

No. 19-2096

United States Court Of Appeals
FOR THE EIGHTH CIRCUIT

HUMAN RIGHTS DEFENSE CENTER,

Plaintiff-Appellant,

v.

BAXTER COUNTY, ARKANSAS,

Defendant-Appellee.

Appeal from the United States District Court, Western District of Arkansas
Hon. Timothy L. Brooks, United States District Judge

**BRIEF *AMICI CURIAE* OF RUTHERFORD
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and AMERICANS FOR PROSPERITY,
SUPPORTING APPELLANT, URGING REVERSAL**

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Corporate Disclosure Statement

None of the amici has any parent company, nor does any publicly held corporation own 10% or more of the stock of any of the amici.

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<i>Roper v. Simmons</i> , 543 U.S. 551 (2005).....	10
<i>Simpson v. County of Cape Girardeau, Missouri</i> , 879 F.3d 272 (8th Cir. 2018).....	16, 22
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<i>Wolfish v. Levi</i> , 573 F.2d 118 (2nd Cir. 1978), <i>reversed by Bell v. Wolfish</i> , 441 U.S. 520 (1979).....	18

Statutes and Constitutional Provisions

Religious Land Use and Institutionalized Persons Act, 42 U.S.C.
2000cc-122

Other Authorities

Know Your Rights: Legal Rights of Disabled Prisoners, ACLU,
<https://www.aclu.org/other/know-your-rights-legal-rights-disabled-prisoners>.....20

Arch City Defenders, *ArchCity Defenders announces launch of updated “Pro Se STL” resource, a local ‘Know Your Rights’ guide*,
<https://www.archcitydefenders.org/archcity-defenders-announces-launch-of-updated-pro-se-stl-resource-a-local-know-your-rights-guide/>20

Paul Avrich, “Prison Letters of Ricardo Flores Magon to Lilly Sarnoff,” *22 International Review of Social History* 382 (1977).....26

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Bob Drogin, “Nelson Mandela’s letters detail his 27 years as the world’s most famous political prisoner,” *L.A. Times*, July 13, 201828

Michael A. Fletcher, “The creator of this social media app wants prisoners to stay connected to their families,” *The Marshall Project*, Jan. 22, 2019, available at <https://theundefeated.com/features/marcus-bullock-creator-of-flikshop-app-wants-prisoners-to-stay-connected-to-their-families/>14

Martin Luther King, Jr., “Letter from a Birmingham Jail,” reprinted in Andrew Carroll, ed., *Letters of a Nation* 226 (1997)7, 8, 30

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David M. Shapiro & Charles Hogle, <i>The Horror Chamber: Unqualified Impunity in Prison</i> , 93 NOTRE DAME L. REV. 2021, 2043-45 (2018)	20
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Oscar Wilde, <i>The Annotated Prison Writings of Oscar Wilde</i> (ed. Nicholas Frankel 2018)	26

Identity and Interest of Amicus Curiae

Amici are organizations focused on protection of civil liberties and reform of criminal justice. They support the rights of jail and prison inmates to full substantive communications, because of the personal needs of the inmates, and the beneficial effects of such communications, and of protection of basic human rights, to all.

The Rutherford Institute focuses on defending civil liberties and educating the public on important issues affecting their constitutional freedoms, including free speech and prisoners' rights. The Institute honors and respects the right to distribute literature and discuss a multitude of views, and it recognizes both the rights of speakers and hearers, in view of the public interest in having access to information within a free flowing marketplace of ideas. In the field of prisoner's rights, the Institute seeks to help protect the poor, oppressed and those who lack a voice of their own, and in that regard it has fought for prisoners' basic rights to information.

The R Street Institute is a non-profit, nonpartisan, public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

The Clark-Fox Family Foundation supports regional growth and prosperity through research and program development in PK-12 and higher education, public health, immigration, social justice and racial equity, workforce development, entrepreneurship and innovation. The Foundation has recently conducted in-depth research on the impact of mass incarceration.

ArchCity Defenders (ACD) is a nonprofit holistic legal advocacy organization which, among other things, regularly addresses the harms of mass incarceration. ACD has researched, litigated, and partnered with community organizations in addressing many issues relating to the incarceration of poor people and people of color in jails and prisons in Missouri and across the county. ACD regularly conducts substantive communications with incarcerated persons, including those with whom it does not have an attorney-client relationship, and its advocacy is informed in part by information gathered through these communications.

Americans for Prosperity (AFP) exists to recruit, educate, and mobilize citizens to take an active role in building a culture of mutual benefit where people succeed by helping others improve their lives. AFP's activists nationwide advocate and promote policies that will advance that culture, including criminal justice reform, free expression, and limited government.

