

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PENNSYLVANIA INSTITUTIONAL :  
LAW PROJECT, ABOLITIONIST :  
LAW CENTER, AMISTAD LAW :  
PROJECT, and AMERICAN :  
CIVIL LIBERTIES UNION :  
OF PENNSYLVANIA, :

Plaintiffs, :

v. :

JOHN E. WETZEL, :  
Secretary of Department of Corrections, :  
SHIRLEY MOORE SMEAL, Executive :  
Deputy Secretary of Department of :  
Corrections, and TABB BICKELL, :  
Executive Deputy Secretary for :  
Institutional Operations, :

Defendants. :

No. \_\_\_\_\_

**VERIFIED COMPLAINT**

The Pennsylvania Institutional Law Project (“PILP”), Abolitionist Law Center (“ALC”), Amistad Law Project (“ALP”) and American Civil Liberties Union of Pennsylvania (“ACLU-PA”), by and through their counsel, Schnader Harrison Segal & Lewis LLP, hereby file this Complaint against John E. Wetzel, the Secretary of the Pennsylvania Department of Corrections (“DOC”), Shirley Moore Smeal, the Executive Deputy Secretary of the DOC, and Tabb Bickell, the

Executive Deputy Secretary for Institutional Operations of the DOC, and in support thereof, aver as follows:

## **INTRODUCTION**

1. In September 2018, the DOC initiated a series of new measures intended to prevent drugs from entering DOC facilities. These included the introduction of drone-defense measures at DOC prisons, enhanced search protocols for both people incarcerated in DOC facilities and their visitors, restrictions on incoming books and publications, and a new policy that prevents incarcerated people from receiving any mail, whether legal or non-legal, that contains original documents. This lawsuit relates only to the changes in the DOC's handling of legal mail.

2. Although the DOC is not aware of any instance whereby attorneys have introduced contraband into DOC facilities via legal mail, DOC officials started confiscating all incoming legal mail and holding it for 45 days, only allowing recipients a photocopy of their correspondence. This new policy disregards the privileged nature of attorney-client communications and irrevocably compromises the confidentiality of those communications.

3. Plaintiffs are legal services organizations that use the mail to provide confidential legal advice to thousands of DOC prisoners annually. Plaintiffs also

represent hundreds of DOC prisoners in state and federal court proceedings across the Commonwealth involving prisoners' constitutional and other rights, family law, criminal matters, direct criminal appeals, and habeas corpus actions, including in capital cases. Before the DOC enacted the new policy, Plaintiff organizations regularly used the mail to send privileged communications to people incarcerated within DOC prisons. Since mid-September, however, Plaintiff organizations have concluded that they can no longer use the mail to engage in confidential correspondence with their clients in DOC prisons because to do so would violate professional ethics and be inconsistent with the Rules of Professional Responsibility governing attorneys. This is because the DOC's new legal-mail policy does not, and cannot, assure that privileged correspondence will remain confidential. Consequently, Plaintiff organizations have been forced to abandon use of the mail to send privileged communications to clients in DOC State Correctional Institutions ("SCIs").

4. The new policy severely curtails Plaintiff organizations' ability to provide legal advice to people in DOC prisons and to represent clients effectively in pending legal matters involving constitutional rights and, in some cases, matters of life and death. The harmful impact of the new DOC legal-mail policy is not unique to Plaintiff legal organizations and their clients; it extends much further, to countless other lawyers in public defender offices, capital habeas units, and private

practitioners who also represent DOC-housed clients in myriad criminal and civil matters.

5. Absent evidence that attorneys use the mails to send contraband to clients, the DOC's new legal mail policy is an exaggerated, irrational response to a non-problem that deprives Plaintiff legal organizations of an indispensable – and often the only viable -- means of communicating with their imprisoned clients, thereby seriously undermining the lawyers' ability to provide zealous and effective legal representation. The DOC's unwarranted interference with attorney-client communications violates the First Amendment to the U.S. Constitution.

6. Plaintiffs and their clients have suffered and will continue to suffer irreparable harm because of the DOC's substantial interference with their First Amendment right to communicate confidentially and maintain the attorney-client privilege. Plaintiffs in this civil rights lawsuit seek preliminary, and thereafter permanent, injunctive relief.

### **JURISDICTION AND VENUE**

7. This action to vindicate the First Amendment rights of PILP, ALC, ALP and ACLU-PA, and their current and prospective clients, is brought under 42 U.S.C. § 1983. This Court has jurisdiction over this action under 28 U.S.C. § 1331.

8. Venue is proper in the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1391(b) in that the Defendants and Plaintiffs are subject to personal jurisdiction within the Middle District of Pennsylvania, and events that gave rise to this action occurred within the Middle District of Pennsylvania.

### **PARTIES**

9. The Pennsylvania Institutional Law Project is a nonprofit organization that is part of the Pennsylvania Legal Aid Network, a statewide consortium of legal aid organizations providing free civil legal assistance across the Commonwealth. PILP has three offices in the Commonwealth, including one in Lewisburg.

10. PILP works on behalf of indigent incarcerated and institutionalized people in the Commonwealth of Pennsylvania who have suffered violations of their constitutional rights and provides representation in family law matters. As part of its mission, PILP directly represents people detained in DOC prisons. In addition, PILP's lawyers frequently send privileged correspondence, including legal advice and information about their legal rights, via mail to DOC prisoners pursuing claims *pro se*.

11. Many of PILP's clients and prospective clients are imprisoned within DOC facilities throughout the Commonwealth, including in this judicial district, and are all similarly affected by the new state-wide legal mail policies.

12. PILP brings these claims on behalf of itself, its employees, and its clients and prospective clients in DOC custody.

13. The Abolitionist Law Center is a public interest law firm formed for the purpose of abolishing class- and race-based mass incarceration. The ALC is located in Pittsburgh, Pennsylvania.

14. In support of this mission, ALC represents people in jails and prisons who have suffered violations of their constitutional or other rights. In addition, ALP frequently mails privileged correspondence, including legal advice and information about their legal rights, via mails to individuals in DOC facilities.

15. Many of ALC's clients are imprisoned within DOC facilities throughout the Commonwealth, including in this judicial district, and are all similarly affected by the new state-wide legal mail policies.

16. ALC brings these claims on behalf of itself, its employees, and its clients and prospective clients in DOC custody.

17. Amistad Law Project is a public interest law center firm formed in October 2014. As part of ALP's mission, it represents individuals incarcerated in DOC facilities, especially in matters affecting human or constitutional rights. ALP's office is located in Philadelphia, Pennsylvania.

18. In connection with its client representations, ALP frequently mails privileged correspondence, including legal advice and information about legal rights of individuals, to clients and potential clients in DOC facilities.

19. Many of ALP's clients are imprisoned within DOC facilities throughout the Commonwealth, including in this judicial district, and are all similarly affected by the new state-wide legal mail policies.

20. ALP brings these claims on behalf of itself, its employees, and its clients and prospective clients in DOC custody.

21. The American Civil Liberties Union of Pennsylvania is a state affiliate of the national American Civil Liberties Union, both of which are nonprofit, public interest organizations dedicated to defending and protecting civil rights and civil liberties. The ACLU-PA has four offices across the Commonwealth, including one in Harrisburg. The ACLU-PA's mission includes providing legal advice to vulnerable populations, including incarcerated persons. The organization has a long history of litigating prisoners' rights cases.

22. As part of its mission, the ACLU-PA provides legal advice, typically on prisoners' constitutional rights to just and humane treatment while in detention, to hundreds of people housed in DOC prisons every year. Additionally, the ACLU-PA regularly represents DOC prisoners in civil-rights lawsuits challenging the constitutionality of DOC policies, practices and conditions of confinement. For

instance, the ACLU-PA currently is counsel in a pending federal court class-action lawsuit on behalf of a class of death-sentenced prisoners challenging the DOC's use of solitary confinement. *See Reid, et al., v. Wetzel, et al.*, 18-cv-00176-JEJ (M.D. Pa.). The ACLU-PA has been class counsel in other class-action lawsuits challenging the DOC's treatment of its prisoners, including a 2013 case challenging the treatment of seriously mentally ill prisoners, *Disability Rights Network, et al., v. Wetzel, et al.*, 18-cv-00176-JEJ (M.D. Pa.), and an older case challenging the conditions of confinement at all then-existing Pennsylvania prisons, *Austin v. Pennsylvania Dep't of Corrections*, 876 F. Supp. 1437 (E.D. Pa. 1995). In the foregoing and other cases, ACLU-PA attorneys frequently send privileged correspondence via mail to people in DOC custody. Because the ACLU-PA's clients are located in DOC institutions across the state, often in prisons that are many hours driving distance from ACLU-PA's offices, the ability to send privileged communications via mail to clients is essential to the organization's effective and ethical representation.

23. ACLU-PA brings these claims on behalf of itself, its employees, and its clients and prospective clients in DOC custody.

24. John E. Wetzel is the current Secretary of the DOC. Defendant Wetzel is being sued in his official capacity.



25. Shirley Moore Smeal is the Executive Deputy Secretary of the DOC. Defendant Smeal is being sued in her official capacity.

26. Tabb Bickell is the Executive Deputy Secretary for Institutional Operations for the DOC. Defendant Bickell is being sued in his official capacity.

27. The DOC operates 25 state correctional facilities that, as of September 30, 2018, imprisoned nearly 50,000 people. *See* Pennsylvania Department of Corrections Monthly Population Report As Of September 30, 2018 (found at <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Current%20Monthly%20Population.pdf> and last accessed October 26, 2018).

28. The DOC's Central Office is located at 1920 Technology Parkway, Mechanicsburg, PA 17050.

## **FACTUAL BACKGROUND**

### **Confidential Communications Between Attorneys and Clients**

29. PILP currently represents approximately forty people incarcerated within DOC facilities in prospective or ongoing federal civil rights lawsuits or in family court. PILP attorneys additionally are class counsel on three putative or confirmed class actions involving the DOC, with class membership numbering thousands of individuals.

30. Additionally, PILP is required by its funders to provide legal advice to over 800 indigent people annually, the vast majority of whom are individuals imprisoned in DOC facilities.

31. PILP further provides information to over 15,000 incarcerated individuals annually, the majority of whom are imprisoned in DOC facilities.

32. In order to communicate with their clients, PILP attorneys and staff send confidential materials to their clients through the mail. Additionally, PILP sends information to prospective clients who have requested legal assistance but have not signed and returned official documentation accepting PILP as their legal counsel.

33. ALC currently represents approximately thirty people incarcerated within DOC facilities.

34. ALC attorneys are presently class counsel for 153 prisoners challenging the DOC's practice of housing people sentenced to death in solitary confinement. *See Reid v. Wetzel, supra.*

35. In order to communicate with their clients, ALC attorneys and staff send confidential materials to their clients through the mail. Additionally, ALC sends information to prospective clients who have requested legal assistance but have not signed and returned official documentation accepting ALC as their legal counsel.

36. ALP currently represents approximately twenty people incarcerated within DOC facilities.

37. In order to communicate with their clients, ALP attorneys and staff send confidential materials to their clients through the mail. Additionally, ALP sends information to prospective clients who have requested legal assistance but have not signed and returned official documentation accepting ALP as their legal counsel.

38. ACLU-PA attorneys are presently class counsel for 153 prisoners challenging the DOC's practice of housing people sentenced to death in solitary confinement. *See Reid v. Wetzel, supra.* Additionally, the ACLU-PA currently represents several other DOC-confined people in ongoing federal civil rights cases.

39. ACLU-PA attorneys and staff regularly send confidential information to their clients through the mail. In addition to corresponding with clients whom the organization represents in litigation, ACLU-PA staff sends information and advice to prospective clients who have requested legal assistance. In any given year, the ACLU corresponds with 600-1000 DOC prisoners about their legal affairs, often involving alleged violations of constitutional rights by the DOC and its staff.

40. Lawyers working for Plaintiff organizations have an ethical duty to protect from disclosure their communications with their clients. *See Pennsylvania*

Rules of Prof'l Conduct r. 1.6(d) (2018). When the confidentiality of those communications is threatened, attorneys are duty bound to take steps to ensure that those communications remain confidential.

41. Courts have recognized for centuries that communications between a client and his/her attorney must be protected from disclosure to third parties. In fact, confidentiality is described as the "cornerstone" of the attorney-client relationship.

42. Clients who fear disclosure of their communications may be reluctant to confide important facts to their attorneys. The lack of free communication inhibits the ability of attorneys to provide advice and representation. The need for confidentiality, therefore, is essential to the attorney-client relationship.

43. Privileged communications between Plaintiff organizations and their clients include, among other things, questions from attorneys about facts that could be important to pending matters, answers to such questions from clients, questions from clients as to how they can act to preserve or protect their legal rights, discussions about legal strategy or drafts of pleadings or discovery responses, and an attorney's assessment of the client's case or certain issues within that case. In many cases, the adverse party in those underlying matters is the DOC or its staff.

44. Confidentiality of attorney-client communications is critical not only to promote the effective legal representation of the client's interests, but also to the

overall administration of justice. *See, e.g., Hunt v. Blackburn*, 128 U.S. 464, 470 (1888); *In re Search Warrant B-21778*, 513 Pa. 429, 441 (1987).

### **Attorney Communications with Incarcerated Individuals**

45. Although imprisonment necessarily involves a loss of certain privacy and liberty rights, it is well established that people in prison retain First Amendment rights and, in particular, the right to counsel. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84, 107 S. Ct. 2254, 2259 (1987).

46. The need for confidentiality of attorney-client communications is particularly acute in the prison setting. *See, e.g., Lanza v. New York*, 370 U.S. 139 (1962) (“[Even] in a jail, or perhaps especially there, the relationships which the law has endowed with particularized confidentiality must continue to receive unceasing protection . . .” (citation omitted)).

47. The U.S. Court of Appeals for the Third Circuit has held that “opening properly marked incoming attorney or court mail outside a prisoner’s presence, or reading such mail, infringes the Constitution.” *Bieregu v. Reno*, 59 F.3d 1445, 1450-51 (3d Cir. 1995) (citing decisions from other Courts of Appeals). The Court held that the failure to safeguard attorney-client confidentiality “chills protected expression and may inhibit the inmate’s ability to speak, protest, and

complain openly, directly, and without reservation with the court.” *Id.* at 1452. Indeed, the U.S. Supreme Court has ruled that the *only* way to ensure the confidentiality of legal mail to incarcerated people is to require that prison officials open legal mail only in the presence of the individual to whom it is addressed. *Wolfe v. McDonnell*, 418 U.S. 539, 576-77, 94 S. Ct. 2963, 2984-85 (1974).

48. Until recently, the DOC followed a policy for legal mail (“former policy”) consistent with these constitutional requirements. In order to distinguish legal mail, which is entitled to heightened constitutional protection, from non-legal mail, the DOC in the early 2000s established a process of assigning “control numbers” to attorneys.

49. Attorneys would affix the DOC-issued control number to an envelope containing privileged correspondence to individuals in DOC facilities. If the DOC established that the control number matched the attorney’s letterhead, the DOC treated the correspondence as privileged and processed it as legal mail.

50. Officers opening legal mail were supposed to take care that the attorney control number was removed or blacked out before the correspondence was given to the recipient. That way, the recipients would not be able to share the control numbers with non-lawyers, who might then try to evade the more vigorous inspection process associated with non-legal mail by falsely labeling their

correspondence as legal mail. In other words, each attorney's control number was to remain confidential.

51. The DOC's new legal-mail policy has not changed this aspect of the legal-mail process.

52. Under the former policy, once DOC staff verified via the control number that the correspondence was legal mail, corrections officers would open the mail in front of the inmate to briefly check for contraband. Assuming no contraband was found, the staff member would give the legal mail to its recipient. *See* DC-ADM 803 (effective date October 29, 2015), a copy of which is attached hereto as Exhibit 1. Upon information and belief, correctional officers routinely completed this search process in a matter of seconds.

53. Under the former policy, opened legal mail was never in the custody or possession of prison officials other than for this brief check for contraband. Because prisoners received the original correspondence after DOC officials opened and searched it, and were present at all times when DOC officials handled it, prisoners, and the attorneys who corresponded with them, had reasonable assurance that DOC staff and officials were not reading the legal mail or sharing it with others.

54. Most prison systems use the above-described procedure for opening prisoner legal mail. It has been approved by the Courts. The federal Bureau of

Prisons has employed a similar procedure since 1985, which expressly prohibits reading or copying the correspondence. *See* 28 C.F.R. §540.18 (1994).

### **DOC's Lockdown and Establishment of New Policies**

55. On August 29, 2018, the DOC initiated a 12-day state-wide lockdown of all SCIs, during which all inmate visits were cancelled, the delivery of books and publications to incarcerated individuals was suspended, and the DOC stopped processing all mail, including legal mail.

56. After the lockdown ended, the DOC returned all mail received during the lockdown, including legal mail, to its sender unopened. This included mail from courts and attorneys.

57. The DOC's stated reason for the lockdown was alleged "reports of multiple staff members being sickened by unknown substances over the past few weeks." *FAQ -- New Procedures*, Pennsylvania Department of Corrections (Oct. 26, 2018, 11:48 AM), <https://www.cor.pa.gov/Initiatives/Pages/FAQ-New-Procedures.aspx>. A copy of the "FAQ -- *New Procedures*" is attached hereto as Exhibit 2.

58. As to how these unknown substances were entering its facilities, the DOC stated as follows:

There are seven points of entry for contraband to enter the facility: mail, legal mail, visits, staff, books/publications, drones and inmates returning to



the DOC after having been released. It's speculated that the majority of contraband enters the facilities through the mail.

*See Exhibit 2.*

59. On September 4, 2018, the DOC issued a public statement proclaiming, *inter alia*, that “[f]rom January – June 2018 the Department saw 2,034 drug incidents involving 1,802 inmates. Of these incidents, 309 involved mail & visitors.” A copy of the media release is attached hereto as Exhibit 3.

60. The DOC has not publicly broken down the 309 figure to specify how many of those involved visitors and of the remaining ones involving the mail how many came from legal mail.

61. Following the lockdown, the DOC adopted a range of new measures to combat contraband entering the prisons. *See Exhibit 2 (FAQ -- New Procedures)*. The change to handling of legal mail, at issue in this litigation, is just one of several new interdiction measures.

62. New drug-interdiction measures beyond changes to legal-mail processing include:

- a. A significant change to how non-legal mail is processed whereby all such mail is sent to a DOC third-party vendor in Florida, who will scan the correspondence, transmit the scan to the respective prisoners’

DOC facility, which will print the scan and give the copy to the prisoner, Ex. 2 at 1-5;

- b. Restrictions on prisoners' ability to receive books and publications, including a prohibition on prisoners receiving books directly from publishers, from various non-profit prisoner-book-donation organizations, and restrictions on assorted publication subscriptions, all of which were previously allowed, *id.* at 6-8;
- c. Increased scrutiny of visitors, i.e., searches, and various restrictions on items visitors can bring with them and on vending items previously available in SCI visiting rooms, and enhanced penalties for visitation-related violations on both the prisoner and the visitor, *id.* at 8-12;
- d. Expanded use of "body scanners" and introduction of "improved ion scanners," Ex. 3 at 2-3;
- e. "Expansion of drone detection software and capabilities" to help "identify and combat the introduction of contraband via drones," *id.* at 2;
- f. "Enhanced commitment reception protocol" to tighten screening of return parole violators and newly arriving prisoners, which the DOC described as "problematic and another way that contraband is introduced into the facilities," *id.* at 2; and

g. A new “drug hotline” through which anyone, including prisoners and people wishing to remain anonymous, “can call to report information related to the introduction of drugs or possession of drugs in a SCI by inmates, visitors, or staff members,” *id.* at 3.

63. The DOC subsequently adopted a new policy that prevents all non-legal mail from entering any SCI. See DC-ADM 803 (Effective date: October 3, 2018), a copy of which is attached hereto as Exhibit 4.

64. Under the new non-legal mail policy, all incoming, non-privileged correspondence must be addressed and sent to the DOC’s contracted central incoming mail processing center in St. Petersburg, Florida, which is operated by a company called Smart Communications. When Smart Communications receives mail addressed to a person incarcerated within the DOC, it will open and electronically scan the mail and then electronically transmit the scanned copy to the SCI where the person is imprisoned. SCI staff at that facility will then print the scanned copy and deliver it.

### **DOC’s New Legal Mail Policy**

65. The same October 3 policy also regulates legal mail (that portion of DC-ADM 803 that relates to legal mail is hereinafter the “New Legal Mail

Policy”). The DOC’s new policy refers to legal mail as “incoming privileged correspondence.” It includes:

- “[m]ail from an inmate’s attorney that is either hand-delivered to the facility by the attorney or delivered through the mail system and identified with a control number issued to the sender by the Department’s Office of Chief Counsel”;
- mail from a court; and
- mail from an elected or appointed federal, state, or local official who has sought and obtained a control number issued by the Department’s Office of Chief Counsel [where the communication] involves matters related to a confidential investigation process or similar concerns.”

DCM-ADM 803 (Exhibit 4), Glossary of Terms, page 4.

66. The DOC is not aware of any instance in which bona fide legal mail has been a source of contraband, including the “unknown substances” that prompted the lockdown.

67. The DOC is aware of some unspecified number of instances where an incarcerated individual or some other person has learned an attorney control number and provided that number to someone else so that regular mail can be disguised as attorney mail.

68. Under the former policy, officