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COUNTY OF SAN MATEO
and CHRISTINA CORPUS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

A.B.O. COMIX, KENNETH ROBERTS, ZACHARY GREENBERG, RUBEN GONZALEZ-MAGALLANES, DOMINGO AGUILAR, KEVIN PRASAD, MALTI PRASAD, and WUMI OLADIPO,

Plaintiffs,

v.

COUNTY OF SAN MATEO and CHRISTINA CORPUS, in her official capacity as Sheriff of San Mateo County

Defendants.

Case No. 23-CIV-01075

Assigned for All Purposes to:
Hon. V. Raymond Swope, Dept. 23

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: December 4, 2023
Time: 2:00 PM
Dept.: 23

Action Filed: March 9, 2023
Trial Date: None Set

NOTICE OF MOTION AND MOTIONS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on December 4, 2023 at 2:00 PM, or as soon thereafter as the matter may be heard in Department 23, Courtroom 8A of the above entitled Court, located at 400 County Center, Redwood City, California 94063, the Honorable V. Raymond Swope presiding, Defendants the County of San Mateo and Christina Corpus, in her official capacity as Sheriff of San Mateo County (collectively, "Defendants") will, and hereby do, move this Court to enter an order of judgment on the pleadings with regard to all of the claims for relief of A.B.O. Comix, Kenneth Roberts, Zachary Greenberg, Ruben Gonzalez-Magallanes, Domingo Aguilar, Kevin Prasad, and Wumi Oladipo's (collectively, "Plaintiffs") pursuant to Code of Civil Procedure § 438. The Motion will be made on the grounds that Plaintiffs' Amended Complaint fails to plead facts sufficient to state any claim for relief. Additionally, Plaintiff A.B.O. Comix lacks standing to pursue its claims and Plaintiff Zachary Greenberg's and Plaintiff Wumi Oladipo's claims are moot.

This Motion is based on this Notice of Motion and Motion, Defendants' accompanying memoranda in support thereof, including all attachments, all other pleadings and papers on file in this action, and such other matters as may be presented by counsel at the hearing on this motion.

DATED: September 8, 2023

Respectfully submitted,

BARTKO ZANKEL BUNZEL & MILLER
A Professional Law Corporation

By: 

Chad E. DeVeaux
Attorneys for Defendants COUNTY OF SAN MATEO and CHRISTINA CORPUS

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I. INTRODUCTION

The California and federal Constitutions both recognize that "imprisonment carries with it the circumscription or loss of many significant rights." (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1168.) This is because jails, "by definition, are places of involuntary confinement of persons who have demonstrated proclivity for antisocial criminal, and often violent, conduct." (*Sacramento Cnty. Deputy Sheriff's' Ass'n v. Cnty. of Sacramento* (1996) 51 Cal.App.4th 1468, 1480 ["*Sacramento*"].) Inside "this volatile 'community,' prison administrators are to take all necessary steps to ensure the safety of … prison staffs" as well as "the inmates themselves." (*Id.*)

Plaintiffs' suit initially raised both California and federal claims, challenging San Mateo County's (the "County") policy of digitizing inmate mail and providing copies on tablets and kiosks using Smart Communication's ("Smart") services. The County implemented this policy, inter alia, to prevent exposure to fentanyl and other drugs, which are easily introduced into jails by mail "through paper that ha[s] been soaked, sprayed or otherwise treated with illicit substances before being mailed to prisoners." (*See Human Rights Def. Center v. Bd. of Cnty. Com'rs* (D.N.H. Feb. 2, 2023) __ F.Supp.3d __, 2023 WL 1473863, at *1 ["*HRDC*"].)

Plaintiffs' original Complaint ("OC") claimed the policy "violates the First Amendment" because "it is not rationally related to any legitimate penological goals" and "leaves no adequate alternatives to communication" and "violates the Fourth Amendment because it constitutes an unreasonable search and seizure." (OC ¶¶ 88, 91.) After Defendants removed the action to federal court, Plaintiffs filed an Amended Complaint ("AC"), which omitted their federal claims. The AC claims the policy "serves no legitimate penological purpose,"[1] but "no longer raises claims under federal law" and instead brings identical claims "under Article I, [§] 2 and Article I, [§] 13 of the California Constitution."[2] Because Plaintiffs purportedly abandoned their First and Fourth Amendment claims, the federal court remanded the case back to this Court.

Plaintiffs' jurisdictional gymnastics are a cynical attempt to evade well-settled constitutional principles recognized by *Crime Justice & Am. v. Honea* (9th Cir. 2017) 876 F.3d

[1] Request for Judicial Notice ("RJN"), Ex. A ¶ 2. Exhibit A is hereinafter referred to as "AC."
[2] RJN, Ex. E at 3:13-14, 2:15-17.