Amici sought consent from the parties to the filing of this brief.

Appellant consented but Appellee did not, so amici have sought leave by motion to file this brief.

No party or party's counsel authored this brief in whole or in part, nor did any person contribute money to fund preparation or submission of the brief.

Introduction and Summary of Argument

This appeal raises important issues affecting all inmates of jails and prisons, and their ability to obtain information and make communications relating to their essential interests in liberty and justice. These issues implicate not only prisoners, but everyone's freedom, interests, and well-being.

The District Court approved Baxter County, Arkansas' drastic and draconian limitations on inmate communications by deferring to the judgment of jail officials as to the limitations' expediency and cost savings. But "federal courts must take cognizance of the valid constitutional claims of prison inmates," *Turner v. Safley*, 482 U.S. 78, 85 (1987), and the District Court's analysis did not make the required "balance," *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989), with the legitimate communication needs involved. Indeed, the District Court gave practically no consideration to the significant and drastic effects of the Baxter County policy on inmates' need for

information, communications, and learning. Nor did it weigh the needs of society at large for the benefits of meaningful inmate communication outside the prison walls.

The *Thornburgh/Turner* reasonableness standard must balance jail officials' preferences with the pragmatic realities of inmate informational and communication needs and respect for basic human rights. Jail officials could not, for example, ban all verbal speech by inmates on the ground that many jail problems begin with verbal speech. Nor could they impose a total information blackout, preventing inmates from receiving news, information, or education other than about their case. Imposing such a monastic silence or information blackout would violate common standards of basic human rights. *See Turner v. Safley*, 482 U.S. 78, 100 (1987) (Stevens, J., concurring in part and dissenting in part). The situation at hand is similar, because Baxter County's postcard-only limitation to written communications goes far beyond what is needed or reasonable to address legitimate penological needs, is not neutral in effect, and significantly impairs essential human rights of communication and learning. The District Court's decision did not adequately consider the importance of inmate/outside world communications.

Amici will not repeat or reemphasize the arguments of Plaintiff-Appellant. They submit this brief to emphasize those important

communicative needs, relevant to the *Thornburgh*-mandated “balance” and neutrality, that were overlooked by the District Court. The brief will present background information regarding inmate communications, and their importance both to inmates and the justice system. This context is essential to any wise and appropriate reasonableness review, and weighs forcefully in favor of reversal of the District Court’s decision below.

ARGUMENT

I. Baxter County’s postcard-only policy, which drastically limits communications and receipt of information, is incompatible with basic needs and traditional standards.

Thousands of years of experience in the Western world has shown that prisoners have stories to tell, and information needs, far beyond what can be contained on a few tiny postcards. Common sense, experience, and worldwide values all verify that when a person’s freedom and future is at risk, that person has lots to say, and learn, and a greater, not lesser, need for communication with others.

A. Our Constitution and culture recognize substantive written communications by prisoners as a basic right.

Our constitutional law has long recognized writings and mailings to and from prisoners as essential human rights. The basic right belongs to both sender and recipient. “[T]he addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments

a protection against unjustified governmental interference with the intended communication.” *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974). Mail is a central and essential vehicle of human communication. “[T]he use of the mails is almost as much a part of free speech as the right to use our tongues * * *.” *Lamont v. Postmaster Gen. of U. S.*, 381 U.S. 301, 305 (1965), quoting Holmes, J., dissenting, in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921).

Limits on outgoing inmate mail must meet constitutional standards, must be empirically justifiable based on substantial government interests, and must be no greater than necessary to meet those interests:

First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. *** Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

Procunier, at 411-414.

Under *Thornburgh v. Abbott*, 490 U.S. 401 (1988), and *Turner*, incoming mail is also protected by the First Amendment and any restrictions must be “reasonably related to legitimate penological interests.” *Thornburgh*, 490 U.S. at 404 (quoting *Turner*, 482 U.S. at 89, 107 S.Ct. 2254). In assessing the proper “balance,” 490 U.S. at 407, the court’s primary duty is to determine the

“reasonableness” of the regulation, 490 U.S. at 414, which requires a necessarily holistic inquiry. While both *Turner* and *Thornburgh* provided factors “relevant to” reasonableness, 490 U.S. at 414, the factors are not exclusive, nor should they be mechanically or arithmetically applied. Accordingly, courts should consider all relevant circumstances, including the teachings of history, experience, and social science, in making the proper “reasonableness” assessment and “balance.”

B. History demonstrates that inmates need to express themselves in written communications longer than those allowed by Baxter County.

Prisoner communications with persons outside prison walls are well established in Western culture.

