UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

PRISON LEGAL NEWS, et. al., Plaintiffs; UNITED STATES OF AMERICA, Plaintiff; v. BERKELEY COUNTY SHERIFF'S OFFICE and SHERIFF H. WAYNE DeWITT, Defendants.	)	No. 2:10-cv-02594-MBS **UNITED STATES' BRIEF IN SUPPORT OF PLAINTIFF PRISON LEGAL NEWS' AND HUMAN RIGHTS DEFENSE CENTER'S MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Berkeley County Detention Center ("BCDC") restricts detainees' access to a breathtaking array of books, publications, and religious and educational materials, including the *Washington Post*, *USA Today*, *Our Daily Bread* – a widely-used Christian devotional, and depictions of the Venus de Milo. These restrictions facially violate the First Amendment. BCDC's policies ban a significant amount of core First Amendment speech and are not reasonably connected to any legitimate penological interest. Indeed, the majority of correctional institutions in the United States, including the Federal Bureau of Prisons and South Carolina Department of Corrections, do not place such restrictions on access to expressive materials, demonstrating the lack of any legitimate penological interest underlying these restrictions. The United States urges the Court to

grant Plaintiffs Prison Legal News' and Human Rights Defense Center's (collectively "PLN") Motion for Preliminary Injunction and enjoin these unconstitutional restrictions.[1]

BACKGROUND

I. BCDC's Denial of Expressive Material to Detainees

A. Prior to This Lawsuit, Defendants Rejected Virtually All Expressive Material Sent to BCDC Detainees

Until recently, Defendants rejected virtually all expressive material sent to persons incarcerated at BCDC, including books, magazines, newspapers, pamphlets, and educational materials. Guidelines posted on BCDC's website through early 2011 stated that ***"[t]he only mail allowed to be received by inmates are letters only***. No packages are accepted at the Detention Center. The only exception to this is pictures. Inmates may receive three (3) pictures but they cannot be Polaroid."[2] Relevant provisions in the HFDC Inmate Rules ("Inmate Rules") and HFDC Inmate Hand Guide ("Hand Guide") that were in effect before this litigation likewise precluded virtually all expressive materials. The Inmate Rules banned delivery of any packages to inmates[3] and forbid all mail sent in envelopes larger than 9" x 8".[4] Similarly, the Hand Guide established that BCDC would reject any mail containing "glued, taped or stapled items of any kind," or "bulk mail materials."[5]

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[1] While some of the claims raised by the United States' recent Complaint in Intervention merit further development, the existing factual record demonstrates that BCDC's mail policies prohibit a large swath of expressive material, including many books, magazines, and newspapers. The United States asks this Court to grant PLN's Motion for a Preliminary Injunction to prevent the continuing violation of detainees' First Amendment right to receive these materials.

[2] See Plaintiffs' Complaint, Dkt. No. 1, Exhibit A, at 2 (Oct. 6, 2010).

[3] See Declaration of David Shapiro in support of Plaintiffs' Motion for Preliminary Injunction ("Shapiro Decl."), Dkt. No. 47, Exhibit B (Inmate Rules), Rule 15(i) ("Packages will not be accepted").

[4] Shapiro Decl. Ex. B (Inmate Rules), Rule 15(h).

[5] Shapiro Decl. Ex. C (Hill-Finklea Detention Center Inmate Hand Guide), §12(A)(1-16).

Indeed, BCDC's Mail Log demonstrates that Defendants categorically rejected books, magazines, newspapers and other expressive materials from 2005-2010. The Mail Log provides the following explanations for Defendants' denial of mail sent to detainees during this period:

- "Books not allowed" or "book not allowed;"[6]
- no "novals" (sic);[7]
- "no magazines;"[8]
- "no newspapers;"[9]
- "no media / printed material;"[10]
- "Info not allowed;"[11]
- "no jokes;"[12]
- "maps not allowed;"[13]
- "no bookmarks;"[14]
- "no calendar"[15]
- "no puzzles"[16]
- No "sonogram"[17]
- "map not allowed"[18]

[6] Declaration of Michael J. Songer ("Songer Decl."), Ex. A, attaching excerpts from BCDC Mail Log ("Mail Log") at April 8, 2008; Sept. 3, 2009; Feb. 11, 2010; Sept. 6, 2010; Aug. 4, 2010.
[7] Mail Log Oct. 8, 2010.
[8] Mail Log Dec. 27, 2007.
[9] Mail Log Jan 3, 2008; June 24, 2009; April 6, 2010.
[10] Mail Log July 12, 2010.
[11] Mail Log Sept 15, 2009.
[12] Mail Log July 26, 2010.
[13] Mail Log Sept. 13, 2010.
[14] Mail Log Feb. 8, 2010.
[15] Mail Log Dec. 2, 2009.
[16] Mail Log Oct. 5, 2010.
[17] Mail Log Sept. 24, 2009.

Defendants' responses to detainee grievances during this period further illustrate the categorical nature of the prohibition on most types of expressive material. In September 2008, Defendants informed detainee Richard Harris that "you cannot get any type of Newspaper here in jail." In a 2009 grievance submitted in prior litigation against Defendants, detainee Willie Williams attested that "I am being denied access to all forms of media. No books, magazines, television or radio."[19] In March 2010, Defendants rejected detainee Edwin Harris' third request to receive *Prison Legal News* by explaining "I have told you many times you cannot get newspaper or magazine."[20] Moreover, because BCDC does not maintain a library or other repository of books, magazines or newspapers, its mail restrictions effectively precluded inmates from accessing any reading material during their incarceration.