966. *Honea* upheld Butte County's policy banning the delivery of certain types of inmate mail due to safety concerns. (*Id.* at 969.) As a substitute, the jail digitized the banned mail and installed "electronic kiosks" for inmates "to access electronic versions" of it. (*Id.* at 971.) The plaintiff argued this policy was an unlawful "suppression of expression" and served no "legitimate penological interests." (*Id.* at 972-973.) *Honea* disagreed. Under the First Amendment, "[r]egulations regarding the review of [prisoner's] mail are evaluated under the ... test set forth in *Turner v. Safley* [(1987)] 482 U.S. 78." (*Reynolds v. Rios* (E.D. Cal. Feb. 10, 2011) 2011 WL 617424, at *2.) Applying *Turner*'s test, *Honea* held Butte County's policy was "reasonably related to a legitimate penological objective" and that providing "kiosks" for review of "mail to inmates" is "an adequate substitute for regular distribution of paper copies." (876 F.3d at 970, 976, 978.)

Seeking to sidestep *Honea*'s hornbook holdings, the AC purports to assert "novel California constitutional claims" that Plaintiffs represent are governed by substantively different rules than the federal claims addressed in *Honea* because inmate rights under "the state constitution's free speech and privacy guarantees are ... broader than ... their federal analogs." (RJN, Ex. F at 2:2-3, 3:24-25.) Not so. California has codified prisoners' civil rights in Penal Code § 2600, which provides that the incarcerated may be "deprived of rights" if such deprivation "is reasonably related to legitimate penological interests." This law is "designed to conform California law to the [U.S. Supreme Court's] decision in *Turner*." (*Cnty. of Nev. v. Super. Ct.* (2015) 236 Cal.App.4th 1001, 1009 fn. 2.) Consequently, *all* prisoner free-speech claims under California law are "governed by the high court's test in *Turner*." (*Thompson v. Dep't of Corr.* (2001) 25 Cal.4th 117, 130.) Therefore, *Honea* likewise dooms Plaintiffs' state-law claims. (*See* 876 F.3d at 971-973.) Plaintiffs' search-and-seizure claims also fail because, under California law, "a person incarcerated in a jail or prison possesses no justifiable expectation of privacy" whatsoever. (*People v. Loyd* (2002) 27 Cal.4th 997, 1001.)

In addition to these fatal defects, Plaintiffs' claims must be dismissed for four other independent reasons. First, lead-Plaintiff A.B.O. Comix ("A.B.O.") does not possess associational standing to bring this suit because, among other things, it must plead facts showing that it is a properly formed organization "operating under the laws of California" or another jurisdiction.

(*Creed-21 v. City of Wildomar* (2017) 18 Cal.App.5th 690, 692.) The AC pleads only that A.B.O. "is a collective of artists." (AC ¶ 5.) A "*collective*" is not a properly formed organization.

Second, Plaintiff Zachary Greenberg's claims are moot because he is no longer incarcerated in the County's jails. (AC ¶ 21.) This is so because he "[i]s no longer under the physical control of [the County], and the challenged conduct no longer applie[s] to [him]." (*See Giraldo v. Dep't of Corr. & Rehab.* (2008) 168 Cal.App.4th 231, 257.)

Third, the claims of Plaintiff Wumi Oladipo, Mr. Greenberg's purported "significant other," likewise are moot. (*See* AC ¶ 86.) Even if her relationship with Mr. Greenberg conferred standing while he was incarcerated in the County's jails, her claims are now moot because "the challenged conduct no longer applie[s] to [either of them]." (*Giraldo*, 168 Cal.App.4th at 257.)

Finally, prisoners "must exhaust available administrative remedies before filing a lawsuit." (*Parthemore v. Col* (2013) 221 Cal.App.4th 1372, 1380.) And "it is [the plaintiffs'] burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy." (*Westinghouse Elec. Corp. v. Cnty. of Los Angeles* (1974) 42 Cal.App.3d 32, 37.) Here, the County has established a grievance procedure that enables "inmate[s] [to] file a grievance relating to … mail use procedures." (RJN, Ex. B at § 612.2.) The AC does not plead that Plaintiffs have exhausted their remedies under that policy. Thus, their claims fail as a matter of law.

II. STATEMENT OF FACTS ALLEGED BY PLAINTIFFS

"This case concerns [the] County's use of [Smart's] MailGuard service, which the County uses to eliminate physical mail." (AC ¶ 26.) Before 2021, non-legal inmate mail was "inspect[ed]" by staff and if "approved, it was delivered" to the inmate." (*Id.* ¶ 31.) In 2021, the County began "digitizing incoming mail using [Smart's MailGuard] services." (*Id.* ¶ 32.) MailGuard "redirects physical mail" to Smart's facility where it "scan[s] and upload[s] digital copies of the mail into a proprietary database." (*Id.* ¶ 26.) Jail staff then "review mail" and "[i]f approved, a digital copy of the mail may be accessed by its recipient … via tablets or kiosks." (*Id.*) In 2021, "the County's then-Sheriff … announced that the County's mail policy [is] meant to prioritize ... safety" due to "concerns about fentanyl exposures." (*Id.* ¶ 9.) The policy aims to "keep everyone safe since there ha[ve] been some concerns regarding fentanyl exposures with the old mail system." (*Id.* ¶ 49.)

