No. 03-15006

In The United States Court Of Appeals

For The Ninth Circuit

FRANK CLEMENT,

Plaintiff-Appellee,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Defendant-Appellants.

On Appeal From The United States District Court
For The Northern District of California
Judge Claudia Wilken, No. C-00-1860 CW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

PRELIMINARY STATEMENT

Mail is a prisoner's lifeline to the outside world. It is often the only way for a prisoner to obtain news of distant family and friends, or information on topics of interest ranging from health, news or religion to simple jokes or poems. To provide this material, correspondents often may enclose materials clipped from newspapers or, more recently, downloaded from the Internet. Correspondents may also wish to enclose a letter from a mutual friend or family member or, more recently, a hard copy of an e-mail from them. Many California state prisons permit their prisoners to receive this information so long as the material's content passes muster. Pelican Bay State Prison and at least eight other California prisons, however, prohibit prisoners from receiving these materials, regardless of their content, if the materials were printed from the Internet.

This prohibition is arbitrary, irrational and a violation of the First Amendment. Prison security does not depend on whether the article from the New York Times that a mother sends her son in prison was clipped from a hard copy of the newspaper or downloaded from the online version of the paper. Nor is there a meaningful difference from the prison's perspective between a hard copy of an e-mail enclosed in a letter and that same missive re-typed before being enclosed.

Nevertheless, prison officials categorically prohibit prisoners from receiving any mail that contains material printed from the Internet, regardless of its content. The regulation is peculiarly irrational in that oft-times a letter's enclosure printed from the Internet cannot be distinguished from the same enclosure photocopied from the original document or retyped by the sender. Worse yet, the regulation

prevents prisoners from receiving those materials that increasingly are available only on the Internet, such as the information on preventing prisoner rape published on the website of an organization named Stop Prisoner Rape, or information that courts or government agencies publish only on their websites.

By focusing on the means by which material is reproduced, rather than its content, this regulation irrationally deprives prisoners of access to information. Security is not an issue. If the prison fears a deluge of bulky letters with material downloaded from the Internet that may overburden its mail staff, the simple answer is to limit the number of pages of enclosures permitted in any given letter. As this Court held in *Morrison v. Hall,* 261 F.3d 896, 903-04 (9th Cir. 2001), in striking down a ban on bulk mail, "prohibiting prisoners from receiving mail based on the postage rate at which mail was sent is an arbitrary means of achieving the goal of volume control." It is as if the prison sought to reduce its workload by permitting only materials printed on a Gutenberg printing press or mail sent via Pony Express, in the hope that fewer people would go to the trouble of communicating with prisoners.

Nor is the policy justified by any concern about the traceability of e-mails or other information downloaded from the Internet. The material at issue is always sent as an enclosure to a letter sent via the U.S. mail. Prisoners do not have direct access to the Internet (and we have not challenged that restriction here). If the prison wants to trace the sender of the letter, it can do so regardless of the enclosure. If, for some reason, the prison wants to trace the enclosure, separate from tracing the letter, it is no more difficult to trace an e-mail than other types of

permitted enclosures, such as a piece of paper with no identifying marks, and usually it is much easier.

STATEMENT OF JURISDICTION

Plaintiff agrees with defendants' statement of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the district court correctly ruled that a prison mail regulation banning Internet-generated materials is an arbitrary means of attaining prison security objectives based on evidence that there is no practical difference between a hard-copy printout of information downloaded from the Internet and a photocopy of that same material.

3. Whether the district court's ruling that the Internet mail regulation is unconstitutional on its face authorized the court to issue a statewide injunction banning enforcement of the unconstitutional regulation.

STATEMENT OF THE CASE

A. Statement of facts.

In 1998, Pelican Bay State Prison adopted a policy that materials printed from the Internet and sent into the institution were considered "unauthorized publications" and could not be enclosed in letters sent to prisoners from the outside. *See* Appellants' Excerpts of Record ("ER") 5 (¶ 3). The prison changed this policy several times over the next two years. The most recent version was formalized in a memo from the Warden in February 2001. ER 126-27, 178, 204. A similar policy was implemented at San Quentin State Prison in the summer of

2001. ER 101 (¶ 6). Altogether, at least nine California prisons have adopted policies prohibiting receipt of material printed from the Internet. ER 115 (¶ 6-7).

These policies ban prisoners from receiving hard-copies of documents downloaded from the Internet—including hard-copies of e-mails—regardless of content. ER 101 (¶ 6), 93-94 (¶¶ 8-9). Given the scope of the information available on the Internet, and the widespread use of the Internet by many businesses, non-profit organizations and government agencies, the ban substantially impairs prisoners' abilities to receive important information. ER 72 (¶¶ 6-7), 100-01 (¶¶ 5-6). Prisoners are not permitted to access the Internet directly. ER 171. To obtain information from the Internet, they depend on friends and family to send them material printed from the Internet and enclosed in letters sent via the U.S. Mail. *See, e.g.*, ER 102 (¶ 9).