Rev. Dr. Martin Luther King Jr.’s *Letter from a Birmingham Jail* is perhaps the most famous prison letter of modern times. But that letter would not have been allowed had Baxter County type regulations been in effect. First, Rev. King’s letter was written in response to a statement on April 12, 1963 by eight white Alabama clergymen, published in the local newspaper. Andrew Carroll, ed., *Letters of a Nation* 208-26 (1997). Under Baxter County type regulations limiting non-legal incoming mail to postcards, Rev. King would have been prohibited from receiving that newspaper, and might have never learned of this challenge to his activities.

Rev. King did learn of the statement, and he wrote a 6,972-word response, and released it four days later, on April 16, 1963. It was, of course, *Letter from a Birmingham Jail*, not *Postcard from a Birmingham Jail*. “Letter from a Birmingham Jail,” reprinted in Andrew Carroll, ed., *Letters of a Nation* 208-26 (1997). It could not have fit on a postcard. If it had been limited to postcards, at the typical postcard length of about 100 words, it would have taken up 70 postcards. (If those postcards had been limited to three per week, the amount allowed for indigent inmates in Baxter County, it would have taken 24 weeks, or about 5½ month, to send them.)

In short, under the postcard-only rule of Baxter County, Rev. King would have been denied access to the newspaper containing the challenge to his activities, and he could not have effectively or timely reached his audience with his substantive, moving, and historic response. The form of communications matters, and the Baxter County limitation is so drastic that it effectively cuts off highly important information and prohibits many important inmate communications.

Rev. King’s jail letter is no aberration. Almost all of the prisoner writings remembered in history are two-way long-form expressions, which would have been impossible if the inmates were limited like the inmates in Baxter County.

The letters of Dietrich Bonhoeffer, during his imprisonment by the Nazis, for example, are considered the “most influential” part of his seventeen volumes of theological writings. Kevin P. Spicer, “Review, *Dietrich Bonhoeffer’s Letters and Papers from Prison: A Biography*, by Martin E. Marty,” *81 Church History* 1028 (2012). Bonhoeffer wrote to his family and his friend and fellow theologian Eberhard Bethge, expressing both his religious meditations, and his responses to their letters. But this important, historic, and still-studied correspondence would not exist had the Nazis imposed Baxter County-like controls. In that situation, Bonhoeffer’s family would have been restricted in how much they could write, thereby giving him less information about his family’s situation to respond to. Bethge could not have carried on his theological dialogue with Bonhoeffer. And Bonhoeffer’s deep meditative writings could not have fit onto postcards.

Similarly, the prison-written epistles of St. Paul (generally thought of as the books of Ephesians, Philippians, Colossians, and Philemon in the Christian Scriptures) could not have been condensed to a few postcards without great loss in meaning and message. These epistles, too, were part of two-way communications. Paul’s epistle to the Philippians is considered by many scholars to consist of portions of three separate letters, suggestive of an ongoing correspondence between Paul and members of the Christian

community at Philippi. And even though the tools of writing two thousand years ago were cumbersome, Paul's epistles from prison contain substance far beyond what could fit on a modern postcard. The Roman prisons of antiquity allowed Paul and his correspondents to write at greater than postcard length.

Traditions deserve consideration on constitutional issues. *Roper v. Simmons*, 543 U.S. 551, 560 (2005) ("history, tradition, and precedent" are all considered in constitutional interpretation). The experience of Birmingham, Alabama during the height of the civil rights movement, Nazi Germany, and the Roman Empire all point to greater freedom in prisoner communications than under the Baxter County rule. Those experiences weigh strongly against the drastic and unprecedented Baxter County restrictions.

C. The postcard form is inherently inadequate for messages to and from inmates in jail.

1. The size and structural limitations of postcards make them inadequate.

Postcards are most often used where the message is simple and short and the reader knows the background facts. That is probably why the classic use of postcards was vacation correspondence: *Having a great time in Pensacola. Johnny built a sand castle yesterday. Wish you were here. We'll be back soon. Love, Mary.* Postcards are also used for announcements, invitations, and reminders, where very little information need be conveyed.

None of these traditional uses involves critical or highly important messages. No one would freely select the postcard medium for communications concerning his or her personal liberty and future.

A postcard is essentially a small index card, limited to between 3½" x 5" and 4¼" x 6" in size. United States Postal Service, Sizes for Postcards, <https://pe.usps.com/businessmail101?ViewName=Cards>. Such cards require 35¢ stamps. (Pre-stamped USPS cards, at about the minimum size, 3½ x 5½", are available at 39¢ each.) Any larger card is treated as "oversized" and requires full first class postage (currently 55¢). A typical postcard will fit around 100 words, depending on the size of the writing—roughly the length of this paragraph.