Katie Shuler, BCDC's administrative specialist in charge of mail processing, conceded that detainees were not permitted to receive any non-religious material prior to 2011[21] – an admission underscored by three mail log entries within the past year that color BCDC's exclusion of non-religious materials. On June 1, 2010, BCDC rejected an item with the stated explanation of "only a Bible." The Mail Log records similar justifications for denials on August 20, 2010 – "religious material only" – and February 14, 2011 – "not religious." Indeed, evidence suggests that prior to this litigation the only reading materials Defendants consistently permitted detainees to possess were copies of the Bible. BCSO Sergeant Kendra Habersham explained in a July 12, 2010 email to Prison Legal News editor Paul Wright that "***inmates are only allowed to receive soft back bibles in the mail directly from the publisher. They are not allowed to have***

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[18] Mail Log Sept. 13, 2010.
[19] *Williams v. Sanders*, Case No. 9:09-cv-03014 (D.S.C.), Dkt. No. 11 (Dec. 7, 2009).
[20] Declaration of Paul Wright in support of Plaintiffs' Motion for Preliminary Injunction ("Wright Decl.") Dkt. No. 47, at Fig. 2.
[21] Deposition of Katie Shuler ("Shuler Dep."), Apr. 13, 2011, at 94 ("Q: Did that policy change occur in 2011? A: Yes").

magazines, newspapers, or any other type of books."[22] Finally, BCDC Sergeant Rosemary Sanders explained in an affidavit in other recent litigation that, while detainees "are allowed to possess a copy of the Holy Bible," "prisoners in A-Pod are not allowed to receive publications from outside of the detention center, including religious publications."[23]

B. BCDC Revised Its Policies in Response to This Litigation, but Continues to Prohibit Most Magazines and Newspapers

Sometime in 2011[24] – several months after Prison Legal News filed this lawsuit – Defendants revised their mail policies to purportedly allow greater access to expressive material. The new guidelines posted on BCDC's website permit detainees to receive books that are "shipped directly from the publisher or bookstore" and are "in a soft cover format."[25] Similarly, "[m]agazines and newspapers must be shipped directly from a publisher by a mail subscription only."[26] In her deposition, Ms. Shuler explained that the new policy is not written in any formal policy document and "has not been signed off on," but is currently enforced by BCDC officials who process mail.[27] Under the new policy, books, magazines and newspapers sent from publishers remain subject to the Inmate Correspondence Policy enumerated in HFDC 706, which provides that "[a]ll incoming mail will be inspected," and "will be returned to sender" if it contains objectionable material. Two types of "objectionable" material are most relevant to PLN's motion: (1) "stapled items of any kind;"[28] and (2) "[a]ny photo that is considered inappropriate (i.e., pornographic, lack of clothing, drugs, weapons, alcohol, cigarettes, etc.)."[29]

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[22] Wright Decl. Ex. L. (emphasis added).
[23] *Williams v. Sanders*, Case No. 9:09-cv-03014 (D.S.C.) Affidavit of Rosemary Sanders ("Sanders Aff.") (Dkt. No. 26-2) (April 29, 2010).
[24] Shuler Dep. at 94 ("Q: Did that policy change occur in 2011? A: Yes").
[25] http://www.berkeleycountysc.gov/dept/sheriff/suspects/finklea.asp (last visited May 23, 2011).
[26] *Id.*
[27] Shuler Dep. at 97.
[28] HFDC 706(A)(11), attached to Shapiro Decl., Ex. A.
[29] HFDC 706(A)(7), attached to Shapiro Decl., Ex. A.

These exclusions from Defendants' new mail policy continue to proscribe many forms of expressive material.

1. Staples

Defendants currently enforce an absolute ban on mail containing staples. While Defendants' justifications for this new policy have varied, *see* Pls' Mot. for Prelim. Inj. at 5-7, the categorical nature of its scope has not. HFDC 706 states clearly that Defendants will reject incoming mail containing "stapled items of any kind." Ms. Shuler confirmed that, although BCDC formerly removed staples to allow delivery of legal and religious materials, its current policy is to reject all mail containing staples.[30] Indeed, the mail log evidences BCDC's strict invocation of the no staple rule to reject mail under its new policy. While the log indicates that BCDC rejected stapled items less than 50 times per year from 2007-2010, there were 36 such rejections from February 23-April 4, 2011 – the most recent period for which Defendants have provided the log records.[31]

The no–staples policy precludes detainees from receiving countless magazines and periodicals covering an array of topics. Examples of publications bound by staples include *Time*, *Newsweek*, *U.S. News & World Report*, *The Economist*, *People*, and *Sports Illustrated*, among many others. The no staples rule similarly denies access to many religious publications and educational materials such as *Our Daily Bread*, a widely-used Christian devotional publication.

