No. _____

In the Supreme Court of the United States

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

v.

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

Petitioner is an elected Sheriff and is in charge of managing a county jail. Respondent has created a publication that includes advertisements for bail bond companies and criminal defense attorneys, and has demanded that the Sheriff distribute unsolicited copies of his publication to recently detained inmates on a weekly basis. The Sheriff, citing his content-neutral policy of not allowing any unsolicited publications to be distributed in the jail, has refused. Respondent contends that the Sheriff's policy violates his First Amendment rights, and he is seeking a federal court order to force the Sheriff to distribute his publications. The questions presented are:

1. Whether the First Amendment provides commercial publishers with a right to demand that jail and prison administrators distribute their unsolicited publications to inmates.

2. Whether it is consistent with federalism and separation of powers concerns for federal courts to order elected county sheriffs to distribute unsolicited commercial publications to inmates, based on an evaluation of the content of the publications, and the number of publications the publisher is seeking to distribute, in each particular case.

PARTIES TO THE PROCEEDING

Petitioner (Defendant and Appellee below)

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

Respondents (Plaintiffs and Appellants below)

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

Prior to oral argument, the Ninth Circuit Court of Appeals combined this case with the Respondents' similar lawsuit against JOHN McGINNESS, in his official capacity of Sheriff of the County of Sacramento, California.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Perry L. Reniff, in his official capacity as the elected Sheriff of Butte County, California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's divided opinion (App. 1a-28a)[1] is reported at 631 F.3d 1044 (9th Cir. 2011). Its order denying rehearing and rehearing en banc, including a two-judge concurring opinion and an eight-judge dissenting opinion (App. 41a-53a) is unreported but is available at 2011 U.S. App. LEXIS 18218. The opinion of the United States District Court for the Eastern District of California (App. 29a-40a) is unreported but is available at 2009 U.S. Dist. LEXIS 21976.

JURISDICTION

The Ninth Circuit issued its decision on January 31, 2011. App. 1a. Petitioner timely filed a petition for rehearing and rehearing en banc, which was denied on September 1, 2011, with two judges concurring in and eight judges dissenting from the denial of rehearing en banc. App. 41a. This Court has jurisdiction under 28 U.S.C. section 1254(1).

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[1] "App." refers to the appendix of this petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS 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.

U.S. Const. amend. I.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of

> Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

1. a. Respondent Ray Hrdlicka ("Hrdlicka") is a former bail bond agent who has created the publication *Crime, Justice & America* ("CJA"). App. 3a, 4a. CJA contains general articles about the criminal justice system, along with full page advertisements for bail bond companies and criminal defense attorneys. App. 4a. New editions are issued about once a year. App. 4a.

Hrdlicka relies on public information to obtain a weekly list of the names of inmates in county jails, and he demands that county jail administrators distribute unsolicited copies of CJA to new inmates every week. App. 4a-5a. To make a profit, Hrdlicka solicits bail bond companies and defense attorneys to place paid advertisements in CJA by highlighting the claim that their ads will be sent directly to new inmates. App. 24a, 45a. For example, Hrdlicka's advertisements state:

* "Are You Getting Your Message Inside the Jail?"

* "Seen by Hundreds to Thousands of **Pre-Trial inmates**"

* "Get your message in front of a bunch of people who need your services immediately!"

* "Delivered directly into the County Jail!"

b. Petitioner Perry Reniff is the elected Sheriff of Butte County, California. The Sheriff has a mail distribution policy that does not allow any unsolicited publications to be distributed to inmates in his custody. App. 31a. The policy is designed to reduce the amount of staff time required to search and distribute incoming mail; reduce the amount of contraband that enters the jail; and reduce the amount of unsolicited papers that circulate inside the jail, which in the experience of the Sheriff and his management staff, are more likely to be used by inmates for improper purposes, because unlike legal or personal mail, inmates have no connection to unsolicited publications, and do not care if unsolicited papers are lost, damaged or seized. App. 31a-33a.

The Sheriff's policy is content-neutral, and fully respects an inmate's right to request and receive any appropriate publications, including CJA. App. 25a, 46a.

2. In 2004 Hrdlicka demanded that the Sheriff provide him with a weekly list of every inmate in custody so that he could send an *unsolicited* copy of CJA to new inmates each week. App. 6a, 46a. Alternatively, Hrdlicka suggested that the Sheriff could save significant time and resources by agreeing to accept unaddressed copies of CJA in bulk, with the understanding that the Sheriff's staff would distribute and clean up the publications. App. 6a, 23a. Under either method, Hrdlicka is only seeking to distribute unsolicited copies of CJA. It is undisputed that no inmate in the Sheriff's custody has ever requested the publication. App. 25a.

The Sheriff informed Hrdlicka that his mail policy does not allow any unsolicited publications to be distributed, and while he had no problem with distributing CJA to any inmate who requests it, he would not create an exclusive procedure under either method. App. 6a, 45a-46a. Separately, the Sheriff recognized that Hrdlicka's business was designed to solicit bail from inmates, which is illegal under California law, and the Sheriff refused to distribute unsolicited copies on that basis as well. App. 23a.

3. In February 2008 Hrdlicka filed suit against the Sheriff, seeking declaratory and injunctive relief for an alleged violation of his First Amendment rights. App. 29a-30a. Hrdlicka's goal is to obtain a federal court order to force the Sheriff to continuously distribute his unsolicited publications. App. 7a.

After both parties conducted discovery, the Sheriff filed a motion for summary judgment, and argued that publishers do not have a right to demand distribution of unsolicited publications inside jails, that distributing unsolicited copies of CJA to inmates constitutes unlawful commercial speech, and that the Sheriff's policy has a logical connection to legitimate penological interests. Citing a policy of judicial restraint, the district court assumed without deciding that the Sheriff's mail policy implicates Hrdlicka's rights, and applied the four factors established in *Turner v. Safley*, 482 U.S. 78 (1987) to determine if the policy is constitutional. App. 30a. In a detailed opinion, the district court determined that all four *Turner* factors weighed in the Sheriff's favor, and granted summary judgment for the Sheriff. App. 35a-36a. Hrdlicka appealed.

