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July 19, 2016

Stephen Moyer, Secretary
Department of Public Safety and Correctional Services
Office of the Secretary
300 East Joppa Road, Suite 1000
Towson, MD 21286
VIA EMAIL

RE: DPSCS Proposal to Ban All Incoming Personal Letters

Dear Secretary Moyer:

We write to address the Department of Public Safety and Correctional Services' proposal to ban all incoming letters (other than legal mail) to the more than 21,000 individuals housed in DPSCS facilities across this state. As you are no doubt aware, this policy would give Maryland the dubious distinction of being the first state corrections department in the nation to ban all meaningful personal correspondence of those who are incarcerated—and at a time when there is more evidence than ever that preserving family and community ties is critical to both institutional and public safety, to say nothing of prisoner health and well being.

We understand and appreciate that the asserted interest behind this proposal is the Department's desire to limit the introduction of suboxone. However, given the availability of obvious, far less intrusive alternatives, this particular proposal is precisely that type of "exaggerated response" that courts reject as unlawful. Quite frankly, we are astonished that the Department would even consider such a rule.

Under the proposed rule, men and women incarcerated in Maryland prisons would be permanently barred from ever receiving any meaningful personal correspondence from their loved ones or any other non-legal support group—only postcards. The people in your custody can spend their entire lives in prison—indeed, more than 2,000 are serving life sentences in the Maryland DOC. Under the proposed regulation, these men and women could *never again* receive another letter from their mothers, children, fathers, or others. Instead, their families would be forced to try to put heartfelt messages into what is, essentially, the paper equivalent of a tweet that can be read by anybody.

The implications of such a sweeping regulation cannot be overstated. The policy you propose would affect not only the 21,000-plus people in your custody, but also the tens of thousands of Marylanders who are connected with them. The scheme would forbid a pastor from writing to a parishioner who is now incarcerated—indeed, it would forbid letters from organizations that provide all kinds of supportive services to those who are inside. The proposal would rob families of one of the most profoundly

significant forms of communication in our society. Under the new scheme, an ailing mother could not send her son a letter for him to hold onto after she is gone. A teen could not write her mom to tell her the things she can't say in a visit.

Yet, both common sense and the great weight of evidence tell us that one of the most critical factors in a person's success upon release is having strong family and community ties. More than four decades ago, the U.S. Supreme Court observed that "the weight of professional opinion seems to be that inmate freedom to correspond with outsiders advances rather than retards the goal of rehabilitation." *Procunier v. Martinez*, 416 U.S at 412. This observation has been repeatedly reaffirmed since then. *See, e.g., Cox v. Denning*, No. 12-2571-DJW, 2014 WL 4843951, at *21 (D. Kan. Sept. 29, 2014) ("[F]amily is an important part of the rehabilitative process and mail is very important to inmates and their families. It is particularly important … to have good communication with family and friends as they are the ones who will help [the person] after he is released find employment, a place to live, transportation, and re-establish relationships, which all go toward the goal of rehabilitation."). Indeed, in our experience, those ties are equally important to institutional security—without them, individuals may feel they have little to lose.[1]

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In support of the new proposal, the Department has provided data regarding instances in which suboxone was recovered from prison mail. But this data shows that DPSCS's existing policy – inspecting mail – *works* at keeping out contraband. Indeed, even under the proposed regulation, the Department would be compelled to continue inspecting incoming mail.[2]

As explained in greater detail below, our view is that the proposed policy violates the constitutional rights of families, friends and advocacy organizations that maintain relationships with those who are incarcerated and also reflects a poor policy choice among the many options available to you to address the introduction of contraband into

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[1] This view is shared by the Los Angeles County Sheriff's Office, which operates the nation's largest jail and has rejected a postcard-only policy:

"But for Los Angeles County, the tradeoff isn't worth it, said Steve Whitmore, a spokesman for the Sheriff's Department. 'We believe the mail coming to inmates is as important as their phone calls,' he said. 'If we were to limit the mail, we believe we would see a rise in mental challenges, maybe even violence.'"

Steve Chawkins, "Ventura County to restrict inmates' mail," *Los Angeles Times,* September 23, 2010, http://articles.latimes.com/2010/sep/23/local/la-me-jail-mail-20100923.

[2] To the extent the Department is concerned about staff ability to identify contraband, it is far simpler to improve training and quality control than it is to develop an entirely new regulatory scheme, let alone one that so fundamentally infringes on the rights of families.