Confinement of messages to very short forms affects content—what is communicated. Put differently, imposing this form on inmates is not a "neutral" measure as required by *Turner*. A media literacy scholar has noted that highly reductive forms of communication, such as Twitter, shape the content of messages: "In these reductive languages, the meaning of words is reduced to a literal level; there is no space to examine the implications of meaning. *** No context to information is provided." Art Silverblatt, "Twitter as newspeak," *St. Louis Journalism Review*, Sept.-Oct. 2009. And such reductive messages do not meet needs in today's information-rich society. See Harlan

Cleveland, *The Knowledge Executive: Leadership in an Information Society* 21 (1985) (information is “the primary basis for social cooperation ... [and] for human rights (knowledge of one’s entitlements is the precondition or seeking their fulfillment)”).

Maybe messages could be condensed with skilled writing techniques. But inmate expression and needs often involve narratives about events, arrest, and confinement, and the requirements of criminal law and procedure—subjects that demand detail. Carl Sandburg was a poet and master of concise communications. But when it came to narrative, he wrote his *Life of Abraham Lincoln* in four long volumes. Moreover, few inmates possess highly developed writing skills, and many senders of messages to inmates have limited resources and huge responsibilities, so neither side has the time or resources to refine and condense messages.

Postcards, in short, are designed for other purposes, and are ill-suited for the narrative-based and sensitive communications, and detailed information, that inmates need to send and receive. While legal mail is exempted from the postcard-only limitation, inmates have communications and information needs far beyond their direct communications with lawyers, and their legal representation will suffer if they haven’t learned the right questions to ask and avenues to pursue from media like *Prison Legal News*,

and substantive communications with others.

2. Because of cost, multiple postcards are not an adequate substitute, particularly for traditional long-form communications like newspapers and newsletters.

While the Baxter County rules allow use of multiple postcards, costs make multiple postcard messages impractical.

HDRC's *Prison Legal News*, which runs 72 pages each month, would need to be broken down onto hundreds of postcards, each requiring a 35¢ stamp, in order to cover the same content. Conservatively assuming that each page of content could be put on four postcards, about 300 postcards would be needed each month, at a postal cost alone of around \$100 (in contrast to the "standard" rate used for periodicals, of about 33¢). And that does not cover the cost of converting from traditional newsletter publishing to postcards. As the Ninth Circuit has noted, when periodical mailings to prisons are blocked, that prevents sending and receipt of the information contained in the periodical. *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) ("paying a higher rate is not an alternative because the prisoner cannot force a publisher who needs to use, and is entitled to use, the standard rate to take additional costly steps to mail his individual newsletter"). Similarly, for outgoing mail, if an inmate used a six-postcard deck, to cover a message equivalent to that of short letter, it would cost four times as much in postage

as the comparable letter.

Costs are also a deterrent to inmates. Indigent inmates are limited to sending only three cards a week (a cost of \$1.05 in postage to the jail). An indigent inmate would be limited each week, for example, to only 100 words to a family member, 100 words to a friend, and 100 words for a request for information or assistance.

Even non-indigent inmates and their families are likely to find postcard costs inhibiting. Take the case of Marcus Bullock, whose life turned around because of daily letters and pictures from his mother after he was imprisoned for drug offenses. Bullock later explained, "I know the potential [of correspondence] because of what I've been through. I can personally remember every night at mail call behind those sweaty concrete walls, hoping for my name to be called, looking for a piece of love from anybody that remembered I existed." Because his mother's correspondence led to his success after prison, Bullock now promotes a service for facilitating prisoner communications. See Michael A. Fletcher, "The creator of this social media app wants prisoners to stay connected to their families," *The Marshall Project*, Jan. 22, 2019, available at <https://theundefeated.com/features/marcus-bullock-creator-of-flikshop-app-wants-prisoners-to-stay-connected-to-their-families/>. But could Bullock's mother have maintained her correspondence if

every letter-length communication required multiple postcards, and each photograph required its own postcard, too—a likely quadrupling, at least, of costs, just to maintain those redemptive regular communications with her son?

In sum, the expense of sending multiple postcard thus significantly inhibits substantive communications.

3. Postcards are also inappropriate because of their lack of privacy and the practical unavailability of news and information.

Even apart from costs, postcards won't work for many communications with inmates.

The message of a postcard is exposed to everyone who handles or has access to the mail, thus making it the least private of all mail. Yet correspondence with incarcerated persons inherently relates to highly sensitive and private matters. Inmates often suffer from sensitive medical conditions, ranging from mental health disabilities to sexual abuse to AIDS. They and their families are more likely than free persons to face relationship difficulties and family dysfunctionality. They may have the deepest personal spiritual needs of their lives at this time. Yet communications between inmates and their families and friends on these sensitive issues, and all information they seek on these issues, are required by the Baxter County rules

to travel in the least private of all ways.