Around the same time, Hrdlicka was pursuing a similar lawsuit against the Sheriff of Sacramento County, John McGinness. The district court judge in that case also determined that all four *Turner* factors weighed in favor of Sheriff McGinness's policy, and granted his motion for summary judgment[2]. App. 6a. Hrdlicka appealed that decision as well, and the court of appeals consolidated both cases immediately prior to oral argument.

4. In a joint opinion, a divided panel of the Ninth Circuit Court of Appeals reversed and remanded both cases. App. 1a-28a.

a. In addressing whether the Sheriffs' policies implicated Hrdlicka's First Amendment rights, the panel majority reasoned that because courts have applied a strict-scrutiny analysis to ordinances that make it a crime to distribute unsolicited flyers in public places, there is a "well-established principle" that all publishers have an interest in distributing unsolicited publications. App. 9a. The panel acknowledged, however, that "because a publisher cannot deliver unsolicited communications to an inmate by distributing handbills on the street," App. 9a, whether publishers have a protected interest in distributing unsolicited publications to inmates

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[2] Hrdlicka was also unsuccessful in a previous lawsuit against the Sheriff of Sonoma County, California. *Hrdlicka v. Cogbill*, Case 3:04-cv-03020 (N. Dist. Cal. July 26, 2004). In ruling on the parties' cross-motions for summary judgment, the district court judge in that case also assumed that Hrdlicka's rights were implicated, and determined that all four *Turner* factors weighed in the Sheriff's favor. See Order on Cross Motions for Summary Judgment, Docket Entry 107 (Sept. 1, 2006).

"implicates very different concerns," App. 9a, but concluded that this Court's decision in *Turner* addressed "precisely those concerns." App. 9a. The panel also reasoned that since courts have already applied the *Turner* factors in cases involving publications that were requested by inmates, the *Turner* factors must be applied in this circumstance as well, because there was "no way to distinguish what was at issue in those cases from what is at issue here." App. 12a-13a.

Based on that reasoning, the panel majority held, without ever actually stating, that publishers have a special right to demand distribution of unsolicited publications to inmates, and that an analysis of the *Turner* factors was necessary to determine if the Sheriffs' policies were permissible. App. 13a, 45a, 46a.

b. In considering the first *Turner* factor – "whether the regulation is rationally related to a legitimate and neutral governmental objective" – the panel majority acknowledged that inmates in the Butte County jail currently use torn out pages from phone books and paper back books for improper purposes. App. 16a. But unlike the district court judge, who recognized that inmates are more likely to use unsolicited publications for improper purposes, and that the Sheriff's effort to reduce the amount of unsolicited papers in the jail had a logical connection to his interest in maintaining order and security, App. 32a-33a, the panel majority believed that Sheriff Reniff's officers did not specify "whether distribution of CJA was likely to increase" the rate that paper would be misused by inmates, App. 15a-16a, which in their view, made it "unclear the degree to which allowing distribution of CJA" would adversely affect

jail security. App. 16a-17a. Similarly, in addressing Sheriff Reniff's contention that his refusal to distribute all unsolicited publications has a logical connection to his interest in maintaining control over his staff and resources, the panel majority believed that Sheriff Reniff's officers did not provide any "information quantifying the additional resources that would be required to distribute CJA." App. 17a.

Turning to the second *Turner* factor – "whether there are alternative avenues that remain open to inmates to exercise the right" – the panel acknowledged that the Sheriff has agreed to distribute CJA to any inmate who requests it. App. 19a. But while the district court concluded that the Sheriff's policy provides Hrdlicka with an alternative means to express his rights, App. 33a-34a, the panel majority opined 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." App. 19a. The panel majority also emphasized that CJA contains bail bond advertisements, and although the Sheriff's policy does not implicate inmates' rights, the panel found it significant that if inmates had to actually request CJA, and wait to receive it, "the advertising in CJA will be of little to no use." App. 20a.

The court then addressed the third *Turner* factor – "the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources generally" – but unlike the district court judge, who carefully considered all of the Sheriff's evidence that supported his view that requiring "distribution of unsolicited commercial mail would create an additional burden on the inadequate

resources already existing at the Butte County jail," App. 34a-35a, the panel majority reasoned that since they had already determined that the Sheriff's evidence regarding the first *Turner* factor was insufficient, there were automatically "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 the existence of easy and obvious alternatives indicates" that the Sheriff's policy is an "exaggerated response" – and concluded that because CJA is distributed in 60 counties throughout 13 states, "the response of the two jails in this case may be exaggerated." App. 22a.

Based on that reasoning, the panel majority concluded that "we cannot 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.

c. Judge Smith dissented. App. 23a-28a. He disagreed with the majority's holding that publishers have a special right to demand distribution of unsolicited publications to inmates because, in his view, the proper analysis for determining that issue must start with the understanding that "courts are ill equipped to deal with the problems of prison administration, and that the separation of powers counsels a policy of judicial restraint, particularly when a state penal system is involved." App. 26a-27a, *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (discussing *Procunier v. Martinez*, 416 U.S. 396 (1974)).

Judge Smith observed that in accordance with the principles articulated in *Martinez*, this Court has established that members of the press do not have a "special right of access" to inmates "beyond that afforded the general public." App. 26a (quoting *Pell v. Procunier*, 417 U.S. 817, 834 (1974)). He found the reasoning in *Pell* to be particularly significant because like the situation here, *Pell* dealt with a claim by members of the press that they had a free-standing right to access prisons when no concurrent right of inmates had been implicated. App. 26a. 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.

