court's finding that "the ban on non-subscription bulk mail was not rationally related to a neutral government objective." *Id.* at 699.

Our dissenting colleague concludes that because a prison is a non-public forum, a publisher has no First Amendment interest in distributing, and an inmate has no First Amendment interest in receiving, unsolicited publications. He therefore concludes that the Court's four-part *Turner* test is inapplicable. We respectfully disagree.

[6] The Supreme Court and our court have consistently applied the *Turner* test to determine whether various forms of written communication with

inmates are protected by the First Amendment. *See*, *e.g.*, *Thornburgh* (applying *Turner* to prison regulation prohibiting specific publications); *Crofton v. Roe* (applying *Turner* to prison regulation banning gift publications); *PLN I* (applying *Turner* to prison regulation banning bulk-rate mail); *Morrison v. Hall* (applying *Turner* to prison regulation banning bulk-rate, and third and fourth class, mail); *PLN II* (applying *Turner* to non-subscription bulk-rate mail). In the context of deciding whether the *Turner* test applies, we see no way to distinguish what was at issue in those cases from what is at issue here. All cases, including the case now before us, have individual challenges to prison or jail regulations forbidding various forms of written communications. The fact that in this case the publication was unsolicited may, of course, be taken into account in applying the *Turner* test. But the fact that the publication was unsolicited does not make the *Turner* test inapplicable.

We therefore review the jails' policies under the four-factor *Turner* test. Because we review summary judgments granted to defendants, we view the evidence in the light most favorable to CJA.

1. "Rationally Related to a Legitimate Penological Objective"

The first *Turner* factor is a *sine qua non*: "[I]f the prison fails to show that the regulation is rationally related to a legitimate penological objective, we do not consider the other factors." *Ashker v. Cal. Dep't of Corr.*, 350 F.3d 917, 922 (9th Cir. 2003). But if the regulation is rationally related to a legitimate penological objective, that is not the end of the inquiry.

The other three *Turner* factors must also be evaluated before a court can decide whether the prison regulation or policy is permissible.

a. Jail Security

[7] Officers at the Sacramento and Butte County jails assert that refusing to allow the distribution of unsolicited copies of CJA promotes security in the jails by reducing the likelihood of contraband entering the jail, and by reducing the amount of clutter in each inmate's cell thereby reducing the risk of fires and enabling efficient cell searches. The officers also assert that the policies promote security because, once in the jail, unsolicited publications are more likely than other publications to be used for "nefarious purposes" such as blocking lights or clogging toilets. We do not question the importance of reducing the likelihood of contraband entering the jails, reducing the risk of fire, and enabling efficient cell searches. Nor do we question the importance of discouraging or preventing inmates from using paper for improper purposes. However, defendants' general statements are undercut by the specific evidence they offer in an attempt to show the degree to which these purposes are actually served by a refusal to allow the requested distribution of CJA.

For example, Captain Jones of the Sacramento County jail stated in his deposition that until 2006 the jail accepted delivery of multiple unsolicited copies of the *Sacramento Bee* (the primary general circulation daily newspaper for the Sacramento area) on a "drop-off basis." The jail stopped delivery of the *Bee* in 2006, but for reasons unrelated to those it now gives for refusing to accept delivery of CJA. Captain Jones

stated in his deposition, "I think at the time the Bee was stopped because of a perceived crusade against the sheriff's department during that time period." Captain Jones elaborated, "It was very expensive, as well, so I think it was a combination of factors, but I believe that their coverage of the department during that time period was the catalyst to start looking at those other factors."

After delivery of the *Bee* was canceled, the jail accepted *USA Today* on an unsolicited drop-off basis. *USA Today* was cancelled after about a year because, according to Captain Jones, the jail no longer wished to pay for it. Captain Jones did not list security risks as among the "combination of factors" that motivated the jail's decision to stop distributing either unsolicited newspaper to inmates. He was specifically asked whether there was any diminution of incidents of "covering lights [and] clogging toilets" when *USA Today* was cancelled. He responded, "I wouldn't know. . . . I don't think we ever kept track of such numbers."

Captain Jones stated in his declaration that "inmates are not permitted to leave any materials in the common areas of the Jail," and that "[t]here are not materials which are made available to inmates by placing copies in any of the day rooms." However, he stated the opposite in his deposition: "[I]f someone has a subscription and gets done with it often times they'll put it out for the other inmates to read. . . . [I]f an inmate gets done with a novel, they might put it out for someone else to get[.]" When asked "Would an inmate be allowed to leave out a copy of Time Magazine when they're done with it?", Captain Jones answered "Yes."

Captain Jones sought to distinguish the security threat posed by the availability of newspapers in the common areas compared to the availability of CJA. He said in his deposition, "If there were one Crime, Justice & America in a housing unit, I don't think it would cause any greater security concern than a newspaper would." He was then asked, "What if there was three copies [of CJA]?" He responded, "Well, three would cause three times, you know, if you have a minor concern, then you have three times a minor concern, so it's still not — I don't think it would cause an error [sic] of panic, but nor would it be without consequence." Captain Jones did not account for the fact that a general circulation newspaper ordinarily has more pages than CJA, nor for the fact that a new copy of a newspaper is typically delivered every day, whereas new copies of CJA would be delivered only weekly.

Lieutenant Bryan Flicker of the Butte County jail stated in his declaration that inmates at that jail already have access to paper that they use for improper purposes. He stated that Butte County jail inmates regularly misuse torn out pages from the telephone books the jail provides in every dayroom area, as well as from books donated to the jail by the local community. Lieutenant Flicker did not specify whether distribution of CJA was likely to increase the rate of such use of paper by inmates.

[8] Further, both jails already have separate policies regulating inmates' possession of property, including paper, in their cells. *See Morrison*, 261 F.3d at 902 ("In light of the regulation limiting the total amount of property in a cell, . . . permitting inmates to receive for-profit, subscription publications could not

possibly increase the total volume of cell materials."); *see also PLN II*, 397 F.3d at 700; *PLN I*, 238 F.3d at 1150-51. It is thus unclear the degree to which allowing distribution of CJA in the jails would produce additional clutter in inmates cells or otherwise adversely affect jail security.

b. Staff Resources

[9] Officers at both jails expressed concern that allowing delivery of unsolicited copies of CJA would require additional staff time. Officer James Fox of the Sacramento County jail stated in a declaration that there are 700 pieces of incoming mail and 600 pieces of outgoing mail per day at the jail. "The mail is processed during the night shift by a total of sixty (60) persons, thirty (30) individuals per shift over two (2) shifts. . . . A total of twenty-four (24) personnel hours are used per day on mail related duties at the Jail." But Officer Fox 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. Officers at Butte County Jail provided no information quantifying the additional resources that would be required to distribute CJA. Indeed, they did not even provide information about the resources the jail currently devotes to mail delivery.

[10] Neither jail has suggested that unsolicited publications are more difficult to inspect and deliver than solicited publications. *Cf. PLN I*, 238 F.3d at 1150 ("The Department has presented no evidence supporting a rational distinction between the risk of contraband in subscription non-profit organization standard mail and first class or periodicals mail.").

c. Slippery Slope

Captain Jones expressed a concern in his declaration that "to accept publications or magazines from one publisher would set an unworkable precedent for the Jail and could obligate the Jail to accept any other publications that appeared on the doorstep." But Captain Jones acknowledged in his deposition that the slippery slope problem was not a concern when the jail accepted unsolicited copies of the *Sacramento Bee* and *USA Today*. He specifically stated that the jail did not cease distributing the *USA Today* "because of any concern about a precedential value that it would set."