III. ANALYSIS

A. Plaintiffs' Claims Should Be Dismissed Because They Are Not Justiciable

1. Lead Plaintiff A.B.O. Lacks Associational Standing

"Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff." (*People ex rel. Becerra v. Super. Ct.* (2018) 29 Cal.App.5th 486, 495.) Because "[t]he rendering of advisory opinions" falls outside the constitutional jurisdiction of California's courts, the absence of standing is an incurable "jurisdiction defect." (*Id.* at 497.) Thus, "[s]tanding goes to the existence of a cause of action." (*Apt. Ass'n of Los Angeles Cnty, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128.)

In limited circumstances, "an ***incorporated*** association" that is "organized in part to represent [its members] in matters affecting [them]," may be vested with standing to seek "injunctive relief, to restrain alleged violations of public law which threaten injury to [its] members." (*Cal. Dental Ass'n v. Cal. Dental Hygienists' Ass'n* (1990) 222 Cal.App.3d 49, 61, emphasis added.) But to qualify as an incorporated association, a plaintiff seeking to invoke associational standing must plead facts showing it is properly "formed and operating under the laws of California" or another jurisdiction. (*Creed-21*, 18 Cal.App.5th at 692.) It must be "a properly formed organization with the corporate status and the members necessary to even attempt to claim associational standing." (*Made in the USA Found. v. GMC* (D.D.C. Mar. 31, 2005) 2005 WL 3676030, at *2.) "[P]roperly formed" organizations recognized by our law include corporations, partnerships, and LLCs. (*U.S. v. Kumar* (N.D. Cal. Dec. 20, 2016) 2016 WL 7369863, at *8.) But the AC pleads only that A.B.O. "is a collective of artists." (AC ¶ 5.) A "*collective*" is not a "properly formed organization." Indeed, the California Secretary of State has no record of any corporation, LLC, or limited partnership of record called "A.B.O. Comix" or "ABO Comix" that is authorized to do business in the State of California. (*See* RJN Exs. C-D.)

Even if A.B.O. could overcome this inadequacy, it still has not shown it was "organized" to "represent" any members incarcerated in the County's jails. (*See Cal. Dental Ass'n*, 222 Cal.App.3d at 61.) To do so, it must prove, inter alia, that it has suffered "a drain on its resources from both a diversion of its resources and frustration of its mission which is sufficient to establish

that it is an aggrieved party." (*Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, 1581.) Here, A.B.O. made no factual allegations that it was forced to divert resources to help its "members" because of the County's actions.

Adopting the U.S. Supreme Court's seminal decision on associational standing in *Hunt v. Wash. State Apple Advert. Com'n* (1977) 432 U.S. 333, California courts recognize that "an association has standing to sue when 'its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.'" (*Prop. Owners of Whispering Palms, Inc. v. Newport Pac., Inc*. (2005) 132 Cal.App.4th 666, 673 quoting *Hunt*, 432 U.S. at 343.) While *Hunt* is predicated on the U.S. Constitution, "California courts have applied the doctrine, including the [so-called] three *Hunt* requirements." (*United Farmers Agents Ass'n, Inc. v. Farmers Grp, Inc*. (2019) 32 Cal.App.5th 478, 488.) These requirements dictate an association must plead and prove:

> (a) its members would otherwise have standing to sue in their own right;
>
> (b) the interests it seeks to protect are germane to [its] purpose; and
>
> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

(*Hunt*, 432 U.S. at 343.)

To meet the first prong, A.B.O. must "prove [its] members are 'beneficially interested' in the outcome of [the] proceedings." (*San Francisco Apt. Ass'n v. City & Cnty. of San Francisco* (2016) 3 Cal.App.5th 463, 472.) This "beneficial interest" must be both "direct and substantial." (*Friends of Oceano Dunes, Inc. v. San Luis Obispo Cnty. Air Poll. Control Dist.* (2015) 235 Cal.App.4th 957, 962.) But A.B.O. makes no allegations showing persons it purports to represent are actually its "members." An organization's failure to demonstrate it has interested "members" is fatal to its standing. (*San Diegans for Open Gov't v. Fonseca* (2021) 64 Cal.App.5th 426, 434.) Thus, an organization must provide "the names of [its] members" who have been harmed by the challenged conduct. (*Id.*) And merely alleging that the conduct affected "*prospective*" members is insufficient to establish associational standing. (*Indep. Roofing Contractors v. Cal. Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1341, emphasis in original.)