DPSCS facilities. As you may know, postcard-only mail policies have been invalidated by courts in a number of jurisdictions throughout the country. *See, e.g.*, *Cox v. Denning*, 2014 WL 4843951 (D. Kan. Sep. 29, 2014); *Prison Legal News v. County of Ventura*, 2014 WL 2736103 (C.D. Cal. June 16, 2014); *Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013).[3] Still other challenges, several brought by the ACLU, have resulted in settlements rescinding such policies. *See, e.g., Martinez v. Maketa*, 2011 WL 2222129 (D. Colo. June 7, 2011); *Underwood v. Manfre*, 2014 WL 67644 (M.D.Fla. Jan. 8, 2014); *Jackson v. Ash* 2015 WL 751835; *Hamilton v. Hall*, 2011 WL 2315169, 3:10-cv-355, (N.D.Fla. 2011).

No court has yet ruled on a permanent letter ban in a statewide DOC— likely because no other state DOC has enacted one. But such an extreme policy would invite litigation. We urge you to reconsider your proposal and to meet with us to discuss the matter further.

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The Proposal to Ban all Meaningful Personal Correspondence Would Violate the Constitutional Rights of Thousands of Maryland Families

Restrictions on mail of the sort proposed here implicate the First Amendment rights of those who are incarcerated as well as the people and organizations who wish to communicate with them. *Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974). The First Amendment protection against "unjustified governmental interference" with communication applies to both the sender and the intended recipient. *Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974) (citing *Lamont v. Postmaster General*, 381 U.S. 301 (1965)). In communication by letter, "the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id*.

Although these rights may be limited to some extent in the prison context, such restrictions will be upheld only if "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). To determine whether a regulation satisfies this standard, a court considers: (1) whether there is a valid, rational connection between the regulation and a legitimate government interest; (2) the availability of alternate means of exercising the right; (3) the impact accommodating the right would have upon prison

[3] To the extent that some Courts have upheld postcard-only policies, they have typically done so in the context of *pro se* challenges rather than instances when plaintiffs are represented by counsel throughout. Moreover, imposing a permanent ban on letters in the context of a state prison system, where individuals are serving much lengthier sentences and are far more likely to be distant from family members, is a far cry from the context of temporary stays in local jails. *See, e.g., Barnes v. Mary Christina,* No. CIV.A. DKC-13-3194, 2015 WL 2451104 *6 (D. Md. May 21, 2015) (emphasizing that prisoner's stay "in the facility was transitional and temporary" in rejecting *pro se* challenge to postcard-only policy).

resources; and (4) whether there are obvious, easy alternatives that accommodate the right at *de minimis* cost to valid penological interests. *Id.* at 89–91. Based on our review of how courts have applied these factors in other states and our understanding of DPSCS's proposal, we believe the proposal to ban all incoming personal letters would fail to survive such scrutiny.[4]

1. The Proposal is an "exaggerated response" to security concerns

The first prong of the *Turner* test requires a rational connection between the regulation and a legitimate government interest. *Walker v. Sumner*, 917 F.2d 382, 385 (9th Cir. 1990). While preventing the introduction of contraband is a legitimate penological interest, a permanent ban on meaningful correspondence does not, on its own, give rise to a valid, rational connection to this interest absent evidence that inspection is inadequate. *See Cox*, 2014 WL 4843951 at *17 ("Defendants, however, fail to present a credible explanation of how the postcard-only policy is more effective at preventing the introduction of contraband than the former policy of opening envelopes and inspecting the contents for contraband."); *County of Ventura*, 2014 WL 2736103 at *5 ("Absent any evidence that affirmatively shows that the postcard-only policy enhances jail security, we conclude the postcard-only policy smacks of arbitrariness and irrationality."). There is no "intuitive common sense connection between the postcard only policy and enhancing jail security." *Prison Legal News v. Columbia County*, 942 F. Supp. 2d at 1068, 1083–84 (D. Or. 2013). DPSCS must have "a credible explanation of why a postcard-only policy is more effective at preventing the introduction of contraband than opening envelopes and inspecting their contents. *Id*. Here, the Department has not offered any evidence that banning mail other than postcards is more effective than simply inspecting mail in preventing suboxone from entering its facilities—rather, the Department's inspections have, as intended, detected and thus prevented the introduction of suboxone into facilities in numerous instances.

2. There are not adequate alternatives for meaningful and private communication

The second factor—alternative means of exercising the right—requires courts to consider other avenues of communication that remain open to the family members, friends, and allies of those who are incarcerated. The proposed regulation leaves little room for meaningful private communication, particularly against the backdrop of other limitations on communication.