Judge Smith also argued that the majority's application of the *Turner* factors 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 advertisements contained throughout the publications might lose their value, App. 28a, which was improper 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 as result of the panel's refusal to follow *Shaw*, jail and prison administrators must now allow all unsolicited publications into their facilities, or evaluate the content of unsolicited publications on a case by case basis, which was "impossible under Supreme Court precedent." App. 27a-28a. Rather than force jail and prison administrators into an untenable position, Judge Smith 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.

5. The full court of appeals denied the Sheriffs' requests for rehearing en banc over the dissent of eight judges. App. 42a-53a. Judge Reinhardt, joined by Judge Fletcher, wrote a brief opinion concurring in the denial of the petitions, 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. 44a. Judge O'Scannlain, joined by seven other judges, wrote a lengthy dissent because in his view the court's decision "is completely untethered from Supreme Court precedent," "in considerable tension with our own case law," further "complicates the 'difficult undertaking of prison administration,'" and "needlessly muddles our First Amendment jurisprudence." App. 44a-55a.

Judge O'Scannlain observed that "regardless of what the majority may have found in the pages of CJA," no previous case has ever given "an outsider a First Amendment interest to unsolicited contact with inmates," and that until this case, the Ninth Circuit had scrupulously followed this Court's "direction and recognized the derivative nature of publishers' First Amendment interests in contacting prisoners." App. 47a-48a. He explained that in reaching its contrary conclusion, the panel majority disregarded all of that precedent, and relied instead on cases involving ordinances that make it a crime to distribute flyers in traditional public fora, which were "utterly irrelevant to whether Hrdlicka's First Amendment rights" are implicated here because jails are non-public fora, and

moreover, the Sheriffs' policies do not criminalize speech, but are designed to "preserve the public fisc." App. 48a-49a, 50a.

Judge O'Scannlain recognized that while the business model being pursued by Hrdlicka may be profitable, the First Amendment does not provide him with a right to commandeer "public facilities for his own personal gain," App. 51a, and any cost advantages he might lose by not being able to force his unsolicited publications into county jails were irrelevant, because this Court has already established that the "loss of cost advantages does not fundamentally implicate free speech values." App. 53a (quoting *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119, 130-131 (1977)); accord *Cornelius v. NAACP Legal Def. & Educ. 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."). Judge O'Scannlain explained that in discovering constitutional support for Hrdlicka's business model, the panel majority disregarded this Court's decisions, and by doing so, unnecessarily injected federal courts into a matter "peculiarly within the province of the legislative and executive branches of government." App. 53a (quoting *Turner*, 428 at 84-85).

Judge O'Scannlain observed that the panel majority compounded the problems caused by its finding of constitutional support for Hrdlicka's business model by committing a series of errors in its unnecessary *Turner* analysis. App. 51a-52a. He noted that although the *Turner* test required the panel to determine whether the Sheriffs' refusal to distribute

all unsolicited publications has a logical connection to a legitimate penological interest, the panel improperly framed the issue as whether the Sheriffs were "justified in their refusal to distribute CJA." App. 52a. Judge O'Scannlain explained that as a result of that fundamental error, the panel failed to consider "the impact its ruling produces beyond these jails and this publication." App. 52a.

In addition, Judge O'Scannlain recognized that although the Sheriffs' policies are content-neutral, the panel majority improperly considered the content of CJA in its *Turner* analysis, and that as a consequence of that error, jail and prison administrators throughout the Ninth Circuit are now 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, he pointed out that although the burden was on Hrdlicka to demonstrate that the Sheriffs' 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.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit held that publishers have a special right to demand distribution of unsolicited publications to inmates. The immediate effect of the court's decision is to open up jails and prisons to publishers who wish to utilize a facility's resources for their own financial gain. In fact, shortly after the

lower court's divided decision, another prominent publisher and litigator in this arena, Prison Legal News, filed suit against the Sacramento County Sheriff over that Sheriff's refusal to distribute PLN's unsolicited brochures to inmates. And immediately following the Ninth Circuit's refusal to hear this case en banc, the publisher of *In Your Defense* – another free publication that contains advertisements for criminal defense attorneys – has cited the court's decision in demanding that Sheriffs distribute its unsolicited publications to inmates. Hrdlicka currently demands that jail administrators in at least 13 states distribute unsolicited copies of CJA, and he also has a pattern of filing suit against anyone who refuses to do so. The Ninth Circuit's unprecedented finding of constitutional support for this business model, without considering the impact of its decision, merits review by this Court.

But to make matters significantly worse, the Ninth Circuit also held that when courts are reviewing a publisher's challenge to a jail administrator's content-neutral policy of not accepting any unsolicited publications, the question before the court is not whether the policy has a logical connection to a legitimate penological interest, but whether the facility administrator can demonstrate that the refusal to accommodate each publisher's demands is justified, and that courts considering that limited question must consider the content of the publication – and the number of publications sought to be distributed – in each particular case.

The Ninth Circuit's erroneous application and analysis of the *Turner* test conflicts with numerous decisions of this Court, and forces jails and prisons

throughout nine western states to either allow all unsolicited publications into their facilities, or reject unsolicited publications after an inefficient and improper evaluation of their content. Furthermore, federal judges, rather than jail and prison administrators, are now in charge of determining – on an ongoing and piecemeal basis – which unsolicited publications require distribution, in which jails and prisons, in what amounts, and why.

This Court has consistently recognized that managing a jail or 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, and that separation of powers concerns counsels a policy of judicial restraint, particularly where, as here, a state penal system is involved. The Ninth Circuit's decision to radically expand the role of federal courts into a matter that does not implicate inmates' rights, and that is far removed from the purposes of jails and prisons, provides important reasons for this Court to grant review.

A. THE NINTH CIRCUIT'S FINDING THAT PUBLISHERS HAVE A RIGHT TO DEMAND DISTRIBUTION OF UNSOLICITED PUBLICATIONS TO INMATES EXTENDS FIRST AMENDMENT PROTECTIONS BEYOND REASONABLE LIMITS, AND CONFLICTS WITH THE FEDERALISM AND SEPARATION OF POWERS CONCERNS THAT ARE CENTRAL TO THIS COURT'S DECISIONS.

