

**In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Case No. 03-15006

FRANK CLEMENT,
Plaintiff-Appellee,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,
Defendants-Appellants.

**On Appeal from the United States District Court
For the Northern District of California, Judge Claudia Wiken,
Case No. C 00-1860 CW**

**BRIEF OF PRISON LEGAL NEWS AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE
FRANK CLEMENT AND IN FAVOR OF
AFFIRMANCE**

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TABLE OF CONTENTS

I. INTERESTS OF AMICUS 1

II. ARGUMENT 4

 A. Prisoners have a First Amendment right to receive mail 4

 B. There is no common-sense connection between the ban on Internet-generated mail and the government interests put forward to justify it 6

 1. There is no common-sense connection between the ban on Internet-generated mail and the government interests put forward to justify it. 7

 2. There is no common-sense connection between the ban on Internet-generated mail and Defendants’ concern over mail volume 8

 C. The ban on Internet-generated mail leaves prisoners with no alternative means of accessing valuable speech that is actually or practically available only online 10

III. CONCLUSION..... 15

TABLE OF AUTHORITIES

Cases

<i>Frost v. Symington</i> , 197 F.3d 348 (9th Cir. 1999)	7
<i>Prison Legal News v. Cook</i> , 238 F.3d 1145 (9th Cir. 2001).....	iii, 1, 3, 4
<i>Prison Legal News v. Schumacher</i> , USDC OR, Case No. 02-248-MA.....	3
<i>Reno v. American Civil Liberties Union</i> , 521 U.S. 844 (1997)	11
<i>Thornburgh v. Abbot</i> , 490 U.S. 401 (1989)	5, 6
<i>Turner v. Safley</i> , 482 U.S. 78 (1987).....	passim
<i>Walker v. Sumner</i> , 917 F.2d 382 (9th Cir.1990).....	7

**DISCLOSURE OF CORPORATE AFFILIATIONS AND
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Pursuant to FRAP 26.1, amicus Prison Legal News ("PLN"), a 501(c)(3) non-profit corporation incorporated in the State of Washington, makes the following disclosure:

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4. PLN is not a trade association.

June 30, 2003

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I. INTERESTS OF AMICUS

Amicus Curiae Prison Legal News (PLN) publishes a 36-page monthly magazine providing cutting-edge review and analysis of prisoner rights, prisoner-relevant legislation and court rulings, and news about general prison issues. This information helps prisoners and other concerned individuals and organizations protect prisoners' rights. Founded in 1990 by two prison inmates with a budget of \$50 and access only to a typewriter and a prison law library, PLN is now a non-profit corporation with three full-time employees, based in Seattle, Washington.

PLN covers such issues as court access, prison conditions, excessive force, mail censorship and other free speech issues, prison rape, abuse of women prisoners, the Prison Legal Reform Act, medical treatment for prisoners, AIDS in prisons, the death penalty, and many more topics of great import to prisoners and those concerned about them. A purposeful publication with limited resources, the PLN magazine uses no color and contains almost nothing but informative text; no space or money is wasted on crossword puzzles or personal ads. Unsurprisingly, this Court has characterized PLN as "core political speech." *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001).

PLN subscribers and readers include state and federal prisoners, civil and criminal trial and appellate attorneys, judges, public defenders, journalists, academics, paralegals, prison rights activists, students, family members of prisoners, concerned private individuals, politicians and

government officials. As of December 2002, PLN was distributing approximately 4,000 issues per month, including overseas distribution to 23 countries. In the United States, roughly 65% of PLN's subscribers are state and federal prisoners, and PLN has prisoner subscribers in all 50 states. Thirteen percent of its subscribers are located in California, more than any other state.

PLN maintains a stable of regular contributing writers, most of whom are imprisoned. PLN also uses an extensive network of freelance writers, again often imprisoned. To enable imprisoned writers to adequately research and report on an assignment, PLN typically must send source material via mail, such as news articles, case law, and other legal sources concerning prison-related issues, litigation, and legislation. To the extent resources allow, PLN also sends such materials to prisoners who request them, regardless of whether they are contributing writers.