As a practical matter, information from traditional newspapers, magazines, and newsletters, can't be adapted to postcards. (This content is quite different from the mother-prisoner communications at issue in *Simpson v. County of Cape Girardeau, Missouri*, 879 F.3d 272 (8th Cir. 2018), which could occur through other means.) So the postcard-only rule essentially keeps thousands of pages of potentially relevant and helpful publications from inmates.

Indeed, Baxter County doesn't expect the content from publications to be sent to inmates by postcards. If media content were converted to postcards, it would require many postcards, and that would make the jail's review task harder, not easier. It is far easier to inspect one newsletter than 300 postcards. Indeed, Baxter County claims that the postage stamp is the problem area and must be inspected, but 300 postcards contain 300 postage stamps, and one periodical usually contains no stamps. Baxter County *expects* that the content previously offered by mass media, and newsletters like *Prison Legal News*, will *no longer reach inmates*, because of the postcard-only rule. In short, Baxter County imposed a postcard-only policy that does not regulate, but rather eliminates, a large swath of outside world communications.

Finally, a multiple-card work-around would bring its own problems.

Sending multiple cards increases the possibility of confusing the recipient, especially if the order is not clear or if all cards aren't received. A prisoner who receives 300 postcards rather than a single newsletter is likely to have a hard time figuring out where to start and what follows what. A message spread over a deck of postcards, moreover, is so unusual that it carries with it a kind of scarlet-letter type stigma: *this is a message to or from a disfavored person.*

II. Long-form communications to and from inmates are essential, so that they can obtain useful and relevant information, exercise their rights, and adequately defend themselves.

A. The postcard limitation on incoming mail prevents inmates from receiving materials relevant and necessary to their rights and defense.

Postcards are inherently inadequate for the information that prisoners want and need to receive. Just as all of us in our daily lives need information contained in books, magazines, newspapers, newsletters, brochures, manuals, and correspondence of various kinds, inmates need information and advice that is most commonly and readily available in long-form writings. Inmates need background information about how to deal with their incarceration and the circumstances that led to it. Yet the Baxter County postcard limitations prohibits inmates from receiving precisely this information that they need most.

As the Second Circuit noted,

In the close and restrictive atmosphere of a prison, ... [t]he simple opportunity to read a book or write a letter, whether it expresses political views or absent affections, supplies a vital link between the inmate and the outside world, and nourishes the prisoner's mind despite the blankness and bleakness of his environment.

Wolfish v. Levi, 573 F.2d 118 (2nd Cir. 1978), reversed by *Bell v. Wolfish*, 441 U.S. 520 (1979) (but specifically noting, 441 U.S. at 528 n.9, that the prison officials did not challenge that portion of the Second Circuit decision enjoining the reading and inspection of inmate outgoing and incoming mail).

To know and exercise their rights, inmates need access to materials like *Prison Legal News*. Prisoners have “a constitutional right of access to the courts,” *Bounds v. Smith*, 430 U.S. 817, 821 (1977). That access can be “adequate, effective, and meaningful,” *Bounds*, 430 U.S. at 822, only when the inmate knows his or her rights and the procedural paths toward exercising them. Indeed, prisoners have a duty to exercise due diligence in discovering relevant facts to support their habeas corpus claims. *Williams v. Taylor*, 529 U.S. 420, 435 (2000); *Osborne v. Purkett*, 411 F.3d 911, 916 (8th Cir. 2005). Limiting their mail exchanges, incoming and outgoing, to 100 words per mailing, severely limits them in satisfying that obligation.

Many courts have recognized that *Prison Legal News* delivers vital

information to inmates helping them understand and exercise their rights. *Human Rights Def. Ctr. v. Bd. of Cty. Comm'rs*, No 18 CV 00355 JAP/SCY, 2018 WL 3972922, at *2 (D.N.M. Aug. 20, 2018) (*Prison Legal News* “contains news and analysis about prisons, jails and other detention facilities, prisoners’ rights, court opinions, management of prison facilities, prison conditions, and other matters pertaining to the right and/or interests of incarcerated individuals”); *Prison Legal News v. Stolle*, Civ. No. 2:13cv424, 2014 WL 6982470, at *1 (E.D. Va. Dec. 8, 2014) (*Prison Legal News* “includes articles and news about various legal issues, access to courts, prison conditions, mail censorship, prisoner litigation, visitation rights, religious freedom and prison rape, among other things”); *Prison Legal News v. Lindsey*, No. 3:07-CV-0367-P, 2007 WL 9717318, at *1 (N.D. Tex. June 18, 2007) (“The magazine contains information of interest to prison inmates concerning access to courts, prison conditions, mail censorship, jail litigation, prisoners’ rights, and related subjects.”); *see also* Giovanna Shay, Response, *One Market We Do Not Need*, 160 U. PA. L. REV. PENNUMBRA 319, 326 (2012), <http://www.pennumbra.com/responses/3-2012/Shay.pdf> (describing *Prison Legal News* as the “leading publication for prisoner rights”).