Information of vital interest to prisoners is often available only on the Internet. For example, Stop Prisoner Rape, a national non-profit group that helps prisoners prevent prison rape and counsels victims, publishes its materials only on the Internet. ER 83 (¶¶ 2-3). The organization cannot afford the substantial costs of publishing its materials in paper form and mailing them to prisoners across the country. ER 84 (¶ 8). Instead, it refers families and friends of prisoners to its website so that they can download the materials and mail them to the prisoner. ER 83 (¶ 4). The ban on materials printed from the Internet puts this information off-limits for prisoners.

In other cases, as a practical matter, information of vital interest to prisoners is available only on the Internet. ER 100 (¶ 3). Many organizations provide

information to the public first and foremost through the Internet. *Id.* For example, the California Supreme Court publishes its rules relating to procedures in death penalty cases on its website. ER 102 (¶ 10). This Court similarly makes its rules (including recent amendments) and opinions available on its website. Even defendant CDC responds to requests for information by referring callers to the Internet. ER 101 (¶ 8). For many other publications, cost or lack of local availability make the Internet the only feasible means of access.

Beverly Lozano, a death penalty activist in Dixon, California, corresponds with San Quentin death row prisoner Scott Collins. ER 100 (¶ 1). Before San Quentin implemented its Internet policy, she often sent him materials downloaded from the Internet concerning his attempt to obtain habeas counsel and other information relevant to his habeas petition. ER 103 (¶ 11). In her experience, organizations and service-providers, including the CDC, have not been willing to mail her hard-copies of requested information. ER 101 (¶ 8). In addition, she has encountered substantial delay and cost in trying to get legal and other materials from the library. ER 102 (¶ 10).

E-mail has replaced paper mail as the primary method of communication for many people. ER 72 (¶ 5). E-mail allows distant people to obtain and exchange information reliably, quickly and inexpensively. *Id.* For example, Larry Stiner, a prisoner at San Quentin, has a family in Surinam. ER 92 (¶ 3). The only way that Watani (as Stiner is known) can receive timely information about the welfare of his children or participate in decisions about their upbringing is through e-mails sent by a social service worker in Surinam to Watani's friend in California, Sheilah

Glover. ER 93 (¶ 8). However, San Quentin prohibits Glover from mailing the e-mails to Watani. *Id.* When Watani's eldest daughter sent an e-mail letter to him via Glover, prison authorities returned it because of the ban on Internet material. ER 93-94 (¶ 9).

The named plaintiff, Pelican Bay prisoner Frank Clement, filed an inmate grievance in January 1999 when his pen-pal correspondence was returned to the sender due to the new policy. ER 5-6. Clement had subscribed to an Internet pen-pal service that allows prisoners to post a web page and solicit pen-pal correspondents. *Id.* Potential correspondents respond by sending an e-mail to the prisoner's web page, which is then downloaded by the service-provider and mailed to the inmate. ER 8. On January 10, 1999 and April 6, 1999, the prison mailroom rejected letters sent by the Internet service to Clement containing messages downloaded from Clement's web page. ER 5-6. Clement filed a grievance that prison authorities ultimately denied. ER 6-7.

Getting information from incoming mail serves important rehabilitative and integrative functions for prisoners. It helps prisoners maintain ties to their families and the community, helps them acquire skills in prison and allows them to consult with an attorney. *See, e.g.*, ER 176.

For all of the Internet-generated materials identified above, Pelican Bay Warden Auggie Lopez admits that the information would be allowed if the materials were recopied by hand. ER 178-79. Thus, the Internet policy bans the information solely on the basis of the medium by which it was sent. Ultimately, the policy discriminates against persons who use modern technology to provide

information to and otherwise communicate with prisoners. If a correspondent photocopies a poem, for example, or an article from Time magazine, and sends it to a prisoner, the material will be allowed. ER 208. But if the correspondent prints the same poem or article from the Internet and encloses it in a letter to the prisoner, the material is rejected.

B. Procedural History.

Plaintiff Frank Clement filed his amended complaint on July 26, 2001, asserting that California Department of Corrections officials violated his First Amendment rights by enforcing their regulation banning all mail containing materials printed from the Internet. ER 1.[1]

Defendants moved for summary judgment (ER 13), but submitted no evidence in support of their motion. Instead, they took the position that the issues had already been decided in their favor by the California court of appeal's decision in *In re Collins,* 86 Cal. App. 4th 1176 (2001). ER 31-33. Plaintiff opposed the motion, submitting declarations demonstrating the value to prisoners of receiving materials printed from the Internet and the lack of justification for defendants' regulation prohibiting those materials. ER 47-158. Plaintiff also submitted the trial transcript from the *Collins* case. ER 166-249. Defendants submitted a reply (ER 266), but again offered no supporting evidence.

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[1] The complaint also asserted other claims that the district court rejected and that are not at issue on this appeal.