A.B.O. characterizes itself as "a collective of artists that works to amplify the voices of incarcerated LGBTQ people through artistic expression…." (AC ¶ 59.) It alleges it has "at least one member incarcerated in Maple Street Correctional Center with whom [A.B.O.'s] staff has corresponded in the last year." (*Id.*) But it does not identify this member or explain any specific harm that person suffered. It does not even allege that this purported member uses the mail or that the policy has deterred the member from doing so. The AC merely conclusorily posits that the mail policy has "deterred [unidentified] members of the collective from expressing themselves as openly." (*Id.* ¶ 62.) It failed to identify specific members that have been impacted by the mail policy as well as the specific harms suffered. A.B.O. has also not shown that it is "sufficiently identified with and subject to the influence" of the individuals it seeks to represent. It has not shown that those individuals elect, serve, or finance its activities. None of the inmate-Plaintiffs allege they are A.B.O. members or that A.B.O. even represents their interests. Likewise, the AC does not allege what involvement, if any, the other Plaintiffs have with A.B.O. Nor does it provide any details regarding A.B.O.'s organizational structure or funding. Thus, A.B.O. lacks standing.

2. Plaintiffs Zachary Greenberg's and Wumi Oladipo's Claims Are Moot

"Plaintiff Zachary Greenberg is currently incarcerated at Folsom State Prison." (AC ¶ 21.) He "[i]s no longer under the physical control of [the County], and the challenged conduct no longer applie[s] to h[im]." (*Giraldo*, 168 Cal.App.4th at 257.) Thus, "any injunction or declaratory judgment would not impact [him]." (*Id.*) As such, his claims are not justiciable because a prisoner's transfer or release from a jail "while his claims are pending" generally "moot[s] any claims for injunctive relief relating to the [jail's] policies." (*Id.* at 259, citation omitted.) This is because injunctive relief "lies only to prevent threatened injury and has no application to wrongs that have been completed…. It should neither serve as punishment for past acts, nor be exercised in the absence of any evidence establishing the reasonable probability the acts will be repeated in the future." (*Scripps Health v. Marin* (1999) 72 Cal.App.4th 324, 332.)

Plaintiff Wumi Oladipo's claims are also moot for the same reasons. Ms. Oladipo purportedly is Mr. Greenberg's "significant other." (AC ¶ 86.) Assuming that her relationship with Mr. Greenberg conferred standing to challenge the mail policy while he was in the County's jails,

"the challenged conduct no longer applie[s] to [either of them]." (*Giraldo,* 168 Cal.App.4th at 257.) Thus, any claims that Mr. Greenberg and Ms. Oladipo may have had are now moot.

3. Plaintiffs Failed to Exhaust Their Administrative Remedies

To bring a claim under California law regarding the terms of confinement, a prisoner "must exhaust available administrative remedies before filing a lawsuit." (*Parthemore*, 221 Cal.App.4th at 1380.) This rule applies "even when the grievances involve an alleged constitutional violation." (*In re Serna* (1978) 76 Cal.App.3d 1010, 1014.) In addition, "where remedy by appeal is available" under a grievance policy, the plaintiff must also exhaust all avenues of appeal under the policy "before redress may be had in the courts." (*Blake v. PUC of City & Cnty. of San Francisco* (1953) 120 Cal.App.2d 671, 673.)

"[F]ailure to exhaust administrative remedies" is *not* merely "an affirmative defense." (*Westinghouse*, 42 Cal.App.3d at 37.) When a plaintiff sues a state agency that provides a grievance procedure, exhaustion of all avenues of review under that procedure is an element of the plaintiff's case in chief. (*Id.*) In such cases, "it is [the plaintiffs'] burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy" in order to state a prima facie case. (*Id.*) "Under California law, the requirement of exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts." (*Phillips-Kerley v. City of Fresno* (E.D. Cal. Oct. 19, 2018) 2018 WL 5255224, at *4.) Thus, a prisoner's "failure to exhaust administrative remedies is a proper basis for demurrer." (*Parthemore*, 221 Cal.App.4th at 1379.)

Jails must "develop written policies and procedures whereby all incarcerated persons have the opportunity and ability to submit and appeal grievances relating to any conditions of confinement, including but not limited to: .. mail ... procedures ...." (15 C.C.R. § 1073.) Pursuant to this law, the County established a procedure enabling "any inmate [to] file a grievance relating to conditions of confinement," including "mail use procedures." (RJN Ex. B at § 612.2.) To do so, an inmate must "complete[] [an] inmate grievance form" which must "be filed ... within 14 days of the complaint." (*Id.* at § 612.3, § 612.3.2.) The policy further provides: "Inmates may appeal the finding of a grievance to the Division Commander as the final level of appeal within five days of receiving the findings of the original grievance." (*Id.* at § 612.3.3.)

The AC does not plead that Plaintiffs exhausted their rights under the grievance procedure. Thus, Plaintiffs have not satisfied their "burden to plead and establish as a part of their case in chief that they exhausted their administrative remedy." (*Westinghouse*, 42 Cal.App.3d at 37.)