2. Inappropriate Photographs

BCDC's Inmate Correspondence Policy sets forth broad rules banning materials that contain certain types of photographs. HFDC 706 states that Defendants will reject any mail

[30] Shuler Dept. at 27-32.
[31] At this rate, BCDC will reject 320 stapled items per year. [(36 denials / 41 days) x 365 = 320.49 denials in a 365-day year].

containing a "photo that is considered inappropriate (i.e., pornographic, lack of clothing, drugs, weapons, alcohol, cigarettes, etc.)"[32] or "[m]aterial that would encourage deviant sexual behavior."[33] Defendants apply these undefined provisions broadly. In deposition testimony, Ms. Shuler explained that the ban on "pornographic" material encompasses "anything that's related to anything sexual . . . ."[34]" Likewise, Ms. Shuler construed the term "lack of clothing" to include any picture in which either a man or woman is not wearing both a shirt and pants,[35] and explained that the "encourag[ing] deviant sexual behavior" rule applies to any material that references sex.[36]

If any page of a publication contains a photograph that runs afoul of these expansive regulations, Defendants exclude the entire publication. For example, Ms. Shuler testified that she would refuse to deliver an entire issue of the *Washington Post* that contained an advertisement for the Bloomingdale's department store showing a woman wearing underwear,[37] an issue of *USA Today* containing a vacation advertisement showing a bikini-clad woman on a beach,[38] and a publication depicting the Venus de Milo.[39] Nor are the exclusions limited to "sexual" material. BCDC's policy prohibits delivery of any publication containing an advertisement for an item classified as contraband, such as alcohol or cigarettes.[40] As with "sexual" material, Ms. Shuler stated that she would reject an entire issue of *USA Today* that

[32] HFDC 706(A)(7), attached to Shapiro Decl., Ex. A.
[33] HFDC 706(A)(17), attached to Shapiro Decl., Ex. A.
[34] Shuler Dep. at 68-69.
[35] Shuler Dep. at 69-70.
[36] Shuler Dep. at 71.
[37] Shuler Dep. at 73 ("Q: If a copy of the Washington Post arrived at the detention center and contained the [Bloomingdale's advertisement], you would refuse to deliver the entire issue of the Washington Post; is that correct? A: Yes. I would send it back.").
[38] Shuler Dep. at 87.
[39] Shuler Dep. at 89-90.
[40] Shuler Dep. at 74. ("Q: If a publication contained an advertisement for something that is contraband at the detention center, would you in every case refuse to deliver the publication? A: Yes.").

contained an advertisement for alcohol.[41] The breadth of this regulation is dramatic; it is difficult to conceive of a mainstream newspaper or magazine beyond its reach.

Analysis of the Detention Center's mail log reveals that Defendants repeatedly cite the inappropriate photograph rationale to reject incoming mail. From January 2007 – April 2011, BCDC denied 1,250 items by citing to a variant of the rationales "inappropriate photo," "not fully clothed" or "contraband in photo." The frequency of these exclusions has increased since BCDC adopted its new policies that purportedly allow detainees to receive publications directly from book stores and publishers. After rejecting an average of 283 items per year under the "inappropriate photo" rationale from 2007-2010, BCDC is on track to invoke this justification 442 times in 2011.[42]

II. Other Penal Institutions, Including the Federal Bureau of Prisons, Provide Far Greater Access to Expressive Material

The Federal Bureau of Prisons ("BOP") operates approximately 115 facilities that house over 215,000 inmates, including some of the most dangerous criminals in the United States. BOP operates six Federal Detention Centers and a dozen satellite detention facilities. Despite the paramount security concerns related to incarcerating such a large and diverse prison population, BOP permits inmates in all facilities to receive publications – including ones containing staples and "inappropriate" pictures – directly from publishers and book stores. BOP regulations for medium security facilities, for example, establish that inmates may receive soft cover publications, including paperback books, newspaper clippings, and magazines, from a publisher, book club or bookstore, 28 C.F.R. § 540.71(6)(a)(2), while prisoners in low security

[41] Shuler Dep. at 75. *See also* Mail Log Feb. 6, 2008 rejecting an item because it contained a photograph of a cigarette.

[42] The mail log shows that BCDC cited "inappropriate photo" 114 times from Jan. 1, 2011 to April 4, 2011, the latest period for which BCDC has made mail log data available. 114 rejections in 94 days equates to 442 in 365 days.

facilities may receive soft cover publications from any source. 28 C.F.R. § 540.71(6)(a)(3). These policies are not tempered by a rule against staples or broad restrictions on "inappropriate" pictures.

A. Staples

BOP does not reject publications because of staples. Indeed, BOP's mail processing policies affirmatively instruct BOP employees to staple mail before delivering it to inmates.[43] Even the highest security BOP facilities allow prisoners to receive stapled reading material.[44] In his attached declaration, former BOP Assistant Director John Clark details his service as Warden of the United States Penitentiary, Marion, Illinois ("USP Marion"), a "supermax" facility built to replace Alcatraz in 1968. During Mr. Clark's tenure as Warden, USP Marion was the highest security federal prison facility in the United States – and it allowed inmates to receive publications with staples.[45]

B. Inappropriate Photographs

BOP's proscription on inappropriate photographs is drawn narrowly. While BOP regulations prohibit material that "is sexually explicit or features nudity," these terms apply only to depictions of actual nudity or sexual acts. BOP regulations define "nudity" as "a pictorial depiction where genitalia or female breasts are exposed;" "sexually explicit" as "a pictorial depiction of actual or simulated sexual acts;" and "features" applies only to publications that contain "depictions of nudity or sexually explicit conduct on a routine or regular basis . . . ." 28 C.F.R. § 540.72(b). Further, BOP regulations exempt any publication in which nudity is

[43] BOP's Mail Management Manual instructs as follows: "[a]fter all inspections are completed, re-close each letter (***staple***, tape, etc.), finish sorting, and prepare for delivery as directed by local procedures. Caution will be taken ***when re-closing letters with a stapler*** to ensure contents are not stapled." BOP Program Statement No. 5800.16 at § 3.7 (April 5, 2011) (emphasis added) attached as Exhibit C.