The court of appeals held that publishers have a right to demand distribution of their unsolicited publications to inmates. If permitted to stand, the decision will require federal courts to micro-manage the distribution of unsolicited publications in jails and prisons, thus injecting federal courts into a matter that should be left to the executive and legislative branches. This Court's review is warranted.

a. In considering the scope of inmates' constitutional rights, and the rights of those who wish to communicate with inmates, this Court has long recognized that "courts are ill-equipped to deal with the problems of prison administration, which requires expertise, planning, and the commitment of resources, all of which are within the province of the legislative and executive branches." *Turner v. Safley*, 482 U.S. 78, 84-85 (1987) (discussing *Procunier v. Martinez*, 416 U.S. 396 (1974)). And while access to jails and prisons may be essential to some – such as lawyers representing inmates – courts should respect the "delicate balance that prison administrators must strike between the order and security of the internal prison environment and the legitimate demands of

those on the 'outside' who seek to enter that environment." *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

In accordance with those concerns, this Court has established that "[i]n the First Amendment context, some rights are simply inconsistent with the status of a prisoner or with the legitimate penological objectives of the correctional system." *Shaw v. Murphy*, 532 U.S. 223, 229 (2001); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977); *Pell v. Procunier*, 417 U.S. 817, 832 (1974). For example, in *Pell*, this Court held that members of the press do not have a "special right of access" to prisons that is any greater than access afforded to the general public. *Pell*, 417 U.S. at 834.

In *Thornburgh,* this Court carefully held that publishers have a legitimate interest in accessing inmates "who, through subscription, willingly seek their point of view..." *Thornburgh,* 490 U.S. at 408. Although *Thornburgh* did not address whether publishers have a protected interest in sending inmates *unsolicited* publications, this Court's decisions make it clear that any court considering that issue must carefully consider the same concerns.

b. But in addressing this important constitutional question for the first time, the panel majority avoided any consideration of those concerns, and inexplicably held that unlike other members of the press, publishers have a special right to demand distribution of their unsolicited commercial publications to inmates. The panel majority's indirect reasoning does not withstand scrutiny.

As was persuasively argued by Judge O'Scannlain, the majority's reliance on cases involving ordinances that make it a crime to pass out flyers in public places are "utterly irrelevant" to whether publishers have a right to force their unsolicited publications into jails and prisons because the policies here do not criminalize speech, but are designed to allow jail administrators to maintain control over their staff and resources. App. 49a. And the panel majority's claim that *Turner* precisely addressed any concerns with extending constitutional protection to publishers in this context is equally unavailing because even after the *Turner* decision, both this Court and the Ninth Circuit have continued to caution against a judicial rule that would provide publishers a free-standing right. App. 25a, 47a-48a. *Thornburgh*, 490 U.S. at 407-408; *Morrison v. Hall*, 261 F.3d 896, 898 (9th Cir. 2001) (noting with approval that "prisons can and have adopted policies permitting prisoners to receive requested publications, while at the same time prohibiting prisoners from receiving unsolicited junk mail."); *Prison Legal News v. Lehman*, 397 F.3d 692, 701 (9th Cir. 2005) ("It is the fact that a request was made by the recipient ... that is important." "This case is not a scenario in which a publisher has attempted to flood a facility with publications sent to all inmates, regardless of whether they requested the publication.")

As a result of the panel's refusal to acknowledge the important distinction between requested and unsolicited publications, publishers like Hrdlicka, PLN and others now have a right to demand that jail and prison administrators continuously distribute an unlimited number of their unsolicited publications, and any facility administrator who refuses to accommodate each publisher's demands is subject to

repeated and burdensome lawsuits in federal courts, who are now in charge of micro-managing this entire matter. That result conflicts with the bedrock constitutional principles articulated in *Martinez*, and the panel majority's failure to reconcile its decision with those principles warrants review.

B. THE NINTH CIRCUIT'S UNNECESSARY AND ERRONEOUS APPLICATION OF THE *TURNER* FACTORS MERITS THIS COURT'S REVIEW BECAUSE THE RULING SIGNIFICANTLY IMPACTS JAILS, PRISONS, AND COURTS THROUGHOUT NINE WESTERN STATES.

Applying the standard of review established in *Turner*, this Court has upheld numerous prison regulations that impinge on inmates' and publishers' First Amendment rights. See *Turner v. Safley*, 48 U.S. 78 (1987) (upholding a regulation that restricted the exchange of personal correspondence between inmates); *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (upholding regulations that limited the ability of Muslim inmates to attend Friday religious services); *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (upholding regulations that prevented inmates from receiving requested publications found by a prison warden to be detrimental to security); *Overton v. Bazzetta*, 539 U.S. 126 (2003) (upholding regulations that imposed various restrictions on inmates' visitation privileges); *Shaw v. Murphy*, 532 U.S. 223 (2001) (upholding a regulation that precluded inmates from providing legal assistance to others); *Beard v. Banks*, 548 U.S. 521

(2006) (upholding a prison regulation that prohibited a prison's most dangerous inmates from possessing any publications).

Even assuming that the Sheriff's content-neutral policy implicates Hrdlicka's rights, a faithful application of the *Turner* factors would plainly lead to a determination that the Sheriff's policy has a logical connection to several legitimate and neutral penological interests. As Judge O'Scannlain set out in his dissent, the panel majority was only able to reach a contrary conclusion by fundamentally misapplying the *Turner* test, improperly considering the content of CJA, improperly shifting the burden of proof to the Sheriffs, and applying a heightened and hostile scrutiny. App. 51a-52a. If permitted to stand, the panel majority's erroneous ruling will negatively impact jails, prisons and courts throughout the Ninth Circuit.