Captain Jones could recall "maybe three" requests to distribute unsolicited publications to inmates in Sacramento County jail since 2000. Of those three requests, Captain Jones could not remember if any were for regular publications as opposed to merely one-time-only leaflets. Butte County jail officers did not present any evidence about other requests to distribute unsolicited mail.

d. Interference with Existing Advertising

[11] Sheriff Reniff of the Butte County Jail asserts as an additional interest his desire to maintain control over advertising of bail in the jail. Butte County jail has a contract with Partners for a Safer America, Inc. ("PSA"), under which PSA operates bulletin boards in the jail on which bail bond agents are allowed to post advertisements. PSA pays the jail a percentage of its profits from its sale of advertising space on the bulletin boards. Sheriff Reniff stated that distributing unsolicited copies of CJA to inmates would be inconsistent with the jail's contract with PSA.

However, it is not clear on the record before us that, in fact, distributing CJA would be inconsistent with the contract.

[12] More important, it is obvious (though not stated by Sheriff Reniff) that if unsolicited copies of CJA are permitted in the jail, the value to bail bond agents of advertising on the jail bulletin boards will be diminished. That diminution in value may well be reflected in a lower price paid to PSA by the advertisers, and in a corresponding lower amount paid to the jail by PSA. We do not believe that a jail has a legitimate penological interest, for purposes of *Turner*, in protecting a profit made by impinging on inmates' First Amendment rights. Sheriff Reniff cites no case supporting such a proposition, and we are aware of none.

The Sacramento County jail, like the Butte County jail, has bulletin boards posted with information about bail bond agents. Unlike the Butte County jail, however, the Sacramento County jail is paid no money in return for allowing these postings.

2. Alternative Avenues to Exercise the Right

[13] The second *Turner* factor is whether "other avenues remain available for the exercise of the asserted right." *Turner*, 482 U.S. at 90 (internal quotation marks and citation omitted). Defendants argue that CJA has alternative avenues to communicate with inmates because the jails will distribute CJA to inmates who request it. But there is a material question of fact whether, as a practical matter, Plaintiffs can effectively reach county jail inmates if they can deliver CJA only upon request.

In *Morrison*, 261 F.3d at 904, we held that the second *Turner* factor weighed against the legitimacy of a mail policy when restricted publications would be delivered only if they were sent at a higher rate. " '[P]aying a higher rate is not an alternative because the prisoner cannot force a publisher who needs to use, and is entitled to use, the standard rate to take additional costly steps to mail his individual newsletter.' " *Id.* (quoting *PLN I*, 238 F.3d at 1149). Here, unlike our earlier cases, the jails' policies do not require inmates to pay for CJA, or for CJA to mail its issues at a higher postage rate. *Cf. Morrison*, 261 F.3d at 904.

However, in practice, it is difficult to create a broad awareness of CJA among inmates in jails where, unlike in prisons, populations turn over quickly. It is true that CJA can advertise its publication to inmates through the yellow pages or television, both of which are available in the jails, and through word of mouth. But many inmates will have left the jail before they can learn about the existence of CJA, request that it be sent to them, and then receive it. Inmates typically want information about bail bonds and attorneys as soon as they arrive at the jail. For those who receive CJA only after a significant wait, the advertising in CJA is of little or no use.

3. Impact of Accommodating the Asserted Right

[14] The third *Turner* factor is "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. "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates

or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Id.*

[15] As discussed above, there are material questions of fact as to whether, and to what degree, the jails would be forced to expend significant additional resources if CJA is delivered by either of the two methods sought by Plaintiffs. Plaintiffs state that they are willing to work with jail officials to make distribution as easy and efficient as possible. Plaintiffs seek to deliver only one copy of CJA for every ten inmates each week, and have offered the jails the option of either general delivery or individually addressed mailings. *Cf. PLN I*, 238 F.3d at 1151. Officers at the jails have not explained how mail inspectors will distinguish between a copy of CJA that is solicited and one that is not. If the jails have to compile subscription lists and compare incoming mail to those lists, a ban on unsolicited mail could actually consume more prison resources than accepting such mail. *Cf. id.* (prison officials arguing that it is impractical to distinguish between solicited and unsolicited mail).

4. Exaggerated Response by Prison Officials

[16] The fourth *Turner* factor requires us to consider "whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials." *PLN II*, 397 F.3d at 699. "This is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Turner*, 482 U.S. at 90-91. "[A]n

alternative that fully accommodates the [asserted] rights at *de minimis* cost to valid penological interests" suggests that the "regulation does not satisfy the reasonable relationship standard." *Id.* at 91. Here, the suggested alternative is the limited distribution sought by Plaintiffs, compared to the outright ban imposed by the Sacramento County and Butte County jails.

[17] The undisputed fact that CJA is currently distributed in more than 60 counties throughout 13 states, including in 32 California county jails, suggests that the response of the two jails in this case may be exaggerated. There is a marked contrast between defendants' strong general statements about the ways the ban on unsolicited copies of CJA serves their penological purposes, on the one hand, and the weak, and to some degree contradictory, specific evidence they offer to support those statements, on the other. Further, defendants have not demonstrated that they cannot work with CJA to establish distribution schedules that minimize the drain on jail resources. Finally, the possibility that Butte County Jail's policy is motivated by a concern with losing revenue from bail bond advertisements also suggests that the jail's policy may be an exaggerated response.

5. Summary

[18] Taking the evidence in the light most favorable to Plaintiffs and evaluating that evidence under the four *Turner* factors, we hold that neither defendant is entitled to summary judgment.

B. California Law

Defendants assert as a separate justification for their refusal to deliver unsolicited copies of CJA to inmates that distribution of CJA violates California's bail licensee regulations. The district courts did not reach this issue, and we decline to decide it in the first instance.

Conclusion

[19] For the foregoing reasons, we reverse the district courts' orders granting summary judgment to Defendants. On the record before us, we cannot determine as a matter of law that Defendants have justified banning the unsolicited distribution of CJA to county jail inmates under the four-factor *Turner* test. We remand to the district courts for further proceedings consistent with this opinion.

REVERSED and REMANDED.

N.R. SMITH, Circuit Judge, dissenting:

Ray Hrdlicka publishes *Crime, Justice & America* ("CJA"), a glossy quarterly publication that is distributed for free to prison inmates across the United States. Hrdlicka has chosen a free distribution model of business in which CJA is either given to correctional facilities to be put in common areas on a weekly basis or sent to a list culled from the inmate rolls (which are public record). Apparently, it has been a successful business model. Since its introduction in 2002, over one million copies of CJA have been distributed to

inmates across the United States. CJA's revenue comes from its advertisers, who are primarily bail bonds agents and lawyers. In soliciting advertisers, CJA claims the advertisements will be seen by "hundreds to thousands" of pre-trial inmates.

Hrdlicka now asks this court to assist him in further increasing the circulation of CJA over the objections of two sheriffs who believe that accommodating Hrdlicka's distribution model would burden the administration of their correctional facilities. While we have previously found that the First Amendment guarantees Hrdlicka access to prisoners that have requested CJA, there have been no prisoner requests here. Further, there is no precedent suggesting that the First Amendment guarantees Hrdlicka the special right to sue any sheriff who refuses to be a *de facto* distribution arm of the CJA.