[44] Clark Decl. at ¶¶ 13-14, 23-27, 32-33 attached as Exhibit D.

[45] Clark Decl. at ¶¶ at 23-27.

"illustrative of medical, educational, or anthropological content." 28 CFR § 540.72(b). Thus, federal prisoners may receive non-explicit pictures of individuals in various states of undress. Indeed, BOP's Program Statement identifies the *Sports Illustrated* Swimsuit Issue and the Victoria's Secret Catalog as examples of acceptable publications. *See* P.S. 5266.10, at 7 attached as Exhibit B.

ARGUMENT

It is well established that incarcerated persons retain constitutional rights that are consistent with their "status as [] prisoner[s]" and "with the legitimate penological objectives of the corrections system." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977)). These rights include the First Amendment right to receive expressive material through the mail. *Beard v. Banks*, 548 U.S. 521, 528 (2006) ("imprisonment does not automatically deprive a prisoner of certain important constitutional protections, including those of the First Amendment"); *Turner v. Safley*, 482 U.S. 78, 93 (1987); *Procunier v. Martinez*, 416 U.S. 396, 417 (1974); *Guerra v. Vetter*, 2008 U.S. Dist. LEXIS 116038 at *3 (D.S.C. 2010) ("Prisoners enjoy a First Amendment right to send and receive mail."). "The constitutional interest here is an important one." *Banks*, 548 U.S. at 536. As Justice Thurgood Marshall has explained, "[w]hen the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas . . . It is the role of the First Amendment [] to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit." *Procunier*, 416 U.S. at 428 (Marshall, J., concurring).

Defendants' policies banning all material containing staples or "inappropriate" photographs infringe upon detainees' First Amendment rights by proscribing an array of expressive materials. This infringement extends far beyond policies employed by other penal

institutions and the dictates of institutional security and order. For that reason and those set forth below, the United States urges this Court to grant PLN's Motion and enjoin BCDC's policies banning staples and inappropriate photographs.

Four factors structure the analysis of preliminary injunction motions: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied: (2) the likelihood of harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest." *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 812 (4th Cir. 1991). While each of these factors supports enjoining BCDC's policies banning staples and inappropriate photographs, the "likelihood of success" prong is often decisive in cases alleging violations of the First Amendment's free speech guarantee. *See WV Ass'n of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553, F.3d 292, 298 (4th Cir. 2009) ("a plaintiff's claimed harm is inseparably linked to the likelihood of success on the merits of plaintiff's First Amendment claim"); *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009) ("when a party seeks a preliminary injunction on the basis for a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor.").

I. PLN Is Likely to Succeed on the Merits of Its First Amendment Claim

BCDC's absolute proscriptions on publications containing staples or "inappropriate" photographs facially violate the First Amendment. Facial challenges to prison regulations are judged by the standards the Supreme Court articulated in *Turner v. Safely*.[46] There, the Supreme

[46] We believe *Turner* sets forth the proper mode of analysis. *See, e.g.*, *Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989) (applying *Turner* to First Amendment facial challenge of BOP mail policies). However, a handful of lower courts have applied a traditional over breadth analysis to facial challenges of prison regulations under the First Amendment. Under that doctrine, a policy is overbroad – and constitutionally infirm – if it impinges upon a "significant" amount of Constitutionally protected speech in relation to the policy's "plainly legitimate sweep."

Court identified four factors "relevant in determining the reasonableness of the [prison] regulation at issue": (1) the existence of a "valid, rational connection between the prison regulation and the legitimate governmental interest put forth to justify it;" (2) whether there are "alternative means of exercising the right that remain open to prison inmates;" (3) the impact of "accommodation of the asserted constitutional right" on "guards and other inmates, and on the allocation of prison resources generally;" and (4) the availability of "ready alternatives" for furthering the governmental interest. *Turner*, 482 U.S. at 89-90: The *Turner* inquiry "is not toothless." *Abbott*, 490 U.S. at 414. Indeed, *Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Banks*, 548 U.S. at 535.

A. BCDC's Policies Banning Staples and Inappropriate Photographs Are Not Reasonably Related to a Legitimate Penological Interest

The first *Turner* factor is "multifold": a court must assess whether the governmental objective at issue is "legitimate and neutral" and test whether the challenged regulations are "rationally related to that objective." *Abbott*, 490 U.S. at 414. While prison security is a legitimate and neutral objective generally, here Defendants arguably have not demonstrated that their policies are animated by legitimate security concerns. *See* Pl's Mot. Prelim. Inj. At 3-7. Even assuming that Defendants' invocation of security concerns in this case is "legitimate,"

Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 (2008). There is little doubt that such analysis would yield a finding of unconstitutionality here. The universe of protected material excluded by BCDC's regulations dwarfs the number of legitimately proscribable items. *See United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (finding statute criminalizing depictions of animal cruelty overbroad because application to legitimately proscribable crush videos was "dwarfed" by other applications, such as hunting and fishing magazines). This approach is disfavored in prison litigation, however, "where the right of free speech is limited." *Koutnik v. Brown*, 456 F.3d 777, (7th Cir. 2006); *Waterman v. Farmer*, 183 F.3d 208, 213 (3d Cir. 1999) (substantial overlap between *Turner* standard and over breadth "suggests that the Supreme Court did not intend for [overbreadth] to apply with independent force in the prison litigation context").

however, there is no rational link between security and Defendants' policies banning all stapled and "inappropriate" publications.