At the summary judgment hearing, after observing that the material facts did not appear to be in dispute, the district court inquired whether the parties had any objection to the court treating plaintiff's opposition papers as a cross-motion for summary judgment. ER 298. Neither party objected. Defendants acknowledged that they did not intend to offer any additional evidence and that they would not be prejudiced if the court deemed plaintiff to have cross-moved. *Id.*

On September 9, 2002, the district court granted summary judgment in plaintiff's favor. ER 307. The court noted that defendants had offered two justifications for their rule: (1) that accepting mail with material from the Internet would increase the volume of mail coming into the prison and would burden prison staff, and (2) that materials printed from the Internet pose a security risk because they might contain coded messages or might conceal the identity of the sender. ER 326-27. Applying the four-factor test of *Turner v. Safely,* 482 U.S. 78, 89-90 (1989), the court found neither justification to be adequate.

As to the fear of increased volume, the court observed that this Court had rejected a similar justification in *Morrison* when it struck down as arbitrary a regulation barring prisoners from receiving all bulk rate, third class and fourth class mail. ER 326. The court ruled that the prohibition here was similarly arbitrary, particularly in light of the prison's ability to address any volume issues directly by restricting either the number of pages that prisoners could receive in each item of correspondence or the total number of items of correspondence. *Id.*

As to the asserted risk to prison security, the court found that "[d]efendants have failed to articulate any reason to believe that Internet-produced materials are

more likely to contain coded, criminal correspondence than photocopied or handwritten materials." ER 327. Similarly, there is no reason to believe that correspondence containing Internet materials would be any harder to trace than other correspondence. *Id.* The same factors the prison pointed to as permitting tracing of other mail—a return address on the envelope, fingerprints or DNA evidence—would also apply to mail containing Internet materials. ER 327-28.

Because there was no rational connection between defendants' asserted interests and the prohibition, the district court concluded that the prohibition was invalid under the first *Turner* prong. ER 329. The court also found that the prohibition failed under the other *Turner* factors as well. Prisoners do not enjoy equivalent alternative means of accessing materials available on the Internet, the impact on prison officials of accommodating the prisoners' First Amendment rights is not substantial, and defendants' asserted interest can readily be addressed by alternative means, thus indicating that the regulation is an exaggerated response to prison concerns. ER 329-31.

Having found the prohibition to be invalid, and applying the governing factors under the Prison Litigation Reform Act (42 U.S.C. § 3626(a)(1)(A)), the district court enjoined defendants from enforcing it. ER 334-37, 300.

ARGUMENT

I. PRISONERS HAVE A CONSTITUTIONAL RIGHT TO RECEIVE MAIL.

Imprisonment requires a prisoner to forfeit certain rights and privileges. It does not, however, cast him beyond the reach of the Constitution. The Supreme

Court has repeatedly recognized that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell,* 418 U.S. 539, 555-56 (1974); *see also Turner,* 482 U.S. at 84 ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution"). Thus, prisoners enjoy basic constitutional guarantees, including the right to free speech. *Thornburgh v. Abbott,* 490 U.S. 401, 410 n.9 (1989).

Recognizing prisoners' free speech rights under the First Amendment, this Court has regularly enforced a prisoner's right to receive information and correspondence from the outside world. For example, as noted, in *Morrison* this Court struck down a prison regulation banning all mail sent by third or fourth class or bulk rate as applied to for-profit subscription publications. The Court held that prisoners had a First Amendment right to receive these materials and that prison officials had not shown that the prohibited mail posed any greater risk to prison security than any other mail. 261 F.3d at 904. In *Prison Legal News v. Cook,* 238 F.3d 1145, 1151 (9th Cir. 2001), this Court struck down a prison regulation banning all standard rate mail as applied to non-profit organization mail for the same reason. And in *Crofton v. Roe,* 170 F.3d 957 (9th Cir. 1999), the Court struck down a prison regulation that banned all gift publications because "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, nor has it described any particular risk created by prisoners receiving such publications." *Id.* at 960-61. In each of these cases, the Court found the categorical ban to be

unjustified by prison security concerns and therefore an impermissible abridgment of prisoners' right to receive information.

The enforcement of prisoners' First Amendment rights in these and other cases serves important societal interests. Society has a strong interest in ensuring that prisoners maintain contact with their communities and families, both for its beneficial effect on the prisoner's morale and well-being while confined and for its value in promoting the prisoner's re-integration into society upon release. *See, e.g., Morrison,* 261 F.3d at 904 n.7 (*citing* Willoughby Mariano, Reading Books Behind Bars Reading Programs for State Prison Inmates and Juvenile Hall Wards are Critical to Helping Offenders Develop Literacy and Avoid Return to Crime, Experts Say, L.A. Times, January 30, 2000, at B2). As the Supreme Court has observed,

> Constructive, wholesome contact with the community is a valuable therapeutic tool in the overall correctional process . . . . Correspondence with members of an inmate's family, close friends, associates and organizations is beneficial to the morale of all confined persons and may form the basis for good adjustment in the institution and the community.

Procunier v. Martinez, 416 U.S. 396, 413 n.13 (1974) (internal quotation and citation omitted).

California state regulations cite the Supreme Court's discussion in *Procunier* in support of a requirement that "there shall be no limitations placed on the number of persons with whom the inmate may correspond." 15 Cal. Code Regs. § 3133. Here, the Internet mail regulation, which bans all information printed from the Internet regardless of content, including e-mail correspondence from families and

friends, is at odds with the prison's efforts to rehabilitate prisoners, as well as an abridgment of prisoners' First Amendment rights.