B. Plaintiffs' Claims Fail on the Merits as a Matter of Law

1. Plaintiffs' Search-and-Seizure Claim Is Patently Frivolous

Plaintiffs dedicate nearly a third of their AC—some 28 of their 90 paragraphs—to asserting the County's mail policy is an "invasion of privacy" and thus "constitutes an unreasonable search and seizure of correspondence and other information in which Plaintiffs and others maintain a reasonable expectation of privacy" in violation of Article I, § 13 of the California Constitution. (AC ¶¶ 48, 90; *accord e.g.*, *id.* ¶¶ 2, 6-9, 12, 29-30, 33, 41, 43-47, 57, 62, 64, 68, 72, 75, 79, 81-82, 86-87.) This contention is frivolous.

Article I, § 13 is California's "counterpart to the Fourth Amendment." (*People v. Sabo* (1986) 185 Cal.App.3d 845, 448 fn.1.) Like the Fourth Amendment, a claim under Article I, § 13 turns on whether the person invoking it had "a reasonable expectation of privacy." (*People v. Abbot* (1984) 162 Cal.App.3d 635, 639.) "Determining whether an expectation of privacy is ... 'reasonable' necessarily entails a balancing of interests. The two interests here are the interest of society in the security of its penal institutions and the interest of the prisoner in privacy." (*Sacramento*, 51 Cal.App.4th at 1480, 1485.) In jails, the law "strike[s] [that] balance in favor of institutional security," as security "is central to all other corrections goals." (*Id.* at 1480.) California applies a bright-line rule: "a person incarcerated in a jail or prison possesses no justifiable expectation of privacy." (*Loyd*, 27 Cal.4th at 1001.) This is because the "lack of privacy is a necessary adjunct to ... imprisonment." (*Id.*) "While the deprivation of a prisoner's rights … requires penological objectives, the legitimacy of jailhouse monitoring of inmate [communications] is based on precisely these objectives." (*Id.* at 1004.) Thus, "California law ... permits law enforcement officers to monitor … unprivileged [inmate] communications"—even when such "surveillance" is unrelated "to the maintenance of institutional security" and is for the sole purpose of "gather[ing] evidence of crime." (*Id.* at 1003-1004, 1010.)

This rule applies to non-legal inmate mail. In *People v. Garvey*, a prisoner "in jail awaiting

trial" for attacking a man in a bar "wrote to a friend" admitting that he "kick[ed] [the victim] in the head." ((1979) 99 Cal.App.3d 320, 322.) "The jailer monitoring outgoing mail copied [the prisoner's] letter" and provided it to the prosecutor. (*Id.*) The letter was admitted against the prisoner at trial. (*Id.*) The court in *Garvey* held that the jailers' surveillance of the letter did not violate any of the prisoner's rights. (*Id.*) This is because "*[e]xcept where the communication is a confidential one addressed to an attorney, court, or public official, a prisoner has no expectation of privacy with respect to letters posted by him*." (*Id.* at 323, emphasis added.) So too here.

2. Plaintiffs' Free-Speech Claim Fails as a Matter of Law

Plaintiffs claim the mail policy "violates Article I, [§] 2 of the California Constitution" by inhibiting inmates' freedom "to express themselves" and "is not rationally related to any legitimate penological goals." (AC ¶¶ 2, 89.) They claim this count "raises novel claims under [California law] regarding the constitutionality of the County's decision to [digitize] non-legal physical mail"[3] and that these claims are governed by substantively different rules than analogous claims under the First Amendment because inmate rights under "the state constitution's free speech ... guarantees are ... broader than ... their federal analogs."[4] Not so.

Article I, § 2 "is equivalent to the First Amendment's free speech clause." (*Gerawan Farming Inc. v. Lyons* (2000) 24 Cal.4th 468, 512.) Under the First Amendment, "[r]egulations regarding the review of [prisoner's] incoming mail are evaluated under the ... test set forth in *Turner v. Safley*." (*Reynolds*, 2011 WL 617424, at *2.) California codified prisoners' constitutional and statutory civil rights in Penal Code § 2600, which provides that during "confinement" inmates may be "deprived of rights" if such deprivation "is reasonably related to legitimate penological interests." Section 2600 is "designed to conform California law to the decision in *Turner*." (*Cnty. of Nev.*, 236 Cal.App.4th at 1009, fn. 2.) Plaintiffs claim § 2600 "does not ... interpret the state constitution's independent guarantee of rights." (RJN, Ex. F at 4:16-19.) Not so. The Supreme Court held that § 2600 embodies ***the sum total of an inmate's "statutory as well as constitutional rights***" under California law. (*In re Qawi* (2004) 32 Cal.4th 1, 21, emphasis

[3] RJN, Ex. E at 5:4-5, 5:11-12.
[4] RJN, Ex. F at 3:24-25.

added.) Thus, *all* inmate free-speech claims under California law are "governed by the high court's test in *Turner*." (*Thompson* (2001) 25 Cal.4th at 130.) This includes claims under the "California constitution." (*Snow v. Woodford* (2005) 128 Cal.App.4th 383, 389, 390 fn. 3.)