1. The court of appeals contravened *Turner* by ruling that courts must focus on the application of a jail's policy to the unsolicited publications involved in each case, and that the burden is on jail administrators to demonstrate the degree to which accommodating each publisher's demands would impact the orderly functioning of their facility.

Turner provides that "[w]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. First and foremost, "there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* at 89. However, prison officials need not produce evidentiary proof that a challenged regulation will or has been effective in accomplishing its goals; all that is required is "a *logical* connection" between the two. *Turner*, 482 U.S. at 94 (emphasis in the original). The burden is on the party challenging the regulation to demonstrate that the "connection between the regulation and the asserted goal is 'arbitrary or irrational.'" *Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (quoting *Turner*, 482 U.S. at 89-90); accord *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

The question in this case, therefore, is whether the Sheriff's content-neutral policy of not allowing any unsolicited publications to be distributed in the Butte County jail has a logical connection to a legitimate penological interest – or more properly stated, whether Hrdlicka has demonstrated that the connection

between the policy and the Sheriff's goals is arbitrary or irrational.

The panel majority fundamentally misapplied the *Turner* test by focusing its entire *Turner* analysis on the application of the Sheriff's policy to the unsolicited publications involved in this particular case, while simultaneously placing an "onerous burden" on the Sheriff to demonstrate the degree to which accommodating this particular publisher's demands would impact the orderly functioning of the jail. App. 16a ("Lieutenant Flicker did not specify whether distribution of CJA was likely to increase the rate of such use of paper by inmates."); App. 16a ("It is thus unclear the degree to which allowing distribution of CJA in the jails would ... adversely affect jail security."); App. 17a ("Butte County officers provided no information quantifying the additional resources that would be required to distribute CJA."); App. 21a ("[T]here 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."); App. 23a ("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...").

As Judge O'Scannlain explained in his dissent to the denial of rehearing en banc, the panel's failure to properly apply the *Turner* test "provided a wonderful display of why federal judges should not be running jails," because the panel's failure to analyze the Sheriff's actual policy prevented the panel from considering "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.

2. The court of appeals disregarded *Shaw* by ruling that courts must consider the content of the unsolicited publications in each particular case.

The second *Turner* factor directs courts to consider "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. In instances where alternate avenues remain available, courts must be particularly mindful of the deference owed to correction officials. *Id*.

It is undisputed that the Sheriff's policy allows inmates to request and receive any appropriate publications, and that the Sheriff has agreed to distribute CJA to any inmate who requests it. App. 19a, 25a, 46a. Therefore, Hrdlicka has a readily available means to exercise his rights, and Judge Smith properly reasoned that just as this Court established in *Pell* that members of the press do not have a special right to demand access to state prisons, Hrdlicka has no "special right to demand that a Sheriff accept one of his chosen methods of distribution." App. 27a.

In order to avoid the rationale in *Pell* and reverse the district court, the panel majority declared that there was 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." App. 19a. In addition, the panel emphasized

that CJA contains bail bond advertisements, and found it significant that if inmates could only receive CJA after submitting a request, "the advertising in CJA will be of little to no use." App. 20a.

As Judge O'Scannlain argued in his dissent, the panel's analysis of the second *Turner* factor conflicts with this Court's decisions in two significant respects, with very significant consequences. First, the panel's belief that there is a material question of fact as to whether Hrdlicka can effectively reach county jail inmates through a subscription based system fails to recognize that the only reason Hrdlicka and other publishers *choose* to distribute unsolicited publications to county jail inmates, and no one else, is because their business models are designed to solicit business from county inmates on behalf of the companies who pay to advertise in their publications. App. 45-46a. But as Judge O'Scannlain explained, the First Amendment does not provide publishers with a right to "commandeer public facilities" for their own financial gain, and when a jail or prison refuses to distribute a publisher's unsolicited publications, the loss of "cost advantages does not fundamentally implicate free speech values." App. 51a, 53a (quoting *Jones*, 433 U.S. at 130-131); accord *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809.

Judge O'Scannlain recognized that in creating a special right of access for publishers seeking to distribute unsolicited publications to inmates, the panel ignored *Pell* and *Jones*, and by doing so, injected federal courts into a matter that should be left to the executive and legislative branches. App. 53a.

Second, Judge O'Scannlain argued that the panel majority's focus on the fact that CJA contains bail bond advertisements, and their belief that the ads might lose their value if the Sheriff's staff does not continuously provide new inmates with unsolicited copies of CJA, was both unnecessary and improper because it is undisputed that the Sheriff's content-neutral policy does not implicate inmates' rights[3], App. 25a, 49a, and "the *Turner* test, by its terms, does not accommodate valuations of content." *Shaw*, 532 U.S. at 230.

In *Shaw,* this Court explained that if courts were permitted to follow the panel majority's reasoning, and "enhance constitutional protection based on their assessments of the content of the particular communications, courts would be in a position to assume a greater role in decisions affecting prison administration." *Id.* But *Shaw* unanimously foreclosed that expanded role for federal courts as being inconsistent with separation of powers concerns. *Id.*

Both Judge O'Scannlain and Judge Smith explained that as a direct result of the panel's refusal to follow *Shaw*, jail and prison administrators throughout the Ninth Circuit are now in the

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[3] It is also undisputed that inmates already have access to bail and attorney advertisements in both the booking unit and the day room areas of the jail, through telephone books and laminated signboards. Unlike unsolicited copies of CJA, which consist of approximately 40 loose pages that inmates can easily use for improper purposes, and which require an ongoing commitment of resources to distribute and clean up, the signboards are in a fixed location, are difficult for inmates to use for improper purposes, and are expressly permitted under California law.

"impossible position" of having to allow all unsolicited publications into their facilities, or evaluate the value of unsolicited publications on a case by case basis. App. 27a-28a, 52a. Furthermore, federal courts are now in charge of determining which publications require distribution in which jails and prisons, in what amounts, and why – the exact result that this Court unanimously rejected in *Shaw*. The far reaching impacts of the panel majority's unnecessary refusal to follow this Court's decisions merits review.