Prison officials may place certain restrictions on a prisoner's right to receive information, but only if the restriction is "reasonably related to the prison's legitimate penological interests." *Turner,* 482 U.S. at 89. *Turner* sets forth the applicable four-part test:

> First, there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it. . . .
>
> A second factor relevant in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates . . . .
>
> A third consideration is the impact accommodation of the asserted right will have on guards and other inmates, and on the allocation of prison resources generally.
>
> Finally, the absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns.

Id. at 89-90 (internal citations omitted); *see also Overton v. Bazzetta,* ___ S. Ct. ___, 2003 WL 21372482 (June 16, 2003) (applying *Turner* factors).

While the *Turner* standard affords deference to prison officials, it "is not toothless." *Thornburgh,* 490 U.S. at 414. Where sufficient justification for the regulation is lacking, it will be struck down, as this Court's decisions in this area make clear. Indeed, federal courts are often the sole guardian of prisoners'

constitutional rights and have a duty to protect prisoners' First Amendment right to receive information.[2]

II. DEFENDANTS' REGULATION IS NOT RATIONALLY CONNECTED TO ANY LEGITIMATE PENOLOGICAL INTEREST.

Turner's first prong asks whether (1) the asserted penological interest is legitimate and neutral, and (2) there is a rational connection between the regulation and the prison's objective. *Cook,* 238 F.3d at 1149. Defendants' regulation fails this test.[3]

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[2] *Cf. Rhodes v. Chapman,* 452 U.S. 337, 354 (1981) (Brennan, J. concurring) ("Courts have learned from repeated investigation and bitter experience that judicial intervention is indispensable if constitutional dictates – not to mention considerations of basic humanity – are to be observed in the prisons.").

[3] Defendants assert that the district court improperly imposed on them the burden of producing evidence proving the existence of the problem addressed by their regulation. Br. 9. They argue that, under this Court's ruling in *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999), their only burden is to show a "common sense" connection. This, however, is precisely the standard the district court applied. The court expressly recognized that the question is whether the defendants' belief is "rational" (ER 325 n.8) and that defendants need only "put forth a 'common-sense' connection between its policy and a legitimate penal interest." ER 323. This approach is consistent with *Overton*, in which the Supreme Court held that the question is whether the prison regulation is rational and that prison officials do not have the burden to "prove" its validity. 2003 WL 21372482 at *4. As the district court correctly found, and as we show in the following sections, defendants' regulation fails this test. There is no basis—common sense or otherwise—to believe defendants' prohibition is rationally related to their asserted interests.

A. Internet materials do not pose any particular security risk.

1. *There is no reason to believe (and no evidence suggesting) that Internet materials present any heightened threat of coded messages.*

Defendants' first argument is that a ban on Internet-generated materials reduces the risk that prisoners will receive coded messages. Br. 9. According to defendants, "the ease with which electronic communications can be manipulated heightens the risk that coded messages and other prohibited communications will be passed to prisoners." Br. 9.

As the district court found, however, defendants offer no explanation as to how this is true. It is not a matter of "common sense" that materials from the Internet can be "manipulated" more easily than other items of correspondence sent to prisoners. Defendants do not explain how a coded message could be inserted in an article printed from the Internet. The printed text appears just as it does online, and the online version cannot be altered before printing. A New York Times article printed from the Internet is identical to a photocopy of a clipping of that same article, except that the Internet version contains Internet headers and footers.

Nor do printed e-mails present any peculiar risk of coded messages. An e-mail is no different in this regard from a letter typed on a word processing program, or a letter written by hand. Coded messages could be inserted regardless of the method by which the letter is prepared. Indeed, if anything, "common sense" suggests that, given the relative difficulty in deciphering handwriting as opposed to printed text, it would be easier to conceal nefarious information in a handwritten letter than in a printed e-mail.

Moreover, defendants' reference to "electronic communications" suggests something more complex than what is actually going on. No prisoner is allowed to receive any communication in "electronic" form. Prisoners are not permitted access to the Internet. ER 177. Thus, there is no issue here about any prisoner receiving an e-mail (or any other document) with hidden, embedded text that the prisoner might be able to recover and read using a computer. All that the prisoner receives is text on paper sent through regular mail.[4] The contents of the printed copy are just as visible as any other printed or handwritten material the prisoner might be sent.

Defendants suggested below that someone could cut-and-paste (or download) the article into a word processing program and then cut-and-paste messages into that article. ER 294. But, as the district court recognized (*id.),* the same is true of *any* word-processed document, whether or not it originated on the Internet. A correspondent could cut-and-paste (or just type) an illicit message into the text of a letter or a research paper or any number of other documents residing on the correspondent's computer. The cut-and-paste function does not work only (or even more effectively) on material retrieved from the Internet.[5]

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[4] *See* ER 177:

> Q: So when you're talking about materials from the internet, you're talking about someone printing something off the internet and then mailing it in?
>
> A: That's true.