The majority holds that there is a "First Amendment interest in distributing and receiving unsolicited publications." It cites *Klein v. City of San Clemente,* 584 F.3d 1196 (9th Cir. 2009), for the proposition that the First Amendment protections do not depend on the request of the recipient. *Klein,* however, explicitly deals with First Amendment restrictions in "public fora." 584 F.3d at 1200-01. Prisons are not public fora. *See United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978). Instead prisons are one of a few "public institutions which do not perform speech-related functions at all . . . [where] the government is free to exclude even peaceful speech and assembly which interferes in any way with the functioning of those organizations." *Id.; see also Adderley v. State of Florida*, 385 U.S. 39, 41 (1966)

("Jails, built for security purposes, are not [public fora].")

The majority's statement, that "*Turner* [*v. Safely,* 482 U.S. 78 (1987)] addresses" any "concerns" regarding the difference between public fora and prisons, is unavailing. As the Supreme Court stated in *Turner*, "[o]ur task, then . . . is to formulate a standard of review for *prisoners' constitutional claimsI*[.]" 482 U.S. at 85 (emphasis added). No prisoners' constitutional claims are implicated in this case. Both before and after *Turner,* the Supreme Court and this court have uniformly and frequently cautioned against a judicial rule allowing publishers of unsolicited publications a right to demand distribution within prisons. *See Morrison v. Hall*, 261 F.3d 896, 905 (9th Cir. 2001) ("[P]risons *can* and have adopted policies permitting prisoners to receive [requested] publications, while at the same time, prohibiting prisoners from receiving unsolicited junk mail.") (emphasis added); *Prison Legal News v. Lehman*, 397 F.3d 692, 701 (9th Cir. 2005) (Distinguishing *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977), by stating: "In this case, every piece of mail sent by PLN is sent as a result of a request by the recipient . . . it is the fact that a request was made by the recipient . . . that is important.")

No party disputes that we have no request on a part of any prisoner to receive the CJA. Prisoners' First Amendment rights are not implicated in any way. Instead, Hrdlicka is asking the court to create a special rule, under the First Amendment, protecting his chosen method of distributing CJA to inmates.

Any First Amendment analysis involving prisons must be couched in the understanding that:

> [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. . . . Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities.

Turner, 482 U.S. at 84-85 (discussing *Procunier v. Martinez*, 416 U.S. 396 (1974) (internal quotation marks and citations omitted). With this understanding, the Supreme Court has held that the press has "no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Pell v. Procunier*, 417 U.S. 817, 834 (1974). While *Pell* dealt with the press attempting to access prisons in order to gather information, it remains one of the only cases that has dealt with the press's right of access to prisons when no concurrent right of prisoners has been implicated.[1]

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[1] *Pell* also dealt with an inmate's right of access to the press. However, the analysis was done separately from the press's right of access to the prison. *See Pell*, 417 U.S. at 823-828.

Just as the press had no special right of access to prisons in *Pell*, here Hrdlicka has no special right to demand a sheriff accept one of his chosen methods of distribution, especially given that a prison is not a public forum. If Hrdlicka would like prisoners to read CJA, he has the option of spending the time and money that all other members of the press spend in order to acquire new readership. Namely, Hrdlicka can advertise both in and outside of the jail in an effort to convince inmates (or noninmates) to request his publication.[2] He can also rely on the word of mouth that many publications take the time to develop among their readers. While this method of acquiring readers may be costly, in the context of prisons, losing "cost advantages does not fundamentally implicate free speech values." *Jones*, 433 U.S. at 130-31; *see also Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788, 809 (1985) ("The First Amendment does not demand unrestricted access to a non-public forum merely because use of that forum may be the most efficient means of delivering the speaker's message."). Hrdlicka has chosen not to advertise to acquire new readership. Instead, he seeks the cost advantage of automatic distribution at any jail he chooses to target. He does not have such a right.

The majority's analysis under *Turner* further demonstrates the problem with finding a special First Amendment right for Hrdlicka's distribution method. By allowing CJA the right to demand unrequested distribution, the majority forces sheriffs either to allow all unrequested mail to reach inmates or to make a case by case determination of the quality of the

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[2] No inmate has been refused a requested copy of CJA.

publication. In discussing the *Turner* factors, the majority notes "[f]or those who only receive CJA after a significant wait, the bail bond advertising in CJA is of little or no use." But the Supreme Court has dictated that the value of information to inmates is not a valid consideration. "[T]he *Turner* test, by its terms, simply does not accommodate valuations of content." *Shaw v. Murphy*, 532 U.S. 223, 230 (2001). The majority would now require valuation of content for any publisher or bulk mail advertiser that asked for access to prisons (if no valuation is to be made then the majority would suggest that all unrequested mail should be allowed unless *Turner* is satisfied). Such assessment is impossible under Supreme Court precedent.

Instead, the simpler and saner rule is that Hrdlicka has no special First Amendment right to demand that a prison agree to one of his distribution methods. A prison is not a public forum, and a ban on unrequested publications is a content neutral method for sheriffs to ensure efficient administration of their facilities. A publisher wishing to develop readership among prisoners is free to advertise or develop word of mouth programs to encourage the request of a publication. The publisher is not entitled to use the First Amendment for cost savings in acquiring new readers. Therefore, Hrdlicka does not have a special First Amendment right to demand distribution in prisons, and Sheriffs Reniff and McGuinnes are entitled to summary judgment.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NO. CIV. 08-cv-00394 FCD EFB

[Filed August 3, 2009]

CRIME, JUSTICE & AMERICA, INC., a California Corporation; and RAY HRDLICKA, an individual,

Plaintiffs,

v.

JOHN McGINNESS, in his official capacity of Sheriff of the County of Sacramento, California,

Defendants.

MEMORANDUM & ORDER

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This matter is before the court on defendant John McGinness' ("defendant" or "McGinness") motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs Crime, Justice & America, Inc. and Ray Hrdlicka ("Hrdilicka")

(collectively "plaintiffs") oppose the motion.[1] For the reasons set forth below,[2] defendant's motion for summary judgment is GRANTED.

BACKGROUND[3]

Plaintiffs filed this action, arising out of the policies of the Sacramento County Jail in its distribution of plaintiffs' magazine, *Crime, Justice & America* ("*CJA*"). (Compl., filed Feb 22, 2008.) Plaintiffs assert that defendant's policies violate their Constitutional

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[1] Plaintiffs previously filed a motion to continue defendant's motion for summary judgement pursuant to Rule 56(f) and a motion to modify the scheduling order to reopen discovery pursuant to Rule 16. The court granted the motion.

[2] Because oral argument will not be of material assistance, the court orders the matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

[3] Unless otherwise noted the facts herein are undisputed. (See Undisputed Material Facts in Support of Summ. J. ("DUF"), filed Apr. 14, 2009; Undisputed Material Facts in Opp'n to Summ. J. ("PUF"), filed July 10, 2009).

While plaintiffs filed their own statement of undisputed facts, they failed to respond to defendant's statement. However, the court will look to the underlying evidence to determine whether there is an actual dispute of fact.

Moreover, the court notes that plaintiffs have failed to comply with numerous local rules and court orders relating to a filing of a Statement of Undisputed Facts rather than a Statement of Disputed Facts, citation to the record in their Statement of Undisputed Facts, and vastly exceeding the court's page limitations without request or approval. However, in the interest of justice, the court nevertheless considers all the materials filed by plaintiffs.

rights guaranteed by the First Amendment be denying distribution of *CJA* whether directly mailed to inmates or dropped off for bulk distribution. (Compl. ¶¶ 31-37.) Plaintiff Crime, Justice & America, Inc. is a private company with the primary business purpose of publishing and distributing the quarterly periodical *CJA*. (Compl. ¶ 6.) Plaintiff Hrdlicka is the sole owner and the publisher of CJA. (Compl. ¶ 7; PUF ¶ 1.) Defendant McGinness is the Sheriff of the County of Sacramento at all relevant times. (Compl. ¶ 8.)