PLN relies extensively on the Internet for much of this material. PLN especially relies on government Web sites, as well as online databases such as Westlaw, Lexis-Nexis, and the free resource Findlaw, to locate and print necessary source materials. Internet sources are particularly important for timely reporting on new court decisions and statutes that have not yet been published on paper.

PLN also relies on the Internet for publicity and distribution, maintaining a Web site (www.prisonlegalnews.org) where it provides back issues for download, links to other Web sites relevant to prison legal issues,

and subscription order forms. PLN often receives printouts of these order forms from first-time subscribers who are incarcerated. As prisoners lack Internet access of their own, they must receive these forms after they are printed out and mailed to them by friends or family. When resources allow, PLN intends to extend its Web site to include legal briefs and other informational material of use to prisoners and prisoner-rights activists. Again, prisoners would have to rely on non-incarcerated friends and family to download, print, and mail those materials to them.

PLN has litigated the speech rights of prisoners and their correspondents in order to preserve its own ability to accurately report and effectively distribute legal news relevant to prisoners. *See, e.g., Prison Legal News v. Cook*, 238 F.3d at 1149 (challenge to a prison regulation banning standard or "bulk" mail); *Prison Legal News v. Schumacher*, USDC OR, Case No. 02-248-MA (negotiated settlement with Oregon Department of Corrections under which all mailings from PLN will now be delivered to prisoners regardless of postal classification).

PLN, because of its reliance on the Internet in continuing its mission to provide timely and accurate legal news to prisoners and concerned citizens, and as evidenced by its past involvement in similar litigation, has a strong interest in defending the right of prisoners to receive, and non-incarcerated citizens to send, mail containing speech printed from the Internet.

Plaintiff has consented to the filing of this brief, and Defendants have

declined to consent but have indicated no opposition. We have sought leave of this Court to file this brief.

II. ARGUMENT

A. Prisoners have a First Amendment right to receive mail

This case presents the simple question of whether prison officials may prevent prisoners from receiving information via ordinary postal mail simply because that information had been downloaded from the Internet. Under the regulation at issue here, a prisoner may receive a clipping or photocopy of a newspaper article -- but not if it had been downloaded from the newspaper's Web site and then printed onto paper.

Prisoners have a First Amendment right to receive information by incoming mail. *See, e.g., Prison Legal News*, 238 F.3d at 1149. To be constitutionally valid, prison regulation of incoming mail must be reasonably related to the prison's legitimate penological interests. *See Turner v. Safley*, 482 U.S. 78, 89 (1987).

The district court correctly recognized that the regulation described above fails constitutional muster under *Turner* and its progeny. In this amicus brief, Prison Legal News seeks to emphasize the importance of permitting PLN to send, and prisoners to receive, printouts of information downloaded from the Internet. Much information today is available only on the Internet. And even when information is available from non-Internet sources, Internet sources are often easier and cheaper to use -- an important consideration for those of modest means, whether a small non-profit group

like PLN or a prisoner's friends and family. Accordingly, amicus urges this Court to affirm the district court.

Prison inmates do not surrender their First Amendment rights merely because they are incarcerated. "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution, nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the inside." *Thornburgh v. Abbot*, 490 U.S. 401, 407 (1989) (internal quotations and citations omitted). Therefore, a prison regulation that infringes inmates' constitutional rights is valid only if it is "reasonably related to the prison's legitimate penological interests." *Turner*, 482 U.S. at 89. *Turner* defines the relevant test of reasonableness:

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. . . 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 Thornburgh*, 490 U.S. at 413-14 (applying *Turner* test to prison's regulation of incoming mail).

As the district court clearly found, *see Appellants' Excerpts of Record*

("ER") 330-31, and as Appellee has adequately argued, *see* Appellee's Br. 25-26, allowing prisoners to receive Internet-generated materials would have no meaningful impact on guards and other inmates, nor on the allocation of prison resources generally. Similarly, as already explained by the district court, *see* ER 331, and Appellee, *see* Appellee's Br. 27, the availability of an obvious, easy alternative demonstrates that the ban on Internet-generated mail is an unreasonable and exaggerated response to prison concerns. Therefore, Amicus will here only address the first two of the *Turner* factors.