Even the District Court’s description of HRDC’s publications demonstrates their value:

To accomplish its mission, HRDC publishes and distributes *Prison Legal News*, a monthly legal magazine which contains news about prisons, prisoners' rights, and prison facilities and conditions, among other things. In addition to its 72-page magazine *Prison Legal News*, HRDC also publishes and distributes *The Habeas Citebook*, books about the criminal justice system, self-help books for prisoners, and informational packets that contain subscription order forms and a book list.

Mem. Op. at 2. Depriving inmates of HRDC's publications deprives them of essential information as they seek to defend themselves and exercise their rights.

The postcard-only rule deprives inmates of many other useful materials. For instance, many non-profit organizations have "Know Your Rights" fact sheets. *See, e.g.,* ACLU, *Know Your Rights: Legal Rights of Disabled Prisoners*, <https://www.aclu.org/other/know-your-rights-legal-rights-disabled-prisoners>; ArchCity Defenders, *ArchCity Defenders announces launch of updated "Pro Se STL" resource, a local 'Know Your Rights' guide*, <https://www.archcitydefenders.org/archcity-defenders-announces-launch-of-updated-pro-se-stl-resource-a-local-know-your-rights-guide/>. Inmates need materials like this; without them, they would struggle to understand challenging legal concepts, procedures, and rules. *See* David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE

DAME L. REV. 2021, 2043-45 (2018) (describing challenges incarcerated persons face in following complex prison administrative grievance procedures). Outside reading material thus plays a significant role in allowing inmates to learn about and gain the ability to vindicate their legal rights.

While the Baxter County postcard-only is framed as a matter of form (postcards, not letters or publications), it is not content neutral in practice. It prevents inmates from receiving practically all existing materials that would inform them of their rights and provide help and assistance to them in combatting unfair conditions, and fighting strongly for their defense and release. Suggesting that one or more postcards can substitute for HDRC's publications is a little like suggesting that one, or a few, three-line haikus could suffice as instructions to set up a computer network.

Inmates do not have other adequate ways of receiving information comparable to that in *Prison Legal News* and other publications, so the Baxter County rules cannot be justified on factor 2 of *Turner*, which looks to the existence of alternative means of meeting inmates' constitutional right of communications. *Turner*, 482 U.S. at 90. The Baxter County jail library is sparse and contains only very limited materials. More importantly, neither the jail library, nor the television or other limited resources available to inmates in Baxter County, can substitute for mail. Mail alone permits long-

form communications on both sides—a real exchange of detailed information that may make a difference in the prisoner’s knowledge, judgment, and decisions. It permits drawings as well as text, emotional as well as informational communications, all created with reflection and care in messaging. Mail also uniquely allows detailed one-to-many communications from experts (like the editors and contributors of *Prison Legal News*) to similarly situated persons with similar informational needs.

Notably, the record below is quite different from that in *Simpson v. County of Cape Girardeau, Missouri*, 879 F.3d 272 (8th Cir. 2018). There, only a mother’s communications with her prisoner son were at issue, and the court found alternative means through visits and phone calls. *Id.* at 281. By contrast, in Baxter County, with *Prison Legal News* and all other print media barred, inmates have no alternative means of obtaining the immense amount of useful information contained in those publications.

B. The postcard limitation interferes with inmates’ rights to practice their religion.

Inmates have a constitutional right to observe and practice religion. The federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc-1, reinforces that constitutional right, with additional statutory protections against any “substantial” burdens on prisoners’ religious

practices.

Experience verifies that prison correspondence often addresses prisoners' spiritual thoughts and needs. See Joe Lockhard, "No possessions but rages': vindication, salvation and early Kentucky prison letters," 35 *Biography* 650 (2012) ("Isolated from and marginalized within society, many US prison inmates have relied on familiar Christian concepts of redemption to frame self-understanding and create a hopeful vision of the future.").

Moreover, an inmate's religious beliefs will often involve sending communications to others that relate to religion. As noted above, the epistles of St. Paul were an integral part of his Christian mission to evangelize to the world. Dietrich Bonhoeffer similarly sought to provide religious meditations and comfort to friends and family with his letters from prison. Thus, outgoing prisoner mail, such as religious instruction to children or words of spiritual reassurance to friends, will often be essential to the prisoner's exercise of his or her religious beliefs.