The Sheriff is in charge of managing the Sacramento County Jail (the "Jail"). (DUF ¶ 1.) On average, there are 2,340 inmates at the Jail per day. (DUF ¶ 2.) There are over seven hundred pieces of incoming mail and six hundred pieces of outgoing mail per day. (DUF ¶ 5.) In accordance with applicable regulations, defendant implemented policies and procedures relating to the receipt of mail for inmates in the jail. (DUF ¶ 3.)

The mail at the Jail is processed during the night shift six days a week by a total of sixty persons. (DUF ¶¶ 7, 13.) Control room officers are responsible for opening and inspecting the mail, and floor officers distribute the mail. (DUF ¶ 8.) Commercial publications and personal mail are reviewed for content and searched for contraband prior to distribution. (DUF ¶ 9.) A total of twenty-four personnel hours is used per day on mail related duties at the Jail. (DUF ¶ 12.)

The mail policy currently in place at the Jail prohibits the distribution of unsolicited commercial mail. (DUF ¶ 15.) The policy does not take into account the content of any unsolicited publications, nor the

postage rate under which unsolicited publications are sent. (DUF ¶ 16.) The Jail will not accept publications for distribution received on a "drop-off" basis or delivery that constitutes "bulk delivery." (DUF ¶ 17.) The Jail considers "bulk mail" to be any mail, regardless of volume not individually addressed and not individually posted with U.S. Postage. (PUF ¶ 81.) Defendant contends that the primary purpose of the refusal to accept and distribute unsolicited commercial mail is to allow the Sheriff to control the volume of mail that enters the Jail, which allows for control over the amount of time and resources used to categorize, effectively search, and distribute incoming mail. (DUF ¶ 18; see PUF ¶ 54 ("Sacramento County Jail denies distribution of bulk mail for two reasons: (1) the precedential value of potentially having to accept other deliveries of bulk mail; and (2) the potential negative effect on the work load for the Jail staff."))

Further, inmates are only allowed to keep a limited amount of written materials in their cells and are not permitted to leave any materials in the common areas of the jail. (DUF ¶ 23.) Moreover, the Sheriff is required to maintain the Jail in a neat, orderly manner, and all places not open to continuous observation must be kept free from combustible litter and rubbish at all times. (DUF ¶ 22.) The purported purpose of these rules and requirements are to: (1) limit inmates' ability to secret contraband; (2) limit the amount of materials that inmates can use to plug toilets and flood their cells and pods; (3) limit inmates' ability to place items over the lights and windows in their cells, allowing staff to perform mandated hourly welfare checks more efficiently; and (4) enhance inmate safety by providing fewer avenues in which they can communicate inappropriate and violent

messages and instructions to each other. (DUF ¶ 24.) Even with the various rules already in place, inmates routinely attempt to hide contraband, start fires, flood their cells, and cover their lights and windows. (DUF ¶ 26.) Further, Jail staff spend a significant amount of time searching for contraband and attempting to prevent disruptive and dangerous incidents. (DUF ¶ 27.)

The Jail has multiple common areas, also known as Day Rooms, which contain telephones, televisions, and bulletin boards with advertising. (DUF ¶ 28.) There are no materials which are made available to inmates by placing copies in any of the day rooms; this prevents inmates from exchanging messages with each other and limits fire and other safety hazards. (DUF ¶ 34.) Defendant asserts that if the Jail were to place bulk copies of *CJA* in the common areas, additional staff and resources would be required to monitor the copies of the publication, remove and replace the publication on a daily basis, and clean up an trash or excess created by the placement of the publication. (DUF ¶ 35.)

Inmates at the Jail are provided with access to a law library and a general circulation library. (DUF ¶ 36.) Inmates can also receive magazines that they subscribe to, if nothing precludes delivery of the particular magazine on the basis of subject matter (e.g., pornography). (DUF ¶ 40.)

CJA is currently distributed in correctional facilities in more than sixty counties throughout thirteen states. (PUF ¶ 16.) It is generally distributed to inmates of correctional facilities in one of two manners: (1) direct mailings to inmates; or (2) general

distribution. (PUF ¶ 18.) In the case of direct mailing, *CJA* is sent, individually addressed, through the U.S. Mail to inmates at a correctional facility at a ratio of approximately one issue for every ten inmates. (PUF ¶ 19.) In the case of general distribution, plaintiffs drop off a weekly distribution of *CJA* at a ratio of approximately one issue for every ten inmates, and the jail staff leaves a small stack of magazines in common areas. (PUF ¶ 26.)

Sometime in September 2003, plaintiffs inquired with the Sheriff whether he would be amenable to allow inmates at the Jail to receive *CJA*. (DUF ¶ 41.) On September 30, 2003, plaintiffs were informed by Sheriff Lou Blanas, Sacramento County Sheriff at the time, via Sergeant Scott Jones ("Jones"), that so long as the material and content of the magazine did not fall within prohibited guidelines for inmate mail, they were free to mail the publication to any inmates within the jail facilities. (DUF ¶ 42.) Jones also informed plaintiffs that a list of each inmate housed at the Jail, along with their identifying criteria for receiving mail, was made available to the public on a daily basis in the lobby. (DUF ¶ 43.) However, Jones told Hrdlicka that the Jail would not facilitate the publication's delivery to inmates on a "drop-off" basis. (DUF ¶ 44; PUF ¶ 35.)

On January 6, 2004, Jones again wrote plaintiffs and informed them that the Jail would not accept the publication delivered *en masse*, but that plaintiffs could mail the magazine to individual inmates. (DUF ¶ 45.) Over the next few months, plaintiffs requested a weekly electronic copy of the list of inmate names and housing information or, in the alternative, a paper-based copy. (DUF ¶¶ 46-48.) On May 21, 2004, Jones reiterated that a printed list of inmates and

relevant information was available in the lobby of the Jail, but that he was not required to send or mail a copy of the list to plaintiffs and would not undertake such a duty. (DUF ¶ 49.) On April 5, 2005, Jones responded to another request for electronic records, informing plaintiffs that the information sought did not exist in electronic format that could be provided, but that a printed list was available in the lobby. (DUF ¶ 50.) At some point prior to January 2007, the technology at the Jail was upgraded and an electronic list became available. (DUF ¶ 57.) After this time, an electronic copy of the information was provided to plaintiffs. (DUF ¶ 57.)

Plaintiffs were notified on multiple occasions that *CJA* could be mailed directly to inmates without objections. (DUF ¶ 55.) In approximately December 2004, plaintiffs began sending copies of *CJA* to inmates at the Jail through bulk-mail. (PUF ¶¶ 43-45.) Plaintiffs contend that the copies were paid for individually and were addressed to an individual inmate; however, postage was paid at the bulk rate of 14.7 cents per magazine as opposed to individually stamped copies that would have cost $1.21 per magazine. (PUF ¶ 45.) Plaintiffs sent hundreds of copies of their publication to the Jail on this bulk-mail basis. (DUF ¶ 51.) In May 2005, *CJA* was denied further distribution in the Jail through bulk-mail because of the perceived extra burden on the jail staff. (PUF ¶ 77.) Plaintiffs also concede that the distribution of *CJA* in the Jail is a concern because of the introduction of written materials into the Jail over which inmates do not have ownership. (PUF ¶ 86.)