B. There is no common-sense connection between the ban on Internet-generated mail and the government interests put forward to justify it

Under *Turner*, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90. Importantly, deference to prison officials is implicit in the *Turner* test itself; the *Turner* standard of review was crafted to be "responsive...to the policy of judicial restraint regarding prisoner complaints." *Id.* at 85 (internal quotation and citation omitted). Accordingly, no additional deference is required beyond its terms. When challenged, "[p]rison authorities cannot rely on general or conclusory assertions to support their policies," *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir.1990), and exaggerated responses to even legitimate concerns are unacceptable. *Turner*, 482 U.S. at 90. Rather, Defendants must at least advance a "common-sense" connection between their policy and the alleged penological interest. *Frost v. Symington*, 197

F.3d 348, 357 (9th Cir. 1999).

Here, the so-called rationales offered by Defendants to justify the ban on Internet-generated mail at Pelican Bay State Prison lack any sensible connection to the asserted penological interests. Defendants' fears of anonymous, coded messages are no more than unfounded suspicions about a misunderstood medium, and their worries about prison mailrooms being "flooded" with "reams of documents downloaded at a whim" are exaggerated at best. Appellants' Opening Br. 11.

1. There is no common-sense connection between the ban on Internet-generated mail and the government interests put forward to justify it.

As the district court correctly found, "Defendants 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 (emphasis added). Defendants argue that this finding was erroneous because it placed on them an improper evidentiary burden. *See* Appellants' Opening Br. 9-10. However, the district court found for Plaintiff not because of Defendants' lack of evidence, but their lack of common sense. Coded messages can just as easily be transmitted via mail that does not come from the Internet. *See* ER 327. Furthermore, since material from the Internet would reach prisoners only in paper and not electronic form, there is no reason to fear hidden, embedded text that prisoners could uncover using a computer. *See* Appellees Br. 15. If Defendants fear electronically embedded text, somehow communicated on

paper, then they might as well be reluctant to handle documents printed from the Internet for fear of catching a computer virus. Such fears could hardly be considered rational.

Similarly, Defendants' assertion that it is easier to hide the sender's identity when mail is Internet-generated was not rejected by the district court because they lacked evidence, but because they could not even *articulate* any explanation for it. *See* ER 329. The same clues as to the identity of the sender of paper mail exist whether or not that mail contains information downloaded from the Internet, and if the concern is over the sender or author of the electronic message that was printed, the evidence shows that it would be easier to track that person than if they had used paper. *See* ER 327-8. Indeed, Defendants cannot even credibly maintain that knowing the identity of a sender is a valid security interest, because prison regulations do not require return addresses on incoming mail. *See* ER 328-29.

2. There is no common-sense connection between the ban on Internet-generated mail and Defendants' concern over mail volume

Defendants expect this Court to defer to their conclusory assertion that Internet-generated mail would unduly burden prison resources because it carries a "potential for a high volume of text" that is somehow distinguishable from the potential volume of any other kind of mail. Appellants' Opening Br. 10. Yet the *only* basis for this concern over mail volume is an irrational fear that senders will "flood the mailroom with reams of documents downloaded at a whim from the internet." Appellants'

Opening Br. 11. Defendants cannot explain how this would be different from printing "at a whim" from the many CD-ROM products containing "reams of documents," such as Microsoft's "Encarta" Encyclopedia or the CD-ROM editions of the Westlaw and Lexis-Nexis databases. Nor can they distinguish such downloading from whimsically printing truckloads of word processor documents that have never been on the Internet, or even speedily batch-feeding paper documents to a photocopier. Certainly, limiting incoming mail to handwritten missives would also reduce the volume of incoming mail by preventing people from, "at a whim," typing words at a much faster rate than they can write. But such a regulation just as certainly would not be rational, and neither is a ban on Internet-generated mail.