3. The court of appeals violated *Beard* and *Overton* by ruling that a reviewing court's only obligation is to review the evidence in the light most favorable to the plaintiff, which undermines the entire *Turner* rationale.

In the context of reviewing a prison administrator's successful motion for summary judgment, all justifiable interests must be drawn in favor of the party challenging the regulation, but "courts must distinguish between evidence of disputed facts and disputed matters of professional judgment. In respect to the latter, [a court's] inferences must accord deference to the views of prison authorities." *Beard v. Banks*, 548 U.S. 521 (2006) (citing *Overton v. Bazzetta*, 539 U.S. at 132.) Rather than apply the standard of review established in *Beard* and *Overton*, and defer to the undisputed and informed judgment of Sheriff Reniff's officers, the panel majority declared that a reviewing court's only obligation is to "review the evidence in the light most favorable" to the plaintiff. App. 7a.

The erroneous standard of review applied by the panel majority undermines the entire *Turner* rationale. For one example, the third *Turner* factor requires courts to consider "the impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prisoner resources generally." *Turner*, 482 U.S. at 90. In the "necessarily closed environment of the 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 institutional order." *Id.* Thus, "[w]hen 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.*

As reflected in the district court's *Turner* analysis, Captain Jerry Jones[4] provided extensive testimony about the inadequate resources currently existing at the Butte County jail, and the "ripple effect" of forcing the Sheriff to dedicate his resources to continuously distributing unsolicited publications, and dealing with the problems those publications cause[5]. App. 34a-35a. But in analyzing the third *Turner* factor, the panel majority ignored Captain Jones' entire testimony, and

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[4] The Sacramento Sheriff's motion for summary judgment was supported by the testimony of Captain Scott Jones.

[5] This Court has observed that even with requested publications, "once in the prison, material of this kind reasonably may be expected to circulate among prisoners, with the concomitant potential for coordinated disruptive conduct," and that in "the volatile prison environment, it is essential that prison officials be given broad discretion to prevent such disorder." *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989).

reasoned that since they had already determined that Sheriff Reniff's evidence regarding the first *Turner* factor was insufficient, there were automatically "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.

The burden of proof and the standard of review applied by the court of appeals is flatly inconsistent with *Beard* and *Overton*, and fundamentally at odds with the entire *Turner* rationale. The panel majority's ruling has the additional impact of dissuading jail and prison administrators from believing that their policies will be reviewed in accordance with the principles outlined in this Court's decisions.

CONCLUSION

The Ninth Circuit's decision is not only erroneous, but it needlessly burdens and confuses jail and prison administrators throughout nine western states, requires ongoing and piecemeal litigation over an issue that is far removed from the purpose of jails and prisons, and injects federal courts into a role that has been unanimously rejected by this Court as being inconsistent with separation of powers concerns.

For all of the above stated reasons, Petitioner, the elected Sheriff of Butte County, California, respectfully requests that this honorable Court grant Certiorari, or alternatively, summarily reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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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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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

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2:08-cv-343-GEB-EFB

[Filed March 18, 2009]

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

ORDER[*]

Defendant moves for summary judgment on Plaintiffs' sole claim alleged under the First Amendment; specifically, Plaintiffs claim Defendant's

[*] This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

denial of their request to distribute unsolicited copies of Plaintiffs' Crime, Justice & America ("CJA") publication to inmates at the Butte County Jail violates Plaintiffs' First Amendment right to communicate with inmates. Defendant argues Plaintiffs do not have a First Amendment right to distribute unsolicited copies of CJA to inmates, and contend even assuming *arguendo* that Plaintiffs have that right, Defendant's refusal to distribute unsolicited copies of CJA to inmates should be upheld because "it is reasonably related to legitimate penological interests," citing Turner v. Safley, 482 U.S. 78, 89 (1987).

"[A] fundamental rule of judicial restraint" is that "questions of a constitutional nature [are avoided] unless absolutely necessary to a decision of the case." U.S. v. Kaluna, 192 F.3d 1188, 1197 (9th Cir. 1999) (quoting Jean v. Nelson, 472 U.S. 846, 854 (1985); Burton v. United States, 196 U.S. 283, 295 (1905)). In Turner, the Supreme Court held "a prison regulation [that] impinges on . . . [First Amendment] rights . . . is valid if it is reasonably related to legitimate penological interests." Turner, 482 U.S. at 89.

> To guide courts in evaluating whether a challenged regulation is reasonably related to legitimate penological interests, Turner established the following four-part test:
>
> (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to the inmates to exercise the right; (3) the impact that accommodating the asserted right will have on

> other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

Morrison v. Hall, 261 F.3d 896, 901 (9th Cir. 2001) (quotation and citation omitted).

Defendant argues the first Turner factor weighs in his favor since his refusal to distribute unsolicited copies of CJA is rationally related to his legitimate and neutral interest in maintaining a secure and orderly jail. Captain Jerry Jones and Lieutenant Byran Flicker of the Butte County Jail each declare the Butte County Jail has a mail distribution policy that prohibits distribution of unsolicited commercial mail to inmates. They declare this mail policy limits the amount of paper to which inmates may have access, which thereby restricts inmates' ability to use paper to secret contraband and allows staff to conduct cell searches more efficiently; limits the amount of material inmates' may use to plug their toilets and flood their cells; and restricts inmates' ability to place paper over their windows and light fixtures, which prevents staff from conducting required welfare checks efficiently. They further declare this mail policy "ensures that staff have the ability to adequately search every piece of [incoming] mail . . . [to] minimizes the amount of contraband that enters the facility." (Jones Decl. ¶ 30; Flicker Decl. ¶ 11.)