STANDARD

The Federal Rules of Civil Procedure provide for summary judgment where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see California v. Campbell, 138 F.3d 772, 780 (9th Cir. 1998). The evidence must be viewed in the light most favorable to the nonmoving party. See Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to meet this burden, "the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000). However, if the nonmoving party has the burden of proof at trial, the moving party only needs to show "that there is an absence of evidence to support the nonmoving party's case." Celotex Corp., 477 U.S. at 325.

Once the moving party has met its burden of proof, the nonmoving party must produce evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. See Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmoving party cannot simply rest on its allegations without any significant probative evidence tending to support the complaint. See Nissan Fire &

Marine, 210 F.3d at 1107. Instead, through admissible evidence the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

ANALYSIS

Through this action, plaintiffs contend that they have a First Amendment right to distribute *CJA* in the Sacramento County Jail because defendant does not have any legitimate penological interests that are served by the current mail procedures relating to the distribution of magazines. Defendant moves for summary judgment on the basis that his refusal to distribute *CJA* in the manner advanced by plaintiffs is rationally related to the jails' legitimate penological interest.[4]

"In a prison context, an inmate does not retain those First Amendment rights that are 'inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)). Specifically, "there is no question that

[4] Defendant also asserts that plaintiffs have no First Amendment right to distribute their unsolicited publication to inmates. Assuming *arguendo* that plaintiffs have such a right, as set forth *infra*, defendant's policies are constitutional pursuant to Turner v. Safley, 482 U.S. 78, 89-90 (1987). As such, the court does not reach this issue. See United States v. Kaluna, 192 F.3d 1188, 1197 (9th Cir. 1999) (quoting Jean v. Nelson, 472 U.S. 846, 854 (1985) ("[A] fundamental rule of judicial restraint" is that "courts are 'not to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'")).

publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners." Thornburgh v. Abbott, 490 U.S. 401, 408 (1989). However, this right "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). Indeed, the Supreme Court has "repeatedly recognized the need for major restrictions on a prisoner's rights" in balancing the institutional needs and objectives of prisons and rights generally afforded by the Constitution. Id.

In Turner v. Safley, the Supreme Court laid out a four-factor test to determine whether a prison regulation that impinges upon First Amendment rights is "reasonably related to legitimate penological interests":

> (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.

Prison Legal News, 397 F.3d at 699 (quotations and citations omitted); see Turner, 482 U.S. 78, 89 (1987). The Court noted that "such a standard is necessary if 'prison administrators . . . , and not the courts, [are] to

make the difficult judgments concerning institutional operations.'" Turner, 482 U.S. at 89 (quoting Jones, 433 U.S. at 128).

A. Rational Relationship to Legitimate Penological Interest

In analyzing the first Turner factor, the court must determine whether there is a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." Id. (quoting Block v. Rutherford, 468 U.S. 576, 586 (1984)). "[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. Further, the governmental objective must be legitimate and neutral and must operate neutrally with regard to the content of the expression. Id. at 90.

It is undisputed that the Jail denies distribution of bulk mail for two primary reasons: (1) the precedential value of potentially having to accept other deliveries of bulk mail; and (2) the potential negative effect on the work load for the Jail staff. Moreover, defendant contends that its current policies regarding bulk mail and general distribution of publications serves to (1) limit inmates' ability to secret contraband; (2) limit the amount of materials that inmates can use to plug toilets and flood their cells and pods; (3) limit inmates' ability to place items over the lights and windows in their cells, allowing staff to perform mandated hourly welfare checks more efficiently; and (4) enhance inmate safety by providing fewer avenues in which

they can communicate inappropriate and violent messages and instructions to each other.[5]

Plaintiffs concede that defendant has an interest in maintaining mail quality control, ensuring jail security, and allocating jail resources. However, plaintiffs argue that the regulations at issue are not rationally related to those legitimate interests.

The court disagrees. Defendant has presented evidence that there are over seven hundred pieces of incoming mail per day at the Jail. This requires a total of sixty people to process the mail and a total of twenty-four personnel hours per day. Under plaintiffs' calculation, distribution through bulk mail would increase incoming mail by at least two hundred fifty pieces per week.[6] Defendant presents evidence that this increase in unsolicited bulk mail would cause additional administration, staffing, and security issues for the jail. (Decl. of Capt. Scott Jones in Supp. of Mot. for Summ. J. ("Jones Decl."), filed Apr. 14, 2009, ¶ 50.) Moreover, plaintiffs concede that distribution of *CJA* is a concern because it introduces written materials for which inmates do not have an ownership interest.

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[5] Defendant also contends that its regulations ensure compliance with California law relating to prohibitions on attorneys' and bail licensees' solicitation of business within correctional or penal facilities. Because defendant's other asserted interests are related and, as set forth *infra*, dispositive, the court does not reach the merits of this contention.

[6] This calculation does not include any increase from other publications from different sources that may occur if defendant's policy is changed to allow this sort of distribution.

Plaintiff also concedes that magazines are associated with the creation of a weapon. (PUF ¶¶ 86, 88.)

Accordingly, the court finds that the undisputed facts demonstrate that defendant's regulation concerning bulk mail and drop-off distribution is logically connected to and advances the proffered legitimate penological concerns. Specifically, defendant's refusal to accept and distribute unsolicited bulk mail enables the Jail to conserve prison resources by limiting the amount of incoming mail that correctional staff must process. Further, by limiting the amount of unsolicited mail, defendant is ensuring that there are less written materials that inmates may easily use or dispose of in ways that are disruptive to the staff or other inmates. Finally, the regulation limits the materials out of which inmates may fashion weapons.

The court also finds that defendant's regulation is neutral in its application. It is undisputed that the current policy does not take into account the content of any unsolicited publications. (DUF ¶ 16.)

Plaintiffs argue that the Ninth Circuit's decision in Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005), relating to the constitutionality of regulations relating to the receipt of publications sent via bulk mail, supports their argument that the regulations at issue are not rationally related to legitimate interests and thus, unconstitutional. However, the facts before the court in Lehman are distinguishable from the facts before the court in this case. In Lehman, the plaintiffs challenged the defendant Washington Department of Corrections' regulation prohibiting the receipt of non-subscription bulk mail and catalogs by inmates. Id. at

696. In finding that the regulation was not rationally related to a legitimate penological interest, the Lehman court emphasized that, in the case before it, every piece of mail sent by the plaintiffs was a result of a request by the recipient. Id. at 700-01 ("[I]t is the request on the part of the receiver and compliance on the part of the sender, and not the payment of money, that is relevant to the First Amendment analysis."). As such, "the sender's interest in communicating the ideas in the publication correspond[ed] to the recipient's interest in reading what the sender has to say." Id. at 701 (internal quotations and citations omitted). Conversely, in this case, plaintiffs do not seek to send *CJA* to inmates who have previously requested to receive the publication. Indeed, plaintiffs have failed to disclose the name of any inmate in the Sacramento County Jail who has requested a copy of *CJA*. (DUF ¶ 58.) Thus, the convergence of the publisher's interest in sending and the inmate's express desire to receive, the existence of which the Ninth Circuit held was both "important" and "relevant" in this inquiry, is notably absent here. See Lehman, 397 F.3d at 700-01.