The limitation on incoming mail particularly burdens inmate religious growth. The rule would appear to prevent prisoners from receiving any printed devotionals, other religious materials, and letters from ministers, priests, rabbis, or other spiritual leaders. Postcard-only rules like that of Baxter County clearly substantially burden inmates' ability to exercise their

religious beliefs, by preventing them from receiving or sending devotional/instructional material and correspondence related to their beliefs.

C. Prisoners need access to media and long-form letters to adequately tell important stories to the press and public.

The news media, as a watchdog on government, often report on jail and prison conditions, law enforcement, and the criminal justice system. The most serious and detailed reporting in these fields is conducted by the print media—newspapers and magazines—because print is better suited for complex stories of this nature than time-limited electronic media like radio and television. But it is precisely this media that covers issues of interest to inmates that the Baxter County rules ban. The rules explicitly ban jail inmates from receiving “publications, magazines, newspapers, periodicals, journals and pamphlets.”

The Baxter County postcard-only rule thus cuts inmates off from huge amounts of valuable information in the print media, especially concerning issues of greatest concern including jail and prison conditions, and the criminal justice system. A collateral but significant development is that it prevents inmates from knowing if their stories and information would be of interest to the media, thereby preventing them from knowing about reporters working on projects for which their information or experience might relate.

Interestingly, the Baxter County rule theoretically allows prisoners to correspond with the media using customary letters, not just postcards, perhaps because the Supreme Court suggested in *Pell v. Procunier*, 417 U.S. 817, 824 (1974), that prisoners had a First Amendment right to written communications in an “open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media.” But such communications are impeded when the inmate can’t see the reporter’s work. The inmate in this situation can correspond, in theory, with reporters. But because the inmate can’t receive newspapers, magazines, or other print publications, he won’t know who is writing about subjects of interest, so he won’t know who to correspond with, nor will he have the background information essential to meaningful dialog.

The *St. Louis Post-Dispatch* won a Pulitzer Prize in 2019 for a series of stories about Missouri jails, and the practice in many counties of jailing persons who did not timely pay traffic-related fines, charging those persons for their time in jail, and then jailing them again if they did not pay the jail charges. In one column related to that investigation, *Post-Dispatch* writer Tony Messenger explained that he had been regularly corresponding with an inmate in a Missouri jail, and then reported at some length what the inmate claimed and how officials responded. The writer also introduced Messenger

to other persons “who had been caught up in this debtors prison scheme.” Tony Messenger, “Battle against mass incarceration is making a dent in Missouri's prison population,” *St. Louis Post-Dispatch*, April 24, 2019, p.2. The column illustrates how mail from jail allows inmates to air grievances and reporters to collect information. Indeed, Messenger’s column notes that he gets “a fair amount” of letters from people in custody who “generally have plenty of good reasons to complain.” *Id.* But this important constitutional check and balance provided by freedom of the press relies on the ability of inmates and reporters to correspond, and inmates are unlikely to correspond with the right journalists when they are prohibited from receiving any print publications other than those self-selected by the jail staff.

Prisoners have long had stories to tell about prison conditions. *See, e.g.,* Oscar Wilde, *The Annotated Prison Writings of Oscar Wilde* (ed. Nicholas Frankel 2018) (“The cruelty that is practiced by day and night on children in English prisons is incredible except to those who have witnessed it and are aware of the brutality of the system”); Paul Avrich, “Prison Letters of Ricardo Flores Magon to Lilly Sarnoff,” 22 *International Review of Social History* 382 (1977) (letters reveal the horrors of prison life during the Palmer era); Maria Alyonkhina (member of Pussy Riot musical group), *quoted in Pussy Riot!: a punk prayer for freedom: letters from prison, songs, poems, and courtroom*

statements, plus tributes to the punk brand that shook the world (2012) (“It’s so cold in the cell [in Russia] that our noses turn red and our feet are ice cold but we are not allowed to get into bed and under the covers before the bedtime bell. The holes in the windows are stuffed with hygiene pads and bread crumbs.”). But if these stories can’t reach the right journalists, the watchdog function of the media, which is one of the key purposes of the First Amendment, will be frustrated.

III. Substantive communications are the lifeblood of a free society, and the values of these communications must be considered even in a deferential analysis.

For thousands of years in Western culture, prisoners, though confined and punished, have been allowed more freedom to obtain information and send messages than the current Baxter County rules now allow. Our cultural tradition is one of many elements that teaches that legitimate penological objectives do not require such drastic curbs.