Adding to the irrationality of this ban is the fact that, as a practical matter, many Internet-generated documents cannot be identified as such, including files for word processors such as Microsoft Word, or ".pdf" files for Adobe Acrobat. Such files are easily and commonly attached to e-mails or linked to from Web sites, yet carry no marks identifying them as Internet documents. In fact, with unlimited time, money, and paper, one could print every legal opinion in the Westlaw database without ever generating a document that identified itself as coming from the Internet, since each is available as a Microsoft Word document. All of those cases could then be mailed to Pelican Bay, and the restriction at issue would be of no help—although a simple page limit on each piece of mail, regardless of source, would.

C. **The ban on Internet-generated mail leaves prisoners with no alternative means of accessing valuable speech that is actually or practically available only online**

The second *Turner* factor asks "whether there are alternative means of exercising the right [in question] that remain open to prison inmates." *Turner*, 482 U.S. at 89-90. Here, the right in question is access to constitutionally protected information and expression that comes from outside the prison walls. The ban on Internet-generated mail prevents prisoners from getting information that is available only online, whether actually or practically, leaving no alternative means of access to that information. It also prevents PLN from providing its incarcerated writers with the source materials needed to accurately report on prison legal issues.

The contents of the Internet are "as diverse as human thought." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997). The countless online resources concerning the law, medicine, religion, and an untold number of other topics often contain unique material that is unavailable in print publications. Additionally, many printed publications, although technically available in the offline world, are only practically available to most people online. Such documents that are unique to or uniquely accessible on the Internet could prove crucial to a prisoner for succeeding in an appeal, maintaining his health, or even saving his soul.

For timely access to new statutes and legal opinions, which is especially important to PLN's work, Internet access is a must. For example, both the U.S. and California Supreme Courts release their decisions online

before they ever appear on paper (at www.supremecourtus.gov and www.courtinfo.ca.gov, respectively). The online service Findlaw (www.findlaw.com) offers a free, searchable database of state and federal cases and statutes, enabling prisoners' friends and family to search for information helpful to the incarcerated, even if they lack the time or money to do research at a law library or use a premium online service such as Westlaw. Findlaw also provides legal commentary (writ.news.findlaw.com) and legal news (news.findlaw.com) that is published nowhere else. Similarly, Law.com (www.law.com) offers regional legal news from across the country that is likely unavailable in local law libraries, and provides a database (www.nljexperts.com) allowing users to search for legal experts across the country based on expertise, an exercise that would be futile at a local library.

Many people use the Internet to share their religious views and values. Much of this material is not available offline, or is available for free only online. The theological journal of Albuquerque Bible College (www.abqbiblecollege.org/abg_journal.htm) requires payment for physical subscriptions but offers its contents online for free. Similarly, *A Brief Illustrated History of Islam* must be paid for in book form, but is available for free download online (www.islam-guide.com). Finally, the Hebrew University of Jerusalem (<http://sites.huji.ac.il/melton/ejlist.html>) offers an extensive directory linking to many Internet-only religious journals, including Bar Ilan University's *Jewish Studies*

(<http://www.biu.ac.il/JS/JSIJ/>).

The Internet has also become most people's first step when researching an illness. As AIDS is one of PLN's most important issues, online medical information is of particular value. Offline medical information can be expensive, difficult to locate, bulky, and out of date. By contrast, Web sites such as those of the American Diabetes Association (www.diabetes.org) or American Lung Association (www.lungusa.org) offer current, free, targeted information from expert sources. Users can search for specific symptoms, conditions and diseases, drugs, treatments, and preventive measures according to various indicia. A printout of the home page of such specialized Web sites could quickly apprise a prisoner of the resources available online and enable him to request further information for his friends or family to send along. Many health sites also offer e-mail newsletters tailored to a subscriber's individual interests and concerns. For instance, a prisoner interested in smoking cessation and the latest discoveries in cancer treatment could have a friend regularly print and mail a short, individualized newsletter covering those topics (lungnews.kintera.org). Such specialized e-mail newsletters are not unique to medical sites; Findlaw has newsletters covering legal developments in specific practice areas and jurisdictions (newsletters.findlaw.com).