While PLN retains the ultimate burden of proving that the challenged policies violate the First Amendment, *Hause v. Vaught*, 993 F.2d 1079, 1082 (4th Cir. 1993), the first *Turner* factor allocates to Defendants the burden of presenting evidence of a rational connection between its policies and a legitimate penological objective. The Supreme Court has emphasized that the First Amendment "***requires prison authorities to show*** more than a formalistic logical connection between a regulation and a penological objective." *Banks*, 548 U.S. at 535 (emphasis added). Rather, they must show "a reasonable relation." *Id*. at 533. *See also King v. Federal Bureau of Prisons*, 415 F.3d 634, 639 (7th Cir. 2005) ("the government must present some evidence to show that the restriction is justified"). BCDC's inability to make such a showing here compels a finding that PLN is likely to succeed on the merits of its First Amendment claim. *See Jones*, 569 F.3d at 267 ("Failure to satisfy the first [*Turner*] factor renders the regulation unconstitutional without regard to the remaining three factors."); *Amatel v. Reno*, 156 F.3d 192, 196 (D.C. Cir. 1998) ("the first factor looms especially large").

1. BCDC's No-Staples Policy Is Not Rationally Related to a Legitimate Penological Objective

BCDC has no rational interest in denying access to stapled publications like *Time*, *Newsweek*, and *Our Daily Bread*. Indeed, most correctional institutions in the United States, including the Federal Bureau of Prisons and South Carolina Department of Corrections,[47] allow inmates to receive stapled publications. The United States' expert John Clark, who has served as Assistant Director of the nation's largest prison system – BOP – and as warden of the Federal

[47] Although South Carolina Department of Corrections ("DOC") does not make its mail policies publicly available, a spokesperson for the DOC informed the Associated Press that, except for death row inmates, "magazines are allowed in with staples"). Ron Barnett, *USA Today*, "S.C. county jail bans stapled publications," Oct. 25, 2010.

Detention Center in Miami, Florida, attests that "detainees' access to stapled publications is not a legitimate concern for corrections professionals."[48] Indeed, every institution with which Mr. Clark has associated during his 35–year career allowed inmates to receive stapled publications. Ensuring detainees' access to publications, many of which are stapled, is an important component of corrections management. As Mr. Clark explains, Defendants' ban on stapled publications "inhibits security and order by denying prisoners and detainees access to numerous religious publications and reading materials. Prisoners and detainees who cannot access their desired reading material or exercise their religious beliefs become idle, which leads to boredom, frustration, and disruptive behavior."

Moreover, Defendants have produced no evidence of specific security threats posed by staples at BCDC. As set forth more fully in PLN's Motion, *see* Pls' Mot for Prelim. Inj. at 16-20, records produced by Defendants are almost entirely bereft of any evidence that staples have damaged locks, toilets or other fixtures at BCDC, or otherwise threatened security. The vague declarations filed by Defendants in response to PLN's motion reinforce the lack of evidence that staples cause meaningful damage at BCDC. *See* Decl. of David Taschner ("Taschner Decl.") at ¶ 3 (Building management "often" called to repair fixtures "which have been broken by inmates utilizing metal objects such as staples, paper clips and the like"); Decl. of Patrick Garrett at ¶ 5 ("Though the invoices don't necessarily specify staples as the culprit, my recollection and my wife's recollection, is that staples in the locks were the cause of a number of these repairs."). After reviewing the maintenance records and incident reports produced by Defendants that purportedly demonstrate the need for a restriction on staples, the United States'

[48] Clark Decl. at ¶ 32.

expert concluded that banning stapled publications is not a rational response to any of the concerns invoked by Defendants.[49]

Absent any general or specific basis for banning stapled publications, Defendants' categorical exclusion epitomizes the type of unconstitutional "shortcut" that produces "needless exclusions" of expressive material. In *Abbott*, the Supreme Court upheld a narrowly circumscribed BOP regulation that allowed a warden to reject a publication only if he or she found the publication detrimental to order, discipline or security. The Court explained that it was "comforted by the individualized nature of the determinations," emphasizing that a publication falling within one of the categories "*may* be rejected, but only if it is determined to meet that standard under the conditions prevailing at the institution at the time." *Abbott*, 490 U.S. at 416-17. Importantly, the BOP regulations "expressly reject[ed] certain shortcuts that would lead to needless exclusions." *Id*. at 417. Applying *Abbott*, the Second Circuit suggested that a New York prison regulation banning publications from sources that had not been previously authorized was "not sufficiently related to any legitimate and neutral penological objective." *Shakur v. Selsky*, 391 F.3d 106, 116 (2d Cir. 2004) (finding that inmate stated a claim that denial of New Afrikan literature violated the First Amendment). Unlike the individualized review in *Abbott*, the "unauthorized publications" shortcut at issue in *Shakur* "greatly circumscribe[d] the universe of reading materials accessible to inmates" without providing "any standard against which [prison] officials will conduct an individualized review of the publication in question." 391 F.3d at 115-16.