We know from history that the prison writings of Seneca, Boethius, William Penn, Oscar Wilde, Bartolomeo Vanzetti and Nicola Sacco, Bertrand Russell, Daniel Berrigan, George Jackson, and the Dakota prisoners of war were all long-form writings, often in dialogue with persons outside of prison, which would not fit on a single postcard and could only with difficulty and significant costs be written on a deck of multiple postcards.

We know that while occasionally severe limits have been imposed on prisoner receipt of information and prisoner messages to the outside world, those limits are most often associated with authoritarian regimes. For example, the South African apartheid regime severely limited the length and frequency of the letters of Nelson Mandela and some of his fellow political prisoners, initially (and most drastically) to only 500 words every six months, though it later liberalized its rules. Bob Drogin, “Nelson Mandela’s letters detail his 27 years as the world’s most famous political prisoner,” *L.A. Times*, July 13, 2018. Similarly, North Vietnam barred U.S. prisoners of war from sending or receiving more than 10 lines. Lily Rothman & Liz Ronk, “Beyond the Vietnam War Story of ‘P.O.W. Wife’ Valerie Kushner,” *Time*, Sept. 28, 2017. These repressive practices of authoritarian regimes only highlight how far outside the mainstream such practices fall.

In their fear and loneliness, apart from home, family, and ordinary life, inmates need to be able to seek and obtain help. Inmates understandably look to the mail—what Voltaire called “the consolation of life.” Voltaire, “Post,” *Philosophical Dictionary* (vol. 8, p. 261 ed. W. Fleming 1901) (“the post is the grand connecting link of all transactions, of all negotiations. Those who are absent, by its means become present; it is the consolation of life.”).

Only through two-way substantive communications can an inmate

address some of the key pressing questions of his or her life in jail and his or her future prospects. Why am I here? What are the laws and procedures that govern my case and my confinement? What can I do to get out of this place, or to improve my conditions? Can I trust my state-appointed lawyer, and are there alternatives for my representation? What do experts say and recommend about situations like mine? What have others done in similar situations? What can I do to win my case? Who besides my lawyer and family is available to help, and what do they know and recommend in situations like mine? Even if I am guilty, what are the alternatives and opportunities for the best resolution of my case and the best future for me and my family and friends? Who knows about opportunities and can help set me on a path to learning about them and utilizing them?

Organizations like HRDC can provide some answers to these often-asked questions—but not if *Prison Legal News* is blocked. Family members may be able to answer some of these concerns—but not if they are artificially limited to 100-word 35¢ bursts, conveyed through the least private of all communications methods. Inmates can only ask a few of these questions if they are confined to only three 100-word inquiries each week.

Finally, history tells us how intensely meaningful prisoners find messages to and from the outside world. Alfred Delp, a Jesuit imprisoned in

Nazi Germany, wrote even when his hands were manacled. John Hay Hughes, “Review of *With Bound Hands: a Jesuit in Nazi Germany*,” 90 *Catholic Historical Review* 150 (2004). A study of Texas prisoners who were used in convict leasing schemes notes the “determination” of many prisoners “to craft a public self beyond the reach of the whip, to channel their rage and hopelessness, and, most of all, to seek redress and release.” Robert Perkinson, “ ‘Hell Exploded’: Prisoner Music and Memoir and the Fall of Convict Leasing in Texas,” 89 *The Prison Journal* 54S, 57S (2009).

Conclusion

“[W]hat else is there to do when you are alone for days in the dull monotony of a narrow jail cell than write long letters, think strange thoughts, and pray long prayers?”

Martin Luther King, Jr., “Letter from a Birmingham Jail,” reprinted in Andrew Carroll, ed., *Letters of a Nation* 226 (1997).

As a matter of history, policy, and humanity, messages and information exchanges between prisoners and the outside world matter too much to be left solely to tweet-length cards. When the communicative and informational values enshrined in the First Amendment are weighed in the *Thornburgh* reasonableness “balance,” the Baxter County rules cannot be justified, and

accordingly the decision below should be reversed.

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I certify that this document complies with the type-volume restrictions of the Federal Rule of Appellate Procedure 28(a)(5)&(6) and 32(a)(7)(B), because, excluding parts of the document exempted by Fed.R.App. P. 32(f), this brief contains 6,397 words, based upon the word counting function of Microsoft Word. This document complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the typestyle requirements of Fed.R.App.P. 32(a)(6) because the document has been prepared in a proportionally spaced typeface in Microsoft Word using 14 point Cambria (and some slightly larger headings).

/s/ Mark Sableman
One of the Attorneys for Amici
September 5, 2019

CERTIFICATE OF SERVICE

I, hereby certify that on September 5, 2019, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system

/s/ Mark Sableman

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