[5] In fact, defendants' argument only further highlights the arbitrariness of their regulation. Many items available on the Internet can be printed without anything

(continued . . .)

Nor are defendants helped by the "evidence" they cite. Br. 10. To the contrary, the cited evidence shows only the *lack* of any basis for thinking that Internet materials are more likely to contain coded messages. Only two of the references dealt with the possibility of coded messages. A Pelican Bay associate warden referred to the dangers created by the "flow of information," including the "possibilities of coded messages or hidden materials or hidden narcotics, or possibly weapons" being sent to inmates. ER 174-75. But he did not offer any testimony suggesting that these "possibilities" were any greater with respect to materials printed from the Internet as compared to anything else. Similarly, a sheriff's detective testified that e-mail addressees often receive spam mail and that it would be "possible" for someone to mail in a coded message disguised as a spam mail. ER 217-18. But this is no different from saying that it would be "possible" for someone to mail in a coded message disguised as regular junk mail, or disguised as anything else in printed form. As this same witness admitted:

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that would identify them as having come from the Internet. The content can be cut-and-pasted into a word-processor and then printed. Or the material might be available on the Internet in .pdf format, which when opened and printed looks like any other printed document. Prison officials would have no way of identifying such documents as having come from the Internet. Thus, whether any particular correspondence is rejected depends not on whether it poses any security risk, but simply on how it happened to have been printed or downloaded.

> Q: So if there is a coded message, it wouldn't be any different whether you typed it on a typewriter or typed it into your computer, sent it via e-mail, isn't that true?
>
> A: It would be the same.

ER 222.

2. *Nor is there any basis for believing that Internet materials are any harder to trace than other correspondence*.

Defendants' assertion that "the identity of the sender can be concealed" more readily on Internet materials (Br. 10) is likewise unfounded. To the extent defendants rely on "common sense," the common sense conclusion is that the ability to identify the sender is unrelated to whether the sender is mailing something from the Internet or something from somewhere else. Defendants do not explain why the sender of a photocopy of a magazine article could be identified more easily than the sender of the same article printed from the Internet. All of the communications at issue here must come to the inmate through the regular mail, which (as the district court correctly observed) means that they are just as likely as any other communication "to have a postmark, or to contain fingerprint or DNA evidence." ER 328. Indeed, defendants' purported concern over identifying the sender of correspondence is belied by the fact that defendants do not require that correspondence to prisoners at Pelican Bay contain a return address. ER 204-205; *see* ER 137 (§ IV, L).

Similarly, there is no "common sense" reason to believe that a letter printed on a computer and then sent as an enclosure to a prisoner would more readily identify the author or sender of the letter than would the same letter contained in a

printed e-mail. In either case, the letter may or may not give the author's name (although an e-mail is much more likely to show the sender's name). And in either case, the author could use a false name.

Nevertheless, defendants insist that it is more difficult to identify the author of an enclosed e-mail than it is to identify the author of a letter typed on a word processor. However, plaintiff's expert's declaration explains in detail how authorities can trace the source of an e-mail, once the identity of the person that enclosed it is determined. ER 73-77 (¶¶ 9-17). Although there will always be a few people with enough technical sophistication to conceal their identity when sending an e-mail, as a general rule it is easier to determine the sender of an e-mail than it is to identify someone who has taken pains to conceal his identity in sending a letter via the U.S. post office. *See id.* ¶ 8 (comparing ability of FBI to trace e-mail sent by September 11 terrorists with ability of FBI to identify sender of anthrax-laden letters to public figures and public officials in New York and Washington, D.C.).

The evidence defendants cite supports this conclusion. Defendants' witness agreed with plaintiff's expert that e-mails in their electronic form carry with them addressing information in their headers that permit them to be traced to their source. ER 212-13; *compare* ER 73-77, ¶¶ 9-17 (plaintiff's expert's testimony). His contention was that, if the sender is sufficiently knowledgeable, there are ways to alter this information, to use a fake e-mail address or to "spoof" an address so that it appears that the e-mail came from a different person. ER 213-15. In that event, he said, the e-mail format may not assist in identifying the sender.

This testimony, however, does not show that senders can more easily conceal their identities by sending e-mails or other materials printed from the Internet. At best, it says only that, if the sender is savvy enough, he might be able to defeat the *additional* clues provided by the e-mail format to finding his identity. But the fact that in some cases Internet materials might not carry these extra clues does not mean they pose any greater risk to security. In every case, the material from the Internet must be mailed to the prison, thus providing prison staff with the same set of clues as when any other material is mailed. And unlike concealing your identity in an e-mail, which defendants' witnesses admit requires at least some specialized knowledge, no particular skill is required to omit one's name from a regular letter or to type a false name or return address on a letter or envelope.

Defendants also rely on testimony that prison staff often compare the handwriting on the envelope to the handwriting on the enclosed letter to see if the letter was perhaps mailed by someone other than letter's author. ER 198. But, to the extent this is an indicator of any risk to the prison, permitting Internet materials does not pose that risk to any greater degree than permitting the mailing of printed materials, such as a typed letter or a photocopy of an article. In either case, there will be no handwriting to compare.