Plaintiffs counter Defendant's refusal to distribute CJA is an arbitrary means of maintaining a secure and orderly jail, relying on Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005). In Lehman, the Ninth

Circuit found "a ban on non-subscription [i.e., free] bulk mail and catalogs" violated the First Amendment. Id. at 699. The Ninth Circuit stated a ban "based on the postage rate at which the mail was sent" or the fact that "the inmates . . . did not pay for the mail that was sent to them" was an arbitrary means of "reduc[ing] the volume of mail that may contain contraband [because] it is far more likely that contraband would be contained in first class mail than in bulk mail." Id. at 700. The Ninth Circuit also stated this ban was an arbitrary means of "increas[ing] the efficiency of cell searches" since the prison "already regulate[d] the quantity of possessions that prisoners may have in their cells." Id.

Defendant rejoins Lehman is distinguishable since "every piece of mail sent by [the publisher in Lehman was] sent as a result of a request by the recipient" Id. at 700. The Ninth Circuit stated in Lehman "the fact that a request was made by the recipient . . . is important" in determining whether the sender's First Amendment right to communicate with the recipient has been violated because "[t]he sender's interest in communicating the ideas in the publication corresponds to the recipient's interest in reading what the sender has to say." Id. at 700-01 (internal quotation and citation omitted). Therefore, Lehman is distinguishable since Plaintiffs seek to send CJA to inmates "regardless of whether [inmates] requested the publication." Id. at 700.

Further Captain Jones and Lieutenant Flicker aver the prohibition of unsolicited commercial mail is not arbitrary because inmates would especially use unsolicited copies of CJA for improper purposes such as secreting contraband, plugging their toilets, and

covering windows and light fixtures, because "unlike personal mail, or attorney-client mail, inmates do not have a connection to unsolicited commercial mail, and they are less concerned that the unsolicited publications would be damaged, lost, or seized." (Flicker Decl. ¶¶ 22, 24; Jones Decl. ¶ 36.) They further aver that although there are regulations restricting the quantity of each inmate's possessions, these regulations are insufficient because inmates still "routinely attempt [to use their possessions] to secret contraband, start fires, plug their toilets, and cover their light and windows." (Jones Decl. ¶ 36; see also Flicker Decl. ¶ 22.) Accordingly, there is a rational relationship between the prohibition of unsolicited commercial mail and Defendant's interest in maintaining jail security; and the first Turner factor weighs in Defendant's favor.

Defendant also submits evidence on the second Turner factor demonstrating Plaintiffs have an alternative avenue to distribute CJA to inmates; specifically, Captain Jones avers "inmates can . . . request and receive publications . . . ." (Jones Decl. ¶ 9.) Plaintiffs counter this alternative could be satisfied, relying on Plaintiff Ray Hrdlicka's averment that Plaintiffs may "make public records requests for copies of [the Butte County Jail's] full inmate roster" and use this information to make "direct mailings" of CJA to each inmate. (Hrdlicka Decl. ¶¶ 21, 23.) Plaintiffs argue if they follow this procedure, Defendant would have "no apparent way to distinguish" solicited copies of CJA from unsolicited copies of CJA. (Opp'n at 31:12-17.) Plaintiffs appear correct, but their argument does not negate Defendant's position that Plaintiffs have an

alternative. Accordingly, the second Turner factor also weighs in Defendant's favor.

Defendant also submits evidence on the third Turner factor. Captain Jones and Lieutenant Flicker each declare that distribution of unsolicited commercial mail would create an additional burden on the inadequate resources already existing at the Butte County Jail. Captain Jones declares for the past ten years, Defendant has experienced ongoing difficulties in maintaining adequate staffing, and that as a result of inadequate staffing, several programs, such as the inmate road crew, the inmate hog farm, and several vocational programs, had to be discontinued. Lieutenant Flicker declares jail staff currently needs to devote "approximately 6 hours a day to sort, search, transport and distribute the mail." (Flicker Decl. ¶ 10.) Captain Jones further declares there have already been complaints at the Butte County Jail about "the timely distribution of incoming legal and personal mail." (Jones Decl. ¶ 23.)

Captain Jones also declares Defendant's "prohibition against unsolicited commercial mail is designed to limit the amount of mail that enters the facility, which in turn limits the amount of time and resources that must be expended to search and distribute incoming mail. . . . In addition, limiting the amount of staff time that is spent processing unsolicited commercial mail allows [Jones] and management staff more flexibility in assigning staff to perform other duties on an immediate and ongoing basis." (Jones Decl. ¶ 30.) He also declares "requiring [Defendant] to dedicate staff time to processing unsolicited publications would greatly interfere with staff's ability to process other mail, and, depending on

the staffing levels and inmate population at any given time, would likely interfere with the provision of other services as well. . . ." (Jones Decl. ¶ 31; see also Flicker Decl. ¶¶ 11, 12.)

Plaintiffs counter distribution of CJA would not burden jail resources, relying on Hrdlicka's averment that Plaintiffs intend to make weekly distributions of CJA to only ten percent of the inmates in the Butte County Jail. (Hrdlicka Decl. ¶¶ 17, 19, 20, 23, 31.) Based on the list of inmates in the Butte County Jail provided by a Deputy County Counsel in August 2004, which showed approximately 570 inmates, Plaintiffs would only send approximately 57 copies of CJA to the Butte County Jail each week.

Captain Jones rejoins, declaring he is "concerned that if [the Butte County Jail] agree[s] to distribute unsolicited copies of [CJA] [then the Butte County Jail] would then have to permit other unsolicited newsletters, advertisements, and publications to be distributed . . . as well." (Jones Decl. ¶ 33.) In light of Defendant's evidence concerning the impact distribution of unsolicited commercial mail could have on jail resources, the third Turner factor also weighs in Defendant's favor.

Defendant also argues the fourth Turner factor weighs in his favor since he has no "easy and obvious alternatives" and his mail policy is not an "exaggerated response" to prison concerns. Plaintiffs counter alternative ways to address Defendant's concerns already exist, pointing to Captain Jones and Lieutenant Flicker's averments that there are regulations restricting the quantity of each inmate's possessions. However, Captain Jones and Lieutenant

Flicker aver these regulations are insufficient since inmates still "routinely attempt [to use their possessions] to secret contraband, start fires, plug their toilets, and cover their light and windows." (Jones Decl. ¶ 36; see also Flicker Decl. ¶ 22.) Therefore, the fourth Turner factor also weighs in Defendant's favor.