While California "sometimes provide[s] broader protection" than the U.S. Constitution, "cogent reasons must exist before a state court in construing a provision of the state Constitution will depart from the construction placed by the [U.S.] Supreme Court … on a similar provision in the federal Constitution." (*Sacramento*, 51 Cal.App.4th at 1485-1486.) Such reasons plainly do *not* exist here because our Supreme Court held that *all* prisoner civil rights claims under California law are "governed by the high court's test in *Turner*." (*Thompson*, 25 Cal.4th at 130.)

a. The *Turner* Test

Turner is "a rational-basis test." (*Evans v. Skolnik* (9th Cir. 2021) 997 F.3d 1060, 1071, fn. 8.) Under it, a "regulation is valid if it is reasonably related to legitimate penological interests." (*Turner*, 482 U.S. at 89.) It requires courts to evaluate regulations under four factors:

> (1) whether there is a valid, rational connection between the [challenged] policy and the legitimate governmental interest put forward to justify it;
>
> (2) whether there are alternative means of exercising the right;
>
> (3) whether accommodating the asserted right will have an impact on guards, other inmates and allocation of prison resources; and
>
> (4) whether the policy is an "exaggerated response" to the prison's concerns.

(*In re Furnace* (2010) 185 Cal.App.4th 649, 664.)

"California cases" applying *Turner* "have ... stressed the need for courts to defer to prison authorities in running the prison system." (*In re Jenkins* (2010) 50 Cal.4th 1167, 1175.) This is mandated by the "separation of powers," which recognizes "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are particularly within the province of the legislative and executive branches of government." (*Id.*) *Turner* and § 2600 demand that courts show "sensitivity to 'the delicate balance that administrators must strike between the order and security of the internal prison environment and the legitimate demands of those on the 'outside' who seek to enter that

environment, in person or through the written word.'" (*In re Collins* (2001) 86 Cal.App.4th 1176, 1182.) Courts must acknowledge "certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison." (*Id.*)

b. *Honea* and *HRDC* Prove the County's Mail Policy Is Reasonably Related to a Legitimate Penological Interest as a Matter of Law

Honea and *HRDC* establish that the policy satisfies *Turner* and § 2600 as a matter of law. In *HRDC*, the court upheld a strikingly similar mail policy implemented by Stratford County, New Hampshire. (*See HRDC*, 2023 WL 1473863, at *1.) Stratford's policy "ban[ned] all incoming inmate mail." (*Id.*) The jail did this because it was "concerned about the security risk posed by incoming inmate mail" since narcotics, *particularly fentanyl*, can enter the jail "through paper that ha[s] been soaked, sprayed, or otherwise treated with illicit substances before being mailed to prisoners." (*Id.*) "The solution came in the form of electronic tablets." (*Id.* at *2.) As here, Stratford began digitizing "incoming (non-legal) mail" and made it available to inmates on "electronic tablets." (*Id.* at *1-2.) This satisfied *Turner*'s rational-basis test because "restricting inmate access to opioids" is a "legitimate penological interest[] under *Turner*," and by allowing inmates to send and receive mail digitally using "electronic tablets," the jail "provide[d] prisoners with alternate ways to exercise the infringed-upon right." (*Id.* at *2, *7-8.)

Similarly, *Honea* concerned a Butte County policy "prohibiting delivery of unsolicited commercial mail to inmates." (876 F.3d at 969.) As a substitute, the jail digitized the banned mail and installed "electronic kiosks" for inmates "to access electronic versions." (*Id.* at 971.) The ban was motivated by less serious threats than in *HRDC* or here. The jail was concerned, inter alia, that inmates may "use paper to cover windows" or "clog toilets." (*Id.* at 970.)

The plaintiff claimed "the jail's [mail] ban" infringed inmates' free-speech rights. (*Id.* at 971.) But, applying the *Turner* test, the court held Butte's policy was "reasonably related to a legitimate penological objective" and providing "kiosks" for review of "mail to inmates" is "an adequate substitute for regular distribution of paper copies." (*Id.* at 970, 976, 978.) *HRDC* and *Honea* show that the policy at issue here satisfies *Turner* and § 2600 as a matter of law.

c. The Policy Satisfies All the *Turner* Factors as a Matter of Law

(i) The Policy Furthers Legitimate State Objectives

The first *Turner* factor asks whether "the regulation [is] reasonably related to legitimate security interests." (*Turner*, 482 U.S. at 91.) In determining whether an objective is legitimate, courts must "[a]cknowledge[] the expertise of prison officials." (*Collins*, 86 Cal.App.4th at 1182.) This is because "courts are ill equipped to deal with the complex and difficult problems of prison administration" and based on their "expertise," jail officials may reasonably conclude that "certain proposed interactions, though seemingly innocuous to laymen, have potentially significant implications for the order and security of the prison." (*Id.*) Plaintiffs allege the County "change[d] ... the way" inmates "receive mail to prioritize the safety and security of those in [its] correctional facilities." (AC ¶ 49.) The County initiated the policy "over concerns about fentanyl exposures." (*Id.* ¶ 9.) Its aim was "to help keep everyone safe since there ha[ve] been some concerns regarding fentanyl exposures with the old mail system [the jail was] using." (*Id.* ¶ 49.)