Finally, while defendants may legitimately be concerned with preventing one prisoner from corresponding with another (ER 197-98), defendants do not advance any argument that the prohibition on receiving Internet materials does anything to address that concern. Prisoners certainly do not have the ability to

send e-mail. Indeed, there is no reason to believe that permitting prisoners to receive Internet materials from those outside the prison will have any effect on the ability of prisoners to correspond with one another.

B. Defendants have not shown any rational connection between the regulation and their concern about volume.

Defendants' other argument is that the regulation addresses their need to control the volume of mail coming into the prison and to prevent overburdening of the prison staff. Br. 11. This argument fails for at least two reasons.

First, there is no "common sense" reason to believe that permitting correspondents to mail a printed e-mail, as opposed to a typed or handwritten letter with the same content, will result in such a significant increase in mail volume that it would overwhelm the resources of the prison staff. Similarly, there is no reason to believe that allowing articles or other materials printed from the Internet will produce substantially more mail than allowing photocopies of the same materials from other sources.

Second, even if it were true that the mail volume would increase, defendants' categorical exclusion of all Internet material would not be a rational response. This Court rejected nearly the identical argument in *Morrison.* There, as here, prison officials first attempted to justify their categorical ban on bulk rate, third and fourth class mail as necessary to address a particular risk purportedly posed by such mail—in that case, that it would contain contraband. The Court, however, rejected that explanation on the ground that defendants had failed to show that the prohibited mail created any risk of contraband greater than that

created by any other mail. 261 F.3d at 902. Having lost that point, the prison officials then argued that the ban could at least be justified as a means to "facilitate[] the efficient use of prison resources" by reducing the total volume of mail. *Id.* at 903-04. This Court rejected this justification as well, holding that "prohibiting prisoners from receiving mail based on the postage rate at which mail was sent is an arbitrary means of achieving the goal of volume control." *Id.*

The same is true here. As the court below correctly observed, "prohibiting all mail produced by a certain medium – downloaded from the Internet – is an equally arbitrary way to achieve a reduction in mail volume." ER 326. Prison officials could just as well ban prisoners from receiving any mail in an envelope addressed by hand, or any mail that arrived on Thursday or Friday, or any mail from a person whose last name begins with an "S." Each of these restrictions would likely reduce the incoming mail volume. But no one would contend that they would be a rational means of achieving the prison's goal. The restriction here fails for the same reason.[6]

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[6] The arbitrariness of defendants' categorical exclusion contrasts sharply with the regulations upheld in *Overton v. Bazzetta.* The visitation regulations there did not arbitrarily single out a group of visitors to exclude. Instead, the prison drew lines that the Supreme Court found were rationally related to the prison's interest in protecting security and visitor safety—*e.g.,* restricting visits by children, requiring permitted child visitors to be accompanied by an adult, and prohibiting visits by former prisoners who are not immediate family members. *See* 2003 WL 21372482 at *5. The line drawn in this case between Internet and other material bears no such rational relationship to the prison's goals.

As the district court recognized, the proper means for addressing any legitimate concerns about the mail volume is a restriction that does not arbitrarily exclude an entire category of mail—and that thus does not prevent prisoners from receiving valuable information that may be available only in a particular form or from a certain source. Prison officials could, for example, restrict the number of pages permitted as enclosures, or they could restrict the number of items of mail a given inmate could receive. In similar circumstances in *Cook,* this Court rejected the prison's concerns about an "unmanageable influx" of mail by observing that those concerns could be addressed by "other regulations" that did not arbitrarily discriminate against particular classes of mail. 238 F.3d at 1151. And, in *Crofton,* this Court affirmed a district court's ruling that a regulation barring "gift mail" was invalid in part because "the prison could instead regulate the number of gift publications that inmates could receive" rather than prohibiting them outright. 170 F.3d at 960.

Defendants argue that a page limit would be unworkable because prison staff do not have the time to count the pages "contained in every envelope." Br. 17. But a reasonable page restriction would not require that every page in every envelope be counted, as most envelopes will either clearly fall under or over the limit (provided the page limit is not set unreasonably low). Nor is there any merit to defendants' concern that lengthy enclosures could be split into several smaller envelopes. Br. 17. To the extent that actually occurred (and is not caused by an unreasonably low page limit), the problem would be the same for all enclosures, not just those printed from the Internet. Similarly, defendants' suggestion that any

alternative solution would prevent prisoners from receiving legitimate, valuable materials such as court decisions or new procedural rules (Br. 17) is nothing more than a threat that prison officials will adopt page or other limitations that are arbitrarily and unduly restrictive.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE REMAINING *TURNER* FACTORS CONFIRM THE REGULATION'S INVALIDITY.

The foregoing shows that defendants' regulation fails the first requirement of *Turner* that the regulation be rationally related to a legitimate penological interest. Because this requirement is the "sine qua non" of constitutional validity (*Morrison,* 261 F.3d at 901), the regulation is invalid on this basis alone, without regard to the remaining *Turner* factors. As the district court ruled, however, the remaining factors further support the court's finding that the regulation is unconstitutional.