Moreover, the Internet does not merely imitate offline publications. The Internet's greatest strength lies in interactivity, enabling ongoing conversations on every topic imaginable by both experts and amateurs all

over the world. There are e-mail lists, message boards and discussion groups where anyone with valuable information to share or with a particular informational need can participate in a dialogue with others, and provide or acquire personalized knowledge and new perspectives unavailable in any book or magazine.

An e-mail mailing list, or "listserv", is a communal discussion held via e-mail, usually based around a particular topic or community. CataList (<http://www.lsoft.com/lists/listref.html>), for example, is a directory containing over 71,894 public listservs. A search of this directory for lists about cancer produces 158 results, including support groups for a wide range of cancer types; there are 33 lists concerning AIDS and more than 800 lists about law. There is even a directory dedicated solely to criminal law listservs (<http://www.tncrimlaw.com/crimlist.html>). The loved one of a prisoner could subscribe to mailing lists of particular relevance to the inmate, and then print out and mail especially informative e-mails from list participants, containing unique, personalized insights that cannot be found in a library.

Online discussion groups or "newsgroups" are like listservs in that they are online conversations covering specific topics and communities; instead of relying on e-mail, however, messages are posted on Internet news (NTTP) servers, which serve as directories of and hosts to newsgroups. Newsgroups exist for every conceivable topic. A directory of health-related newsgroups (<http://www.makoa.org/usenet.htm>) enables one to easily find

groups dealing with, e.g., AIDS, cancer, nutrition, or sleep disorders; a similar directory of legal topics (<http://www.ilrg.com/ng.html>) includes groups discussing, e.g., child support, death penalty activism, and law enforcement. Web-based message forums serve a similar function. The Criminal Justice Forum message board (www.criminaljusticeforum.com) hosts discussions on prison issues and the drug war, while IntelliHealth (www.intelihealth.com) hosts bulletin boards dealing with specific medical conditions, and even has an "Ask The Expert" forum where experienced doctors will answer health questions. With such resources, a prisoner in correspondence with an Internet user could have his question posted and receive the printed reply.

The most notable feature of newsgroups, as opposed to e-mail listservs and Web-based bulletin boards, is that all of the messages posted to them, stretching back for more than two decades, are stored and searchable with search engines like Google (www.google.com). With such a long history, almost any question you can imagine has been posted, hashed over, and then answered or dismissed by the appropriate community of experts and enthusiasts at some point, and by using Google, the relevant posts can be easily retrieved.

Just as electronic documents are replacing paper and online discussion is supplementing real-world dialogue in ways that ignore geography, digital pictures are transcending the limits of traditional film photography. Before being printed, such pictures necessarily must pass through a computer, and

are usually shared with others via attachment to e-mail or posting on the Internet. Digital pictures taken by most camera-phones must be sent by e-mail to reach a printer, and such cameras are quickly becoming as common here as they are overseas. There is no reason why a prisoner's access to pictures of a family reunion or child's school recital should be limited based on the type of camera his family happens to use. Nor should a prisoner's wife be prevented from sharing impromptu pictures captured with a phone-cam or pocket sized digital camera, of a child's first steps, a particularly endearing smile, or a quiet moment between family, based only on Defendants' arbitrary and irrational fear of the Internet.

As the district court noted, there are recognized rehabilitative benefits to allowing prisoners contact with the outside world, whether to receive educational reading material or to maintain family ties. See ER 324-25. Clearly, much educational material is available only online, and Internet-based communication through e-mail and pictures is quickly becoming central to the family bond. Eliminating those channels of communication will condemn prisoners to a pre-Internet era, while the rest of the world moves on, and will only hinder their reintegration into society upon release.

III. CONCLUSION

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

DATED: July 1, 2003

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3657 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I certify that, on this 30 day of June, 2003, a true and correct copy of Brief of Prison Legal News as Amicus Curiae in Support of Plaintiff-Appellee Frank Clement and in Favor of Affirmance was served via U.S. Mail, postage prepaid, upon the following:

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