Furthermore, two other district courts confronted with nearly identical issues are in accordance with the court's conclusion. In both Hrdlicka v. Cogbill, No. C 04-3020, 2006 WL 2560790 (N.D. Cal. Sept. 1, 2006), and Crime, Justice & America, Inc. v. Reniff, No. 2:08-cv-343, 2009 WL 735184 (E.D. Cal. Mar. 18, 2009), plaintiffs Hrdlicka and Crime, Justice & America, Inc. brought suit challenging nearly identical regulations regarding distribution of unsolicited publications at jails in Sonoma County and at the Butte County Jail. The defendants in Hrdlicka and Reniff proffered penological interests identical to those

proffered by defendant in this case. After reviewing the submissions of the parties and the relevant case law, the district courts concluded that the challenged prohibitions relating to unsolicited publications were rationally related to and advanced legitimate penological interests. Further, both courts also concluded that the Ninth Circuit's holding in Lehman was inapplicable because no request for the publication had been made to plaintiffs.

Therefore, the court concludes that the first Turner factor weighs in favor of defendant.

B. Alternative Means of Exercising the Right

In analyzing the second Turner factor, the court must examine whether "'other avenues' remain available for the exercise of the asserted rights." Turner, 482 U.S. at 90 (quoting Jones, 433 U.S. at 131). Where such alternative means are available, "courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.'" Id. (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)).

Defendant contends that inmates have always had the ability to request and receive *CJA*. Defendant also presents evidence that plaintiffs have been informed multiple times that *CJA* could be mailed directly to inmates without objection. Thus, defendant argues that other avenues remain available for inmates to receive plaintiffs' publication.

The court agrees. Defendant presents evidence that he has never refused to distribute *CJA* to an inmate

that has requested it. (DUF ¶ 59.) While complying with defendant's regulation may reduce the circulation rate of *CJA*, a subscription or request based system would effectively allow plaintiffs to exercise their First Amendment right to communicate with inmates at the Sacramento County Jail. See Jones, 433 U.S. at 130-31 (holding that the loss of cost advantage in bulk mailing did not fundamentally implicate free speech values and thus, the regulations imposed were reasonable); Hrdlicka, 2006 WL 2560790, at *14 (noting that traditional advertising techniques and relying on word-of-mouth to promote inmate subscribers to whom plaintiffs may directly mail issues of *CJA* was a sufficient alternative means of exercising their First Amendment right).[7]

Therefore, the court concludes that the second Turner factor weighs in favor of defendant.

C. Impact on the Allocation of Prison Resources

In analyzing the third Turner factor, the court must examine the impact that accommodation of the asserted constitutional right would have on guards and other inmates as well as on the allocation of prison resources generally. Turner, 482 U.S. at 90. The Supreme Court has acknowledged that in the context of a correctional institution, "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving

[7] While plaintiffs argue that defendant would be unable to distinguish between solicited and unsolicited copies, this argument is irrelevant to the determination of whether a ready alternative exists. See Reniff, 2009 WL 735184, at *2.

institutional order." Id. Where such ramifications will have a significant effect on fellow inmates or prison staff, "courts should be particularly deferential to the informed discretion of corrections officials." Id.

As mentioned above, defendants present evidence that the increase in mail created by plaintiffs' proposed distribution of an unsolicited publication would likewise increase administration, staffing, and security issues within the Jail. Defendant asserts that to accept publications or magazines from one publisher would set an unworkable precedent, obligating the Jail to accept any other publications that appeared on the doorstep. (DUF ¶ 17); see Reniff, 2009 WL 735184, at *3 (holding that the third Turner factor weighed in favor of defendants where distribution of *CJA* would set a precedent regarding the distribution of other unsolicited newsletters or publications). In addition to the increased administrative burden in allocating staff to sort through the additional mail, defendants also present evidence that placing greater burdens on the mail processing staff increases the likelihood that error will occur and contraband will be missed; this would affect the safety and security of the Jail as a whole. (DUF ¶ 21); cf. Prison Legal New v. Cook, 238 F.3d 1145, 1151 (holding that 15 to 30 pieces of mail derived from personal subscriptions to a particular publication in addition to the 5000 to 8000 pieces of first class mail processed daily was minimal, particularly where there was evidence that the Department was able to process improperly addressed bulk mail sent by the state).

Therefore, in light of the undisputed evidence, the court concludes that the third Turner factor weighs in favor of defendant.

D. Easy or Obvious Alternatives

Finally, in analyzing the fourth Turner factor, the court must examine whether there are ready alternatives to the regulation at issue. Turner, 482 U.S. at 90. "[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. However, the Supreme Court has made clear that this factor does not impose a "least restrictive alternative test."

Plaintiffs argue that defendant's regulations are an exaggerated response because other alternatives allay some of the concerns and interests proffered by defendant. Specifically, plaintiffs point to defendant's regulations limiting the amount of possessions inmates may have in their cells. (See PUF ¶ 74.) Plaintiffs also assert that defendants could prohibit or limit an inmates' ability to leave any written materials in common areas.

The court finds plaintiffs' arguments unpersuasive. Plaintiffs' asserted alternatives fail to take into account the administrative burdens imposed upon the Jail and its staff due to an increase in unsolicited mail. Indeed, their proposed new prohibition would likely require more staffing in order to ensure that inmates did not leave unsolicited publications in common areas. Furthermore, plaintiffs fail to address the jail safety issues raised by defendant, such as the potential increase in contraband due to inadequate screening or an inmate's ability to fashion weapons or otherwise improperly use materials over which they have no ownership or personal interest.

Therefore, the court concludes that the fourth Turner factor weighs in favor of defendant.

CONCLUSION

In sum, the court holds that defendant's regulations regarding the mail policy as it applies to unsolicited publications such as *CJA* are reasonably related to legitimate penological interests. There are valid, rational connections between the policies in place and defendant's interests in maintaining mail quality control, ensuring jail security, and allocating jail resources. There are also ready alternatives for plaintiffs to exercise their First Amendment right; defendant's regulations allow for the distribution of *CJA* to inmates when it is properly addressed and mailed to those who voluntarily request it. Further, accommodating plaintiffs' request would impact the allocation prison resources through the increased burden on staff as well as the potential increase in safety issues. Finally, there is no readily apparent alternative to the current regulations that bear in mind the legitimate penological interests proffered by defendant. Accordingly, the court concludes that defendant's challenged regulations are permissible under Turner.

For the foregoing reasons, defendant's motion for summary judgment is GRANTED. The Clerk of Court is directed to close this case.

IT IS SO ORDERED.
DATED: August 3, 2009

/s/ Frank C. Damrell
FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed September 1, 2011]

No. 09-15768
D.C. No. 2:08-cv-00343-GEB-EFB

RAY HRDLICKA, an individual; CRIME, JUSTICE & AMERICA, INC., a California corporation,
Plaintiffs-Appellants,

v.

PERRY L. RENIFF, in his official capacity of Sheriff of the County of Butte, California,
Defendant-Appellee.

No. 09-16956
D.C. No. 2:08-cv-00394-FCD-EFB

RAY HRDLICKA, an individual; CRIME, JUSTICE & AMERICA, INC., a California corporation,
Plaintiffs-Appellants,

v.	)
	)
JOHN MCGINNESS, Sacramento County Sheriff,	)
Defendant-Appellee.	)
	)

ORDER

Filed September 1, 2011

Before: Stephen Reinhardt, William A. Fletcher and N. Randy Smith, Circuit Judges.

Order;
Concurrence by Judge Reinhardt
and Judge William A. Fletcher;
Dissent by Judge O'Scannlain

ORDER

Judge Reinhardt and Judge W. Fletcher have voted to deny the Appellees' petitions for rehearing and petitions for rehearing en banc, filed on February 15, 2011 and February 23, 2011. Judge N.R. Smith voted to grant both.

A judge of the court called for a vote on the petitions for rehearing en banc. A vote was taken, and a majority of the active judges of the court failed to vote for en banc rehearing. Fed. R. App. P. 35(f).