A. The district court correctly found that there are no alternative means for prisoners to obtain some information available on the Internet.

Turner's second prong asks whether prisoners retain alternative means of exercising the constitutional right in question. *Turner,* 482 U.S. at 89-90. Ample evidence supports the district court's ruling that no such adequate alternatives exist here.

It was undisputed below that businesses, state agencies and non-profit organizations increasingly provide services and information primarily over the Internet. ER 72 (¶ 7), 101-03 (¶¶ 8-11). Many publications are often either too

costly to obtain other than through the Internet or are not otherwise locally available. Prisoners rely on information from these sources to stay abreast of developments important to their well-being while incarcerated, including new legal developments. Updated court procedural rules and legal decisions are readily accessible online, whereas it may take months for the printed version to be sent to a local library. ER 102 (¶ 10). The California Department of Corrections itself directs individuals to its website for access to "publicly available" reports, instead of sending a copy of the report to the individual in hard copy form. ER 101 (¶ 8).

Prisoners across the state can learn about defending themselves against prison rape in materials downloaded from Stop Prisoner Rape ("SPR"), which publishes information only on the Internet. ER 83 (¶ 3). Contrary to defendants' assertion (Br. 13), the news synthesis and analysis that is available on the SPR website, and materials compiled by SPR to aid survivors and prison administrators, is not available elsewhere.

In addition, even if all of this information were equally available elsewhere, it could easily take weeks for someone to gather from non-Internet sources the information posted on these websites, including legislative committee and hearing reports, press releases and book synopsis. Moreover, much of this information is technical and specialized. As the district court recognized, "summarization of information by laypeople could result in incorrect or improperly interpreted information being transmitted." ER 330.

The evidence is similarly compelling with respect to e-mail. As discussed above, for at least some prisoners, e-mail provides the only feasible method for

timely communication. A prisoner such as Watani, whose children are Surinam, relies on e-mails to be involved with important aspects of his children's lives. ER 93-94 (¶¶ 8-12). He cannot rely on the Surinam postal service. ER 94 (¶ 12). It can literally take weeks for a simple letter to make the journey from Surinam to Marin County. ER 93 (¶ 8). That method of communication is simply not a viable alternative to using e-mail. In addition, non-profits and other organizations often use e-mail as a primary method of resolving problems and providing information. ER 102 (¶ 9).

Defendants' argument that "prisoners continue to enjoy the traditional means of exercising their First Amendment right to communicate with individuals outside the prison" (Br. 15) ignores the reality that the method of communicating information has changed with the advent of the Internet. ER 72 (¶¶ 5-7). Because of these changes, prisoners *do not* enjoy traditional means of obtaining information if they are restricted from accessing information contained on the Internet. This is not a case of the alternatives simply not being "ideal"; rather, for much of the information the suggested alternatives are not available at all. *Overton,* 2003 WL 21372482 at *6. Defendants' assertion that correspondents may continue to send photocopies of news articles, court decisions and other items of interest to prisoners (Br. 15)—besides demonstrating the arbitrariness of defendants' restriction—ignores that these materials are increasingly available only over the Internet.

B. Allowing prisoners to receive Internet-generated materials would not substantially burden prison resources.

Turner's third prong evaluates the reasonableness of the regulation based on "the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources." *Turner*, 482 U.S. at 89-90.

As discussed above (at 16-17), the record does not support defendants' assertion that permitting Internet materials to be mailed to prisoners will significantly impair prison staff's ability to screen mail. Defendants offer no support for their contrary position. They cite only to the state court's decision in *In re Collins*. The court there, however, merely referred to defendants' unsupported supposition that mail volume would increase. Moreover, the trial record in *Collins* shows that even when the mailroom is understaffed by 50%, it successfully handles the current mail flow with only a one-day backlog. ER 202. There is no reason to believe that, even if defendants' speculation that mail volume would measurably increase were true, either existing or normal prison staffing levels could not adequately conduct any necessary review on a timely basis.

In any event, as already discussed, prison officials retain other avenues for avoiding any overburdening of prison resources, rather than arbitrarily excluding an entire category of materials of importance to numerous prisoners.[7]

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[7] The district court correctly concluded that *Collins* is neither binding nor persuasive here. As the court noted, plaintiff has presented evidence that was not present in *Collins* regarding the nature of Internet materials and the lack of any basis for defendants' regulation. Moreover, *Collins* uncritically accepted the prison officials' argument that they were prevented from adopting a page limitation as a means to control volume because they had adopted another regulation that

(continued . . .)

C. The availability of an obvious alternative demonstrates that defendants' regulation is an exaggerated response.

Turner's fourth prong evaluates whether the prison regulation is an "exaggerated response" to the alleged security issue. *Turner,* 482 U.S. at 89-90. The existence of an "alternative that fully accommodates the prison's rights at a de minis cost to valid penological interests" is evidence that the regulation is unreasonable. *Id.*

For the reasons already shown (*supra,* pp. 20-23), and as the district court found (ER 331), this factor likewise cuts strongly against the validity of defendants' regulation. Just as in *Morrison, Crofton* and *Cook,* the alternative of limiting the volume of mail rather than discriminating against the Internet as a source of enclosures protects any legitimate interest that defendants might have.