Here, Defendants' "no staples" shortcut excludes even more publications than the "unauthorized source" rule in *Shakur*, with even less particularized justification. While the *Shakur* regulation forbade publications from sources that had not yet been "authorized," BCDC

[49] Clark Decl. at ¶¶ 33-43.

permanently bans ***all*** stapled publications, regardless of their merit or potential to foment disruption. Indeed, there is no process by which BCDC could ever admit delivery of any stapled publication to a detainee.

2. BCDC's Ban on "Inappropriate" Photographs Is Not Rationally Related to a Penological Objective

Defendants' broad prohibition on any publication containing an image deemed "inappropriate (i.e., pornographic, lack of clothing, drugs, weapons, alcohol, cigarettes, etc.,"[50] including "anything that's related to anything sexual,"[51] is not rationally related to legitimate penological interests. While correctional facilities have an interest in limiting access to certain types of sexually explicit material, Defendant's expansive regulations preclude delivery of most mainstream newspapers and magazines, as well as many educational materials and religious texts. As Mr. Clark attests, there is no "legitimate penological interest furthered by banning publications that contain sexually suggestive (but non-explicit) pictures or advertisements for contraband items like cigarettes and alcohol."[52]

As with its ban on stapled publications, Defendants' sweeping prohibition on inappropriate photographs proscribes a wide swath of expressive material without providing any particularized basis for doing so. Indeed, Ms. Shuler testified that "in every case" she would ban an entire publication if it contained a single inappropriate photograph.[53] This approach is precisely the type of "shortcut[] that would lead to needless exclusions" described by the Supreme Court in *Abbott*. 490 U.S. at 417. As in *Shakur*, BCDC's restriction on inappropriate content "greatly circumscribes the universe of reading materials accessible to inmates" without providing "any standard against which [prison] officials will conduct an individualized review of

[50] HFDC 706(A)(7), attached to Shapiro Decl., Ex. A.
[51] Shuler Dep. at 68-69.
[52] Clark Decl. at ¶ 45.
[53] Shuler Dep. at 74.

the publication in question." 391 F.3d at 115-16. The Eleventh Circuit applied similar analysis in *Owen v. Willie*, 117 F.3d 1235, 1237 (11th Cir. 1997), explaining that while counsel for the local detention center conceded "that a blanket ban on nude photographs would be unconstitutional," a particular denial of nude material was permissible in light of the facility's policy that each incoming publication "was subjected to three tiers of review before being prohibited." Defendants' categorical exclusions here lack any comparable mechanism.

Moreover, BCDC does not consider the context of purportedly "inappropriate" content when deciding whether to allow prisoners to receive a publication. In her deposition, Ms. Shuler explained that she would "refuse to deliver the entire issue of the *Washington Post*" if it contained a single advertisement for underwear.[54] This disregard for context is incompatible with the reasonableness *Turner* prescribes. As a federal district court in this circuit emphasized, "the prohibition also applies regardless of the context of the depiction or the context of the work as a whole. Therefore, literary classics . . . technically violate this regulation. It is difficult to understand how denying inmates access to such books promotes [penological interests]." *Cline v. Fox*, 319 F. Supp. 2d 685, 692 (N.D.W.Va. 2004) (prison's ban on "obscene material" facially violates the First Amendment). *See also Strope v. Collins*, 492 F. Supp. 2d 1289, 1296 (D. Kan. 2007) (Court could find "no precedent upholding the constitutionality" of a policy of banning "entire publications because they contain what appears to be a few photographs of women's partially bare buttocks."). As in *Cline*, Defendants' policy here prevents detainees from receiving important expressive material – in this case leading newspapers like the *Washington Post* and topical magazines such as *Time* and *Newsweek* – if the publications contain an advertisement for alcohol or cigarettes or a photograph of any individual not fully clothed. "It is

[54] Shuler Dep. at 73.

difficult to understand" how rejecting these publications furthers any penological interest. *Cline*, 319 F. Supp. 2d at 692.

B. BCDC's Mail Policies Do Not Provide Detainees Alternative Means of Exercising Their First Amendment Rights

Defendant's restrictions on publications containing staples or inappropriate content fail the second prong of the *Turner* analysis because BCDC provides no alternative means for detainees to access expressive material. In combination, the no-staples and inappropriate photograph policies ban a large percentage of mainstream newspapers and magazines. Nor do Defendants provide a library or other source from which detainees can access expressive material. Indeed, detainees' only avenue for receiving expressive material is through BCDC's mail room.

This lack of alternatives weighs heavily against Defendants in the *Turner* analysis. It is well-established that the First Amendment protects the right of individuals to receive "information and ideas" of their choosing. *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972); *Rossignal v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) ("The First Amendment . . . protects *both* a speaker's right to communicate information and ideas to a broad audience *and* the intended recipients' right to receive that information and those ideas."). As the Fifth Circuit explained, absent a legitimate penological interest, correctional institutions may not substitute their judgment of what constitutes appropriate expressive material for a detainee's desire to receive specific publications. *See Mann v. Smith*, 796 F.2d 79 (5th Cir. 1986). There, a county jail in Texas urged that its denial of newspapers and magazines did not violate the First Amendment in part because detainees had access to news from television. The Fifth Circuit rejected this argument, explaining that "[w]hatever the intrinsic merits of television in comparison with newspapers and magazines, ***the contents of television are different*** from what

one finds in the printed media. It is not up to the Midland County Sheriff or this court to decide that television can adequately serve the First Amendment right to receive protected materials." *Mann*, 796 F.2d at 83 (emphasis added). *See also Abbott*, 490 U.S. at 418 (second *Turner* factor satisfied where regulations "permit a broad range of publications to be sent, received, and read"); *Mauro v. Arpaio*, 188 F.3d 1054, 1061 (9th Cir. 1999) (upholding a ban on sexually explicit material that "does not ban sexually explicit letters between inmates and others, nor does it ban sexually explicit articles . . . "); *Jackson v. Elrod*, 881 F.2d 441, 445 (7th Cir. 1989) (denying qualified immunity to prison officials that banned all hardcover books where there were no alternatives for inmates to obtain expressive material).