This objective is both "neutral" and "legitimate." It is "neutral" because it applies "without regard to the content of the expression." (*See Turner*, 482 U.S. at 90.) And "restricting inmate access to opioids like ... fentanyl in particular are legitimate penological interests." (*HRDC*, 2023 WL 1473863, at *7.) California courts agree mitigating the introduction of "drugs into ... prison" is a legitimate penological interest. (*In re Espinoza* (2011) 192 Cal.App.4th 97, 108.)

The policy is "rationally related" to the objective of protecting against "fentanyl exposures." In light of "the significant deference granted to corrections officials," courts cannot weigh evidence in determining whether the rational-relationship requirement is met. (*Id.* at 6.) A policy only needs to have "a logical connection to" a "legitimate government interest[]." (*Friend v. Kolodzieczak* (9th Cir. 1991) 923 F.2d 126, 127.) It "makes logical sense" that "bann[ing] … inmate mail" will reduce "inmate access to opioids." (*HRDC*, 2023 WL 1473863, at *2, *7-8.) Fentanyl is introduced into jails "through paper that ha[s] been soaked, sprayed or otherwise treated with illicit substances before being mailed." (*Id.* at *1.) Thus, *Turner*'s first factor is met.

(ii) The Policy Provides Alternative Means to Use the Mail

Turner's second "factor asks whether there are alternative means that remain open to …

inmates." (*Honea*, 876 F.3d at 975-976.) When an alternative is provided, courts must "be particularly conscious of the measure of judicial deference owed to corrections officials." (*Turner*, 482 U.S. at 90.) The alternative "need not be ideal"—it "need only be available." (*Overton v. Bazzetta* (2003) 539 U.S. 126, 135.) "*Turner* does not require that the alternative avenue provide exactly the same level of communication as the plaintiff's preferred method, only that other means of expression be available." (*Honea*, 876 F.3d at 976.) Plaintiffs claim the policy "leaves no adequate alternatives to communication via physical mail." (AC ¶ 89.) Not so. The County "digitiz[es] incoming mail" and provides copies to prisoners "via tablets or kiosks." (*Id.* ¶¶ 26, 32.) *Honea* held providing "kiosks" *alone* is "an adequate substitute for regular distribution of paper copies." (876 F.3d at 970, 976.) *HRDC* held making digitized copies "available on ... electronic tablet[s]" *alone* "more than satisfie[s] [*Turner*'s] second prong." (2023 WL 1473863, at *8.) Thus, *Turner*'s second prong is satisfied here as a matter of law.

(iii) An Accommodation Would Endanger Inmates and Staff

Turner's third "factor requires [courts] to consider the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." (*Honea*, 876 F.3d at 976.) A policy passes this test when accommodating the inmate would come "at a cost of increased risk of danger to the inmate population as well as the staff." (*Chau v. Young* (N.D. Cal. Aug. 20, 2014) 2014 WL 4100635, at *5.) A policy likewise satisfies this test if an accommodation would require "that additional time and resulting expense would ... have to be spent searching ... for contraband" because the materials requested by the inmate are "serviceable for smuggling ... drugs" or other "contraband into [the] institution" and are "difficult to search effectively." (*Antonetti v. McDaniels* (D. Nev. Jan. 25, 2021) 2021 WL 624241, at *13.) The County's mail policy satisfies both these criteria.

Fentanyl "pose[s] a risk to the health, safety, and security of the Jail's prisoners and staff." (*HRDC*, 2023 WL 1473863, at *1.) As Judge Breyer found: "Fentanyl is deadly. While heroin generally contains only 5%-15% active drug, fentanyl is often 100% pure." (*City & Cnty. of San Francisco v. Purdue Pharma, L.P.* (N.D. Cal. 2022) 620 F.Supp.3d 936, 946.) It is "100 times more potent than morphine and as much as 50 times more potent than heroin." (*Id.*) "A dash of

fentanyl—not much larger than a few grains of sand—can be fatal." (*Id.*) An accommodation would increase the risk of fentanyl entering the jail. It also would also raise the risks faced by jail staff. Plaintiffs claim "[o]n information and belief" that "incidental fentanyl exposure does not pose a health risk." (AC ¶ 9.) Not so. Material containing "suspected fentanyl" must be handled with caution "because death can result if just a small amount makes contact with a person's skin." (*U.S. v. Joseph* (11th Cir. 2020) 978 F.3d 1251, 1260.)