IV. THE DISTRICT COURT'S INJUNCTION IS PROPERLY TAILORED TO THE CONSTITUTIONAL VIOLATION AT ISSUE.

Defendants' final argument is that the district court's injunction is too broad. Br. 18-19. This argument is meritless.[8]

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dictates that the number of correspondents with an inmates not be limited. 86 Cal. App. 4th at 1186. This reasoning was faulty. A limit on the number of *pages* does not run afoul of a rule against limiting the number of *correspondents*. *Collins* was also decided before this Court's decisions in *Cook* and *Morrison* striking down prison regulations that—like this one—arbitrarily single out a category of mail as a means of volume control. This case is not meaningfully distinguishable from *Morrison* and *Cook*.

[8] The district court's grant of permanent injunctive relief is reviewed for abuse of discretion. *Dare v. California,* 191 F.3d 1167, 1170 (9th Cir. 1999); *Gomez v. Vernon,* 255 F.3d 1118, 1130 (9th Cir. 2001).

Defendants first contend (without any explanation or citation to the record) that the "policies" at issue and the "evidence" below were limited to Pelican Bay and that the district court thus erred in including other California prisons in the injunction. Br. 19. In fact, it was uncontradicted that defendants' unconstitutional policy is not limited to Pelican Bay, but has been applied at numerous other California prisons as well. ER 115 (¶¶ 6-7). It was similarly uncontradicted that prisoners in those prisons have suffered the same violation of their constitutional rights. ER 92-94 (¶¶ 1, 8-12), 100-03 (¶¶ 1-11). Moreover, the record provides no basis for concluding that the policy, even though invalid at Pelican Bay, might be valid elsewhere. Pelican Bay is a maximum-security prison. If anything, less justification exists for the policy at prisons other than Pelican Bay that house prisoners who are less of a security risk.

This record amply supports the district court's ruling that the regulation is facially unconstitutional and that protection of the prisoners' constitutional rights requires that it be enjoined at all California prisons. The Prison Litigation Reform Act ("PLRA") on which defendants rely codifies existing law with respect to granting injunctions. *Gomez,* 255 F.3d at 1129. In *Armstrong v. Davis,* 275 F.3d 849 (9th Cir. 2001), this Court set forth applicable standards for injunctive relief under the PLRA. The Court held that "[t]he key question…is whether the inadequacy complained of is in fact 'widespread enough to justify system wide relief.'" *Id.* (*quoting Lewis v. Casey*, 518 U.S. 343, 359 (1996)). Broad relief is permissible when the injury results from "violations of statute or the constitution that are attributable to policies or practices pervading the whole system." *Id.*

Existing law regarding injunctions is in accord. *See Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (holding that a statute that "impermissibly restricts a protected activity" is facially unconstitutional and thus invalid); *4805 Convoy, Inc. v. City of San Diego,* 183 F.3d 1108, 1116 (9th Cir. 1999) (holding a licensing ordinance to be facially unconstitutional and upholding an injunction prohibiting its enforcement against any person); *see also California First Amendment Coalition v. Woodford,* 299 F.3d 868, 886 (9th Cir. 2002) (affirming injunction barring enforcement of prison policy in a suit brought by an organization of members of the press).

Defendants next argue that the injunction will require that prisons permit inmates to receive "any internet-generated information—even if it contains escape plans." Br. 19. The injunction, however, does no such thing. It merely enjoins enforcement of defendants' policy of prohibiting mail on the basis that it contains Internet materials. ER 300. The injunction leaves unaffected defendants' other regulations excluding mail on other bases, such as that the mail contains information about escape plans.[9] The injunction requires that the prison treat mail with Internet enclosures on the same basis as other mail. It does not exempt it from other valid, generally applicable regulations.

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[9] *See, e.g.,* 15 Cal. Code Regs. § 3006(c); ER 143 (§ IV, U(1)(a) (disallowing mail that contains information posing a threat of physical harm to another inmate or staff person), § IV, U(1)(c) (disallowing mail that concerns escape plans), § IV, U(1)(g) (disallowing mail that contains coded messages that are not decipherable by prison staff)).

Finally, defendants inexplicably assert that the district court did not find that the injunction complies with the requirements of the PLRA. Br. 19. In fact, the district court meticulously followed the PLRA, including making the very findings that defendants claim it did not make. The court found that the "injunction is narrowly tailored" (ER 336:28), that it is the "least instrusive means necessary" (ER 336:17), and that it extends no further than necessary because it is the minimum that is required to correct the violation. ER 336:14-15. Defendants present no argument or evidence that these finding were incorrect. Nor could they. The court's ruling is amply supported by the record and should be affirmed.

CONCLUSION

For the foregoing reasons, the district court's judgment should be affirmed.

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STATEMENT OF RELATED CASES

Appellee is not aware of any related cases pending in this Court.

No. 03-15006

CERTIFICATE OF COMPLIANCE PURSUANT TO
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I certify that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 7,932 words.

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