The same principle applies here. While Defendants permit detainees to watch television and access some soft cover books, the content and presentation of this media is ***different*** from daily newspapers, topical magazines about news and popular culture, or periodicals about religion or education. The First Amendment guarantees the right to select the type of information one receives. While authorities may limit this right in the corrections context pursuant to a legitimate penological interest, Defendants have failed to identify any such interest for banning publications with staples or non-explicit photographs.

Finally, the Fourth Circuit's decision in *Hause v. Vaught* does not control the second prong of the *Turner* analysis. The *Hause* court upheld a total ban on an inmate's receipt of mail at a short-term detention center. *See Hause*, 993 F.2d at 1084. Upon close inspection, however, the Fourth Circuit's reasoning in *Hause* militates against the constitutionality of categorical publication bans in virtually all correctional settings, including BCDC. First, the court expressly cabined its opinion to "the facts before us," which involved: (1) "a ***short-term*** detainee seeking damages" for denial of reading material during a prior "***short-term*** confinement"; and (2) no

claim for injunctive relief. *Id*. at 1084 (emphasis added); *see also Lindell v. Frank*, 377 F.3d 655, 659 (7th Cir. 2004) (noting that *Hause* "stated that its holding was limited to the facts before it, including the fact that the plaintiff was seeking damages for limitations placed on his rights during limited periods of short-term confinement"). Hause was incarcerated three times, for periods of 16 days, 54 days and 45 days, respectively. The brevity of Hause's detentions precluded alternative methods for accommodating his right to receive publications, including Hause's suggestion to implement a "publisher's only" rule. As the court explained, "most publications sent from publishers . . . will arrive after a detainee has been transferred to another facility or released." *Hause*, 993 F.2d at 1083.

Moreover, Hause had access to newspapers and magazines at an on-site library. *Id*. at 1081. The court concluded that Hause's objections to the adequacy of the library did not rise to constitutional violations because the library's deficiencies resulted from its difficulty in obtaining materials in the aftermath of a damaging hurricane. As the Fourth Circuit explained, "limitations on an inmate's access to information cannot by themselves pose a constitutional problem when they are the result of natural disasters afflicting an entire community . . . ." *Id*. at 1084.

None of the factors underpinning the *Hause* decision are present here. Whereas Hause was incarcerated for less than 60 days, over 100 BCDC detainees have been held at the facility for more than 60 days and 43 have been incarcerated for longer than a year. *See* Pls' Mot. for Prelim. Inj. at 26. As a result, inmates confined at BCDC – unlike those in *Hause* – have ample time to receive publications. Moreover, BCDC offers no library or other avenue for inmates to access reading material – a restriction borne of choice, not natural disaster.

C. Accommodating Detainees' First Amendment Rights Will Not Impose a Significant Burden on BCDC Officials

The third *Turner* factor also militates against the constitutionality of Defendants' policies because allowing detainees to receive newspapers and stapled magazines will not significantly burden BCDC officials. Indeed, using narrower restrictions on allowed publications will lessen the burden on Defendants' mail staff. As PLN explains, removing staples from a magazine consumes less time than it takes for Defendants to document the basis for rejection in BCDC's mail log. *See* Pls' Mot. for Prelim. Inj. at 20-21. Further, removing Defendants' broad, highly discretionary limits on inappropriate content is likely to save time because mail room staff will no longer have to carefully review incoming publications for potentially inappropriate content.[55] Mail room staff could more quickly apply an appropriately tailored rule, such as BOP's proscription on actual nudity and sexually explicit pictures. *See Jones*, 569 F.3d at 272 (finding a prison could not satisfy the third *Turner* factor where "reasonable alternatives to [the regulation] exist at what appears to be a minimal cost").

D. Defendants' "No-Staples" and "Inappropriate Content" Policies Are an Exaggerated Response to Prison Concerns

In *Turner*, the Supreme Court explained that "[t]he existence of obvious, easy alternatives may be evidence that [a prison regulation] is not reasonable, but is an exaggerated response to prison concerns." 482 U.S. at 90-91. Here, Defendants clearly possess easy alternative to their mail policies. Instead of rejecting and cataloging all stapled publications, BCDC's mail staff could remove staples from publications or – like most other correctional facilities – deliver the publications with staples. Instead of combing through publications in search of "inappropriate" photographs such as "anything related to anything sexual," Defendants could craft a narrowly-

[55] *See* Clark Decl. at ¶ 45.

defined regulation against sexually explicit material that would consume fewer resources to enforce.