Restricting written communications to the back of a postcard limits both the quantity and the quality of those communications, as the lack of space and the lack of

[4] If the policy interferes with a prisoner's religious exercise – for example, by preventing meaningful correspondence with a religious advisor – it will be evaluated under the more stringent standard of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*. Under RLUIPA, government action that significantly burdens a prisoner's exercise of religion is unlawful unless the government can demonstrate that it is the least restrictive means of advancing a compelling governmental interest. *See Holt v. Hobbs*, 135 S. Ct. 853 (2015).

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privacy discourages senders from engaging in meaningful communication with their incarcerated loved ones. Forcing "those on the outside to fit everything into a postcard—broadcasting all information contained on it to the world—robs the inmates and non-inmates of the meaningful expression that the Constitution protects." *Bezotte*, 2013 WL 1316714, at *4. A "sender would reasonably and obviously be deterred from writing about personal family matters, romantic relationships, health and medical treatment, finances, and legal matters, given that, when written on postcards, the information may be easily read by a number of people, both inside and outside." *Cox v. Denning*, No. 12-2571-DJW, 2014 WL 4843951, at *21 (D. Kan. Sept. 29, 2014).

Indeed, there are certain types of mail that have no alternative at all, particularly written documents pertaining to the routine matters of daily life. For example, family members are often instrumental in the business of identifying, retaining and serving as a liaison with counsel for those who are incarcerated. Similarly, a postcard-only mail policy prevents family and friends from mailing items such as children's report cards or medical reports, short spiritual and religious tracts, or printed copies of articles published in newspapers, magazines, or on the internet. *Columbia County*, 942 F. Supp. 2d at 1085.[5]

Thus, courts have recognized that banning letters, even while permitting postcards, "severely curtails" First Amendment rights, concluding that "there are no practical alternative means for exercising those rights." *Cox v. Denning*, No. 12-2571-DJW, 2014 WL 4843951, at *21 (D. Kan. Sept. 29, 2014).

The alternate forms of communication – phone and visits – are wholly inadequate alternatives in this context. First, the written word, and what one is able to express through the written word, is substantively different from what one can or will say in person or on the phone—especially when visits and calls are monitored and easily overheard by others. Unlike a call or visit, the words and messages communicated by letter remain with the recipient, to review and revisit again and again.

Second, families and friends cannot call into DPSCS facilities to speak with a loved one; rather, they must wait for the person to call. Prisoners may call out for a fee; however, there are significant restrictions on calls.[6] For yet others, such as those who lack

[5] Courts have also focused on the significant detrimental impact on organizations and businesses. *Cox v. Denning*, No. 12-2571-DJW, 2014 WL 4843951, at *14 (D. Kan. Sept. 29, 2014) ("[M] many organizations … send mail to inmates, such as religious organizations, government agencies, and other organizations that reach out to prisoners, [and they] do not have the resources to transfer information that is otherwise on a pamphlet, handout, or other pre-formatted material to the confines of a postcard.")

[6] For example, if a prisoner calls out and the person does not answer, the prisoner is "locked out" of the system from calling any other number for another 45 minutes—he or she cannot, for example, try the person's work number. Moreover, prisoners are limited in the number of numbers permitted on their phone lists and may only change them every three months. Thus, if a prisoner's mother's number changes, that prisoner cannot call the

funds or those in solitary confinement, phones are simply unavailable as a matter of course. Moreover, all calls are monitored, and this, too, inhibits communication.

Finally, visits are a luxury that some families cannot afford, especially when individuals are housed at the furthest reaches of the state, such as the three thousand people housed in Cumberland and the three thousand people housed at ECI on the Eastern Shore. For them, families must often make drives of several hours each way. For those without cars, or those who are ill or with limited mobility, visits are simply not possible. Moreover, individuals with convictions and those who have been incarcerated are typically barred from visiting, and others are deterred by the extensive security procedures such as fingerprinting and pat-downs.[7] In fact, many families have been frustrated by recent changes in DOC visitation policies, such as the new policy forbidding visitors from embracing each other at the start of or during a visit. This rule has been especially difficult for children, who do not understand that they cannot greet or otherwise touch their loved one and thus must be forcibly held back by their guardians. Some prisoners have felt compelled to forego family visits as a result.

In sum, these restrictions on communication raise a serious question about the adequacy of the alternatives available.