Since all four Turner factors weigh in favor of Defendant, Defendant's refusal to grant Plaintiffs' request to distribute unsolicited copies of CJA is "reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. Accordingly, Defendant's motion for summary judgment is granted.

However, on March 17, 2009, Plaintiffs filed a motion for leave to amend the Complaint to add a new claim under the Clayton Act. This motion is untimely since the last motion hearing date prescribed in a pretrial scheduling order issued on May 2, 2008 was December 15, 2008. Plaintiffs fail to explain why they filed their motion to amend after the prescribed law and motion deadline and why they failed to schedule it for hearing on or before the last motion hearing date. While it is recognized that Defendant's summary judgment motion sub judice was originally set for hearing on December 1, 2008, and that the hearing date for this motion was changed to January 12, 2009, in response to Plaintiffs' late request for a continuance of the motion filed November 26, 2008, that continuance Order did not otherwise extend the last hearing deadline for a motion.

Plaintiffs only address the "no further amendment" provision in the May 2 pretrial scheduling order, arguing that good cause exists for amending this

portion of the scheduling order since they did not have a copy of a contract on which their Clayton Act claim depends until Defendant filed his summary judgment motion on October 30, 2008, and the basis for their Clayton Act claim did not arise until some unspecified time in November 2008. Plaintiffs have the burden, however, of demonstrating that they could not have filed their amendment motion as required by the May 2 pretrial scheduling order, and their failure to state when in November 2008 their Clayton Act claim ripened does not satisfy their burden.

As Plaintiffs must know, the new claim they seek to add would affect several deadlines prescribed in the May 2 pretrial scheduling order, including the discovery completion date which expired October 15, 2008, and trial date which is set for May 19, 2009, and Defendant should have been provided opportunity to litigate Plaintiffs motion to add a new claim "at [this] late stage of litigation" as prescribed in the May 2 pretrial scheduling order. Eagle v. Am. Tel & Tel. Co., 769 F.2d 541, 548 (9th Cir. 1985); see also Garcia v. Dillon Co., Inc., No. 05-cv-02339, 2008 WL 4509821, at *5 (D. Colo. Oct. 1, 2008) (denying the plaintiff's motion to amend where the plaintiff was "seeking to make this a brand new lawsuit, but with a trial date that is only four months away); Chaara v. Intel Corp., No. CIV 05-278, 2006 WL 4079030, at *1 (D. New Mex. May 31, 2006) (denying the plaintiff's motion to amend "because the case is ripe for dismissal rather than transformation into a lawsuit . . .").

Here that opportunity has been denied not only because of Plaintiffs' failure to comply with the last motion hearing date prescribed in the May 2 pretrial scheduling order, but also because of Plaintiffs' filing

of a defective motion under Local Rule 5-137(c). This Rule provides "[i]f filing a document requires leave of Court, such as an amended complaint when an answer is on file, counsel shall attach the document proposed to be filed as an exhibit to the motion and lodge a proposed order as required be these Rules." See also Stringham v. Lee, No. CIV S-04-1530, 2007 WL 1302497, at *1 (E.D. Cal. Apr. 30, 2007) (denying motion to amend because it "was not accompanied by a proposed amended complaint and is defective on that basis alone"); Meyer v. Schwarzenegger, No. CIV S-06-2584, 2008 WL 2223253, at *1 (E.D. Cal. May 27, 2008) ("Since plaintiff did not submit a proposed second amended complaint, the court is unable to evaluate it and defendants are unable to determine whether they might stipulate to its filing. Plaintiff's defective motion for leave to amend must therefore be denied."). This Rule provides notice of the exact amendment proposed, which Plaintiffs has not given because of their failure to attach their proposed amended complaint. Although Plaintiffs state in the motion "[a]ttached hereto as Exhibit A is a true and correct copy of Plaintiffs' proposed Amended Complaint," the referenced proposed Amended Complaint is not attached.

Since Plaintiffs have failed to satisfy the Rule 16 good cause standard by not providing justification for filing a late motion, violated Local Rule 5-137(c) by failing to attach their proposed Amended Complaint to their motion, and seek to add a new claim under the Clayton Act which is tantamount to filing a new lawsuit, reason has not been provided justifying delaying summary judgment Defendant seeks.

For the stated reasons, the Clerk of the Court shall enter judgment in favor of Defendant since his summary judgment motion is granted, and Plaintiff's defective motion filed March 17, 2009, is stricken.

Dated: March 18, 2009

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO: 2:08-CV-00343-GEB-EFB

[Filed March 18, 2009]

RAY HRDLICKA, ET AL.,	)
	)
v.	)
	)
PERRY L. RENIFF,	)
	)

JUDGMENT IN A CIVIL CASE

XX --**Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 3/18/2009

Victoria C. Minor
Clerk of Court

ENTERED: **March 18, 2009**

by: /s/ D. Waggoner
Deputy Clerk

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

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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).

rights, *id.* at 89, the majority's interpretation is an 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

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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 in common areas or allowing individual copies of 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, 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

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

[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.

encouragement of an alternative activity consonant with legislative policy.")).

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

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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.

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.").

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.

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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.

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 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. ___

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

Petitioner,

v.

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

Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains ____ 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 ___, 2011.

_____

Sarah R. Miller
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Cincinnati, OH 45249
(800) 890-5001

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

Date: _____

_____
Notary Public

[seal]

CERTIFICATE OF SERVICE

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

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All parties required to be served have been served.

I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on November ___, 2011.

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Subscribed and sworn to before me by the said Affiant on the date below designated.

Date: _____

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Notary Public

[seal]