Accommodating Plaintiffs would also require the jail "to allocate more time, money, and personnel" to detecting fentanyl. (*HRDC*, 2023 WL 1473863, at *8.) Visually "inspecting incoming mail" for fentanyl is ineffective because "methods for disguising narcotic-treated paper [have] grown increasingly sophisticated and visual inspection often fail[s]." (*Id.* at *1.) And buying machines "to scan incoming mail for narcotics" is extremely expensive and such machines "[can]not detect fentanyl." (*Id.*) Thus, *Turner*'s third factor is satisfied as a matter of law.

(iv) The Policy Is Not an Exaggerated Response

Turner's final factor asks "whether the regulation is an exaggerated response to [the jail's] concerns." (*Snow*, 128 Cal.App.4th at 393.) The AC claims "mail is not a significant source of fentanyl or other drugs in [the] County's jails." (AC ¶¶ 9, 50.) This allegation is irrelevant. *Turner* does not require officials "to wait until there is a breach of security ... in order to take preventative measures." (*Loehr v. Nev.* (D. Nev. Dec. 5, 2005) 2005 WL 8161739, at *9.) It empowers jails "to anticipate security problems and to adopt innovative solutions." (*Thompson*, 25 Cal.4th at 134.) "*Turner* does not require the Jail to prove prior instances of narcotics introduction" through the mail "before enacting a policy to prevent such an eventuality." (*HRDC*, 2023 WL 1473863, at *8.)

"The opioid crisis has infiltrated communities" nationwide, including the Bay Area. (*City & Cnty. of San Francisco, v. Purdue Pharma L.P.* (N.D. Cal. 2020) 491 F.Supp.3d 610, 629.) And "it is common knowledge that fentanyl is particularly deadly." (*Commonwealth v. Burton* (Pa. Sup. Ct. 2020) 234 A.3d 824, 833.) Thus, courts take "judicial notice that heroin/fentanyl addiction in this country has reached crisis levels and that Fentanyl is an especially addicting, dangerous, and unpredictable opiate." (*U.S. v. Lebron* (N.D. Ohio 2020) 492 F.Supp.3d 737, 740.) Indeed, Governor Newsom, exercising his powers as the State's Commander-in-Chief, recently

deployed the National Guard "to combat fentanyl trafficking in San Francisco."[5] Speaker-of-the-House-Emerita Pelosi also asked the Justice Department to deploy "enhanced federal resources" to the Bay Area "to combat fentanyl trafficking" because the opioid crisis's effects are so grave that "local … law enforcement" are insufficient, necessitating a "whole of government approach."[6] Yet, despite these efforts "[m]ore people died from accidental fentanyl overdoses in San Francisco in July [2023] than almost any other month since the city began releasing overdose death data."[7]

Jails are not immune. "Not only has the opioid crisis impacted [Bay Area] streets, but [its] jails are seeing an influx of opioid contraband." (*Purdue*, 491 F.Supp.3d at 629.) The "majority of incarcerated Americans have substance use disorder, many of them with opioid addiction" that is "complicated to manage in the age of … fentanyl."[8] In 2019, California inmates suffered "the highest overdose mortality rate" of any incarcerated population in the U.S.[9] These stark facts demonstrate that it was proper for the County "to anticipate security problems" presented by fentanyl "and to adopt innovative solutions" before tragedy strikes. (*See Thompson*, 25 Cal.4th at 134.) Thus, the policy satisfies *Turner*'s final factor. Because "all four *Turner* factors favor [Defendants]" as a matter of law, § 2600 dictates that Plaintiffs "cannot prevail" on their free speech claim and it must "be dismissed for failure to state a claim upon which relief may be granted." (*See Fields v. Paramo* (E.D. Cal. Sept. 24, 2019) 2019 WL 4640502, at *6.)

IV. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion.

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[5] *Governor Newsom Launches New Operation to Improve Public Safety and Target Fentanyl Trafficking Rings in San Francisco*, Office of Governor Gavin Newsom (April 28, 2023), https://www.gov.ca.gov/2023/04/28/sf-fentanyl-operation/.

[6] *Pelosi Urges Justice Department to Help Combat Fentanyl*, Congresswoman Nancy Pelosi, California's 11th District (April 28, 2023), https://pelosi.house.gov/news/press-releases/pelosi-urges-justice-department-to-help-combat-fentanyl-cartels-bring-operation.

[7] Catherine Ho & Aldo Toledo, *"Tidal Wave of Fentanyl": Data Shows S.F. Drug Overdoses in 2023 Could Surpass Deadly 2020*, S.F. Chron. (Aug. 16, 2023), 2023 WLNR 28139294.

[8] Noah Weiland, *California Battles Fentanyl with a New Tactic: Treating Addiction in Prison*, N.Y. Times (Aug. 9, 2023), https://www.nytimes.com/2023/08/09/us/politics/opioid-overdoses-prison-fentanyl-california.html?smid=nytcore-ios-share&referringSource=articleShare.

[9] *Id.*

DATED: September 8, 2023

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