3. The Department could avoid such significant infringements upon fundamental rights with easy alternatives at little or no greater expense

Nor can the Department defend the proposal under the third and fourth *Turner* factors, which pertain to the impact of accommodating the right and the availability of alternatives. Specifically, the third *Turner* factor is the impact that accommodating the asserted constitutional right would have on guards, other prisoners, and prison resources, *Turner*, 482 U.S. at 90, and the final *Turner* factor is "whether obvious, easy alternatives exist that fully accommodate prisoners' rights at *de minimis* cost to valid penological interests. If so, the regulation may not be reasonable but an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90.

Courts have generally identified mail inspection as a valid low-cost alternative to banning mail altogether. *See Cox v. Denning*, 2014 WL 4843951 *1, *23 (D. Kan. Sep. 29, 2014) (The "obvious and easy alternative to the postcard-only policy is to allow incoming non-privileged letters but inspect them for contraband."); *Prison Legal News v. Columbia County*, 942 F. Supp. 2d at 1068, 1085 (D. Or. 2013); *County of Ventura*, 2014 WL 2736103 at *8. Inspecting incoming mail for contraband instead of a postcard-only policy has little adverse effect on prison resources, particularly where this has been the

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new number until he or she is in the window for adding or removing numbers from the list.

[7] Video visitation programs do not resolve these problems and, indeed, raise new ones. *See generally* Bernadette Rabuy and Peter Wagner, Prison Policy Initiative, Screening Out Family Time: The for-profit video visitation industry in prisons and jails (January 2015), http://www.prisonpolicy.org/visitation/report.html.

standard practice and when the prison is unable to produce evidence that it encountered significant problems under the old policy. *See, e.g.*, *Columbia County* at 1086; *Cox*, 2014 WL 4843951 at *22.

The possible increased efficacy of postcards by eliminating the need to open envelopes is not a valid rationale. Courts have noted that the time difference between examining a postcard and regular mail is only a few seconds or moments. *See Prison Legal News v. Columbia County*, 942 F. Supp. 2d at 1068, 1084 (D. Or. 2013). Moreover, a postcard-only policy may actually be *more* time-consuming for prison staff because staff will almost certainly spend more time preparing rejection notices for every piece of mail that doesn't conform to the policy than it does simply inspecting the mail for contraband. *Cox*, 2014 WL 4843951 at *22. Thus, when factoring in staff time spent preparing notices for returned or rejected non-postcard mail, prison staff save little time with a postcard only policy. *Id*. Even under the proposed regulation, DPSCS would still require prison staff to inspect every piece of mail for suboxone.

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Here, the previous policy of inspecting incoming mail is a viable alternative that accommodates prisoner rights at low cost. Under this previous policy, the Department successfully intercepted 1615 pieces of mail containing suboxone. The DOC's own data show that prison staff are successfully identifying mail with suboxone. To the extent the DOC believes these measures are inadequate, there are numerous other options short of the wholesale banning of meaningful personal correspondence—such as removing stamps or envelopes, improving staff training, or using drug-sniffing dogs.

Perhaps the most compelling evidence that alternatives are readily available is the fact that *no other state or federal prison system* has adopted a postcard-only rule.[8] This fact will weigh heavily against the Department in any legal challenge. *See Holt*, 135 S. Ct. at 866 ("the Department failed to show, in the face of petitioner's evidence, why the vast majority of States and the Federal Government permit inmates to grow ½–inch beards, either for any reason or for religious reasons, but it cannot. … That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks").

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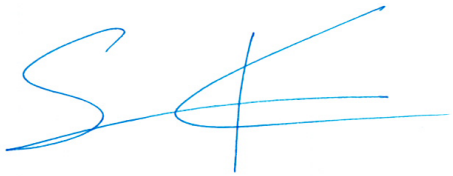
[8] The Department's assertion that there is no corresponding federal standard is incorrect. Indeed, the opening statement to the federal Bureau of Prison's mail management manual is: "Mail is the primary means of communication between inmates and the community. It is important that mail be well-managed and that services be provided professionally and efficiently." U.S. Department of Justice, Federal Bureau of Prisons, Mail Management Manual at 7 (April 5, 2011), https://www.bop.gov/policy/progstat/5800_016.pdf. *See also* U.S. Immigration and Customs Enforcement, Detention Standard 5.1: Correspondence and Other Mail, https://www.ice.gov/doclib/detention-standards/2011/correspondence_and_other_mail.pdf.

In sum, we have grave concerns about the constitutionality of the DPSCS proposal and we urge you to withdraw it from consideration. We look forward to speaking with you to discuss the matter further.

Sincerely,



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