In addition, the exaggerated nature of Defendants' focus on stapled publications is demonstrated by BCDC's failure to prohibit other types of objects used to damage the facility. Although Defendants now claim that staples present a security risk justifying the denial of most magazines, detainees were permitted to order stapled material from BCDC's commissary until very recently. *See* Declaration of Toni Bair ("Bair Decl") at 29-32. Moreover, "any damage that detainees inflict with staples may be caused by material available from sources other than stapled publications, including many sources that are permitted under BCDC's policies, such as kitchen items, tooth brushes, paper, playing cards and metal from fixtures in detainees' cells."[56] Indeed, Defendants' own witness admits as much. *See* Taschner Decl. at ¶ 3 (fixtures "broken by inmates utilizing ***metal objects such as staples, paperclips and the like***"). Staples from publications add little to the universe of objects available to detainees – at the high cost of restricting First Amendment rights. As the Fifth Circuit found in *Mann*, a county jail policy allowing some forms of paper while banning newspapers and magazines was constitutionally infirm because of its "patently underinclusive nature." 796 F.2d at 82; *see also Couch v. Jabe*, 737 F. Supp. 2d 561, 567 (W.D.Va. 2010) (regulation banning "descriptions of sexual acts" facially unconstitutional under *Turner* because it "encompasses much of the world's finest literature, but does not extend to 'soft core' pornography such as Playboy magazine").

II. A Preliminary Injunction is Necessary to Prevent a Continuing Constitutional Injury

Detainees confined to BCDC will continue to suffer irreparable injury if an injunction does not issue. Absent a preliminary injunction, Defendants' prohibitions on stapled

[56] Clark Decl. at ¶ 42.

publications and "inappropriate content" will continue to infringe upon detainees' First Amendment right to receive information. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also Newsom v. Albermarle County School Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (same).

III. A Preliminary Injunction Will Not Harm Defendants

Enjoining Defendants' restrictions on stapled publications and inappropriate content will not harm Defendants. Indeed, an injunction is likely to *lessen* the administrative burden on Defendants' mail staff by limiting their onerous review and documentation of incoming publications.

Moreover, allowing detainees greater access to publications will improve order and security at BCDC. As Mr. Clark explains, "providing mental stimulation is an important tool of good corrections management. The greater an individual's access to reading materials, the less apt he or she is to grow angry or frustrated with the idle existence of life inside prisons and detention centers."[57] The harms asserted by Defendants – fears about the potential use of staples in locks, tattoo kits, and toilets and a vague concern about "inappropriate" content – are not borne out by Defendants own maintenance records and incident reports, and not proven to be problems at the many correctional facilities around the country that do not restrict detainees access to expressive materials like BCDC.

IV. The Public Interest Favors a Preliminary Injunction to Secure Detainees' Constitutional Rights

"There is the highest public interest in the due observance of all the constitutional guarantees." *United States v. Raines*, 362 U.S. 17, 27 (1960). The public interest here is

[57] Clark Decl. at ¶ 8; *see also* Clark Decl. at ¶ 45.

particularly acute because Defendants' regulations infringe upon the freedom of speech. *See, e.g., Banks*, 548 U.S. at 536 (Explaining in the context of prisoners' access to expressive material that "[t]he constitutional interest here is an important one."); *Edmisten v. Werholtz*, 287 F. App'x 728, 735 (10th Cir. 2008) (It is well-settled that "the public has an interest in protecting the civil rights of all persons."). When a person is denied the First Amendment right to receive information, he or she is "shut . . . out of the marketplace of ideas and opinions that it is the purpose of the free-speech clause to protect." *King*, 415 F.3d at 638.

Here, Defendants' infringement upon detainees' right to receive information implicates the core of the First Amendment – political speech and religious exercise. *See R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) ("Core political speech occupies the highest, most protected position" in the First Amendment hierarchy). BCDC's policies effectively ban detainees from receiving most mainstream magazines, such as *Time*, *Newsweek* and *U.S. News & World Report*, stapled flyers or other political pamphlets, and leading newspapers like the *Washington Post*. The public has a powerful interest in ensuring that all segments of the population can choose to access such materials. Indeed, "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

BCDC's restrictions on staples and "inappropriate" content also limit access to publications commonly used in religious exercise, such as *Our Daily Bread*. Congress' serial efforts to protect the religious exercise of incarcerated persons underscore the strong public interest in providing access to the religious publications that BCDC prohibits. For example, the Supreme Court recently explained that passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc (2000), was "the latest of long-running

congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005). RLUIPA passed both houses of Congress unanimously and was supported by more than seventy religious and civil rights groups representing a diversity of religious and ideological viewpoints. *See* 146 Cong. Rec. S7777-78.

Further, a preliminary injunction is necessary to advance the strong public interest in rehabilitation. Depriving incarcerated persons of expressive material is inimical to rehabilitative goals. *See, e.g.*, *Pell v. Procunier*, 417 U.S. 817, 822-25 (1974); *Martinez*, 416 U.S. at 412 ("the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation"). "The simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment." *Wolfish v. Levi*, 573 F.2d 118, 129 (2d Cir. 1978), *rev'd sum. nom. Bell v. Wolfish*, 441 U.S. 520 (1979). Defendants' sweeping mail restrictions deny this opportunity.

CONCLUSION

For the foregoing reasons, the United States respectfully asks this Court to grant PLN's Motion for Preliminary Injunction against Defendants' policies that ban publications containing staples and "inappropriate" content.

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DATED: May 23, 2011

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