The petitions for rehearing and the petitions for rehearing en banc are **DENIED**.

REINHARDT and W. FLETCHER, Circuit Judges, concurring in the denial of rehearing en banc:

The question presented in this case is straightforward: Does the four-factor test of *Turner v. Safley*, 482 U.S. 78 (1987), apply to distribution of a magazine to county jail inmates who have not requested it? A majority of the three-judge panel concluded that *Turner* does apply. An en banc call failed to receive a majority vote of the active judges of our court.

The *Turner* test evaluates the reasonableness of a prison regulation impinging on a constitutional right. We have applied *Turner* in a number of cases to evaluate the reasonableness of regulations banning the distribution of mail. In *Crofton v. Roe*, 170 F.3d 957 (9th Cir. 1990), we applied *Turner* to evaluate a regulation prohibiting an inmate from receiving a gift book from his stepfather. In *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001), we applied *Turner* to evaluate a regulation banning distribution of bulk-rate mail to which prisoners had subscribed. In *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001), we applied *Turner* to evaluate a regulation banning distribution of "pre-paid, for-profit, subscription publications." In *Prison Legal News v. Lehman*, 397 F.3d 692 (9th Cir. 2005), we applied *Turner* to evaluate a regulation banning distribution of requested but "non-subscription bulk mail."

We concluded that the *Turner* test applies, as well, to evaluate the reasonableness of regulations banning distribution of an unsolicited magazine, Crime, Justice

& America ("CJA"). CJA is of unquestioned value to county jail inmates. Because inmates are typically in county jail for relatively short periods, and because the value of CJA to inmates is greatest when they first arrive in the jail, it is unrealistic to insist, as a condition for applying the *Turner* test, that inmates have already subscribed to CJA.

We wrote in our opinion, "The fact that in this case the publication was unsolicited may, of course, be taken into account in applying the *Turner* test. But the fact that the publication was unsolicited does not make the *Turner* test inapplicable." *Hrdlicka v. Reniff*, 631 F.3d 1044, 1051 (9th Cir. 2011).

O'SCANNLAIN, Circuit Judge, joined by GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, IKUTA and N.R. SMITH Circuit Judges, dissenting from the denial of rehearing en banc:

The court today holds that the First Amendment mandates that county jails distribute unsolicited junk mail to their inmates, or face a burdensome lawsuit from the junk mail publisher, citing *Turner v. Safley*, 482 U.S. 78 (1987).[1] Given that *Turner* decided only the standard of review to apply when a prison regulation impinges upon *inmates'* First Amendment rights, *id.* at 89, the majority's interpretation is an

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[1] The majority speaks only of the rights of publishers. But because "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public," any rule that applies to the publishers would apply equally to anyone else. *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *see also Houchins v. KQED, Inc.*, 438 U.S. 1, 11-12 (1978).

extraordinary leap since all agree that no inmate rights are at stake in this case. Regrettably, the majority's opinion is completely untethered from Supreme Court precedent and in considerable tension with our own case law. It further complicates the already "inordinately difficult undertaking" of prison administration. *Id.* at 85. I respectfully dissent, therefore, from the failure of our court to rehear this case en banc.

I

Ray Hrdlicka publishes a quarterly magazine called *Crime, Justice & America* ("CJA") that includes a number of items which may be of interest to jail inmates. Indeed, between 2002 and the publication of the majority's opinion, CJA went through fourteen editions totaling over one million copies. Which is quite impressive, until one realizes that rather than relying on subscriptions, CJA has simply blanketed jailhouses with hundreds of free copies every week.[2]

CJA's business model is fairly simple. It lures advertisers—usually bail bondsmen and lawyers—with the promise of a captive audience of thousands of inmates in immediate need of their services. It then ensures that it will fulfill that promise by pressuring jail administrators to choose either leaving stacks of CJA in common areas or allowing individual copies of

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[2] Though CJA is a quarterly magazine, it is distributed on a weekly basis so that even with the rapid turnover in county jails copies will be available to current inmates. *See Distribution of Crime Justice & America Magazine*, Crime Justice & America, (Feb. 27, 2011) http://crimejusticeand-america.com/distribution-of-crime-justice-america-magazine.

CJA to be mailed directly to inmates off of an inmate roster. Either way, every seven days enough copies arrive at the targeted jails to ensure that at least one out of every ten inmates gets one. Hrdlicka is thereby able to externalize the cost of increasing his readership on the prison system.

Pursuant to content neutral department policies, officials at the Sacramento County and Butte County Jails refused to facilitate Hrdlicka's distribution scheme while allowing Hrdlicka to send CJA to any prisoner who requested it. But in an effort to minimize the risk of smuggled contraband as well as the amount of excess paper inmates could use to do things like start fires or clog toilets, these jail administrators refused to disseminate extra copies to those inmates who had not asked for them.

Hrdlicka filed a suit under 42 U.S.C. § 1983 claiming a constitutional right to pursue his business model. And now this court obliges by discovering such a right in the First Amendment.

II

Challenges to jail or prison regulations limiting outside contact with prisoners undoubtedly involve the balancing of constitutional imperatives. *Turner*, 482 U.S. at 84. The majority focuses almost entirely upon those implicated by the First Amendment. But also among them is that running a jail "requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Id.* at 84-85. Therefore the separation of powers "counsel[s] a policy of judicial restraint," particularly

"[w]here a state penal system is involved." *Id.*; *see also Beard v. Banks*, 548 U.S. 521, 528 (2006).

Fundamental to maintaining this balance between a prisoner's right to contact with the outside world and the State's ability to run a functional prison system is the ability to recognize when First Amendment interests are implicated. And regardless of what the majority may have found in the pages of CJA, nothing in the United States Reports or the Federal Reporter gives an outsider a First Amendment interest, let alone a freestanding right, to unsolicited contact with inmates.

The Supreme Court has certainly never found such an interest. *See Jones v. N.C. Prisoner's Labor Union, Inc.*, 433 U.S. 119, 121 (1977) (brushing aside a union challenge to a restriction against bulk mail to inmates, as "barely implicat[ing]" First Amendment rights); *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (allowing a prohibition on face-to-face interviews with inmates based on "the familiar proposition that lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights" (internal quotation marks omitted)).

Indeed, the only time the Court has ever acknowledged a publisher's "interest in access to prisoners" is when those prisoners "through subscription, willingly seek their point of view." *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989). Only then—when jail regulations limit a detainee's access to the outside world—has the Court considered the First Amendment interests of the person with whom the detainee wished to correspond. And, even then, the Court made clear that it was announcing a rule for

when the "rights of prisoners *and* outsiders" are at issue. *Id.* at 410 n.9. *Cf. Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001) (stating that *Turner* "adopted a unitary, deferential standard for reviewing *prisoners'* constitutional claims" (emphasis added)).

Until now, we have scrupulously followed the Supreme Court's direction and recognized the derivative nature of publishers' First Amendment interests in contacting prisoners. *See Prison Legal News v. Lehman (PLN II)*, 397 F.3d 692, 701 (9th Cir. 2005) (describing *Jones* as upholding "a ban on junk mail" and distinguishing a "scenario in which a publisher has [not] attempted to flood a facility with publications sent to all inmates, regardless of whether they requested the publication"); *Morrison v. Hall*, 261 F.3d 896, 898 (9th Cir. 2001) ("Moreover, prisons can and have adopted policies permitting prisoners to receive for-profit, commercial publications, while at the same time, prohibiting prisoners from receiving unsolicited junk mail."); *see also Prison Legal News v. Cook (PLN I)*, 238 F.3d 1145, 1146 (9th Cir. 2001).

But the majority puts all of this precedent aside, and declares that "[a] First Amendment interest in distributing and receiving information does not depend on a recipient's prior request for that information." *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011).

The majority tries to conceal such ipse dixit with a passing citation to two cases standing for the unremarkable proposition that laws criminalizing core protected speech in traditional public fora are subject to strict scrutiny. *See Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (prohibition against summoning residents to their front doors for the purposes of

distributing literature); *Klein v. City of San Clemente*, 584 F.3d 1196, 1204-05 (9th Cir. 2009) (leafleting unoccupied vehicles on city streets). These cases are utterly irrelevant to whether Hrdlicka's First Amendment interests were implicated by the prison restrictions at issue in this case at all.

III

Even if the majority were correct that Hrdlicka had a First Amendment interest at stake, it still erred by applying the factors annunciated in *Turner* without taking context into account. *Cf. Thornburgh*, 490 U.S. at 414 (stating that the *Turner* factors were designed to "channel[ ] the reasonableness inquiry"). For example, what does it mean to consider "whether there are alternative avenues that remain open to the inmates to exercise the right" or "the impact that accommodating the asserted right will have on other guards and prisoners" when no one contends that an inmate's rights are at risk? *PLN II*, 397 F.3d at 699 (internal quotation marks omitted). The majority inexplicably provides special rights to Hrdlicka because he was attempting to communicate with someone who has been incarcerated.

First, a jail cell is quite clearly not a public forum. *See Jones,* 433 U.S. at 134 (holding that a "prison may be no more easily converted into a public forum than a military base"); *accord Adderley v. Florida*, 385 U.S. 39, 41 (1966); *United States v. Douglass*, 579 F.2d 545, 549 (9th Cir. 1978).[3] As such, under ordinary rules,

[3] Indeed, the majority does not even dispute that jails are not public fora. *See Hrdlicka*, 631 F.3d at 1050.

government officials could have excluded Hrdlicka's speech on the basis of its subject matter or even his identity " 'so long as the distinctions drawn [were] *reasonable* in light of the purpose served by the forum and [were] viewpoint neutral.' " *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 131 (2001) (emphasis added). "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." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985).

Second, rather than criminalizing speech, the ban on unsolicited copies of CJA merely served to preserve the public fisc.[4] And the Court has made abundantly clear that the elected branches may set spending priorities in ways that negatively and unequally impact free speech rights so long as they do not discriminate on the basis of viewpoint. *See Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1988) (citing *Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.")).

In sum, assuming Hrdlicka has an independent First Amendment interest involved in this case, that

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[4] Recall that every piece of mail that enters a detention facility must be inspected, sorted, distributed, monitored and ultimately disposed of. *Cf. Shaw*, 532 U.S. at 231 (allowing jails to consider such burdens even in letters involving legal advice). Restrictions on junk mail allow jail administrators better to allocate resources to other legitimate, and more pressing concerns.

interest does not extend to commandeering public facilities for his personal gain. And it is not infringed by a "viewpoint-neutral exclusion of speakers who would disrupt [these] nonpublic for[a] and hinder [their] effectiveness for [their] intended purpose." *Cornelius*, 473 U.S. at 811. Under such circumstances, the burden was on *him* to show that the regulations were not supported by any rational basis. *See, e.g.*, *Regan v. Taxation with Representation*, 461 U.S. 540, 547-51 (1983).

IV

Instead, the majority places on jail administrators the onerous burden of showing "the degree to which the[ ] purposes [behind the regulations] are actually served by a refusal to allow" distribution of any particular type of unsolicited junk mail. *Hrdlicka*, 631 F.3d at 1051.[5] Indeed, *Beard v. Banks*, 548 U.S. 521 (2006), specifically held to the contrary, even under *Turner's* standard, a regulation preventing certain inmates from receiving *any* magazines based upon a statement and a deposition that these restrictions motivated better behavior. *See also Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (stating that when a prison regulation is being challenged, "[t]he burden is not on the State to prove its validity, but on the prisoner to disprove it.").

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[5] In particular, the majority expects jails to prove "the degree to which allowing [the] distribution [of any particular piece of mail] in the jails would produce additional clutter in inmates cells or otherwise adversely affect jail security," *Hrdlicka*, 631 F.3d at 1052 and "to what degree[ ] the jails would be forced to expend additional resources" to handle the additional correspondence." *Id.* at 1054.

Then, in a wonderful display of why federal judges should not be running jails, the majority dismisses out of hand many practical concerns that will arise from requiring jails to distribute an unknown quantity of unsolicited mail.[6]

The majority also simply ignores the impact its ruling produces beyond these jails and this publication. As Judge Smith's dissent correctly points out, one consequence of the majority's decision is to "force[ ] sheriffs either to allow all unrequested mail to reach inmates or to make a case by case determination of the quality of the publication." *Hrdlicka*, 631 F.3d at 1057 (N.R. Smith, J., dissenting). Sheriffs should not be put in this predicament. Instead, courts should give "considerable deference to the determinations of prison administrators who, in the interest of security, regulate the relations between prisoners and the outside world." *Thornburgh*, 490 U.S. at 408. In applying such deference, we as federal judges must allow prison officials to "reach[ ] experience-based conclusion[s]" about which "policies help to further legitimate prison objectives." *Beard*, 548 U.S. at 533.

V

The First Amendment does not give publishers any interest (to say nothing of a right) to send unsolicited mail to inmates. Sending such mail may be highly

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[6] For this among other reasons, I also disagree with the manner in which the majority applied the four-part test in *Turner*. *See Shaw*, 532 U.S. at 239 (requiring only that the connection between the restriction and the purpose behind not be arbitrary or irrational). But such concerns are secondary to the simple fact that the majority should not have applied *Turner* at all.

profitable to the publisher, but "losing [such] cost advantages does not fundamentally implicate free speech values." *Jones*, 433 U.S. at 130-31. By failing to recognize this, the majority ignores the separation of powers and unnecessarily injects the federal courts into a matter "peculiarly within the province of the legislative and executive branches of government." *Turner*, 428 U.S. at 84-85. And by the full court's failure to order rehearing en banc, we have needlessly muddled our First Amendment jurisprudence. I respectfully dissent from our regrettable decision not to rehear this case en banc.

CERTIFICATE OF COMPLIANCE

No. _____

JOHN MCGINNESS, SACRAMENTO COUNTY SHERIFF,

Petitioner,

v.

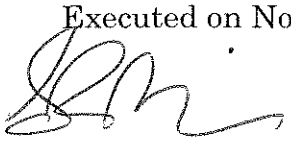
CRIME, JUSTICE & AMERICA, A CALIFORNIA CORPORATION, AND RAY HRDLICKA, AN INDIVIDUAL,

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 8,947 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 22, 2011.



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Sworn to and subscribed before me by said Affiant on the date designated below.

Date: 4/22-11

Notary Public

[seal]

PHILIP TUCKER
Notary Public, State of Ohio
My Commission Expires
January 1, 2012

CERTIFICATE OF SERVICE

I, Sarah R. Miller, hereby certify that 40 copies of the foregoing Petition for Writ of Certiorari of *John McGinness, Sacramento County Sheriff v. Crime, Justice & America, Inc., a California corporation, and Ray Hrdlicka, an individual*, were sent via Next Day Service to The U.S. Supreme Court, and 3 copies were sent Next Day Service to the following parties listed below, this 22nd day of November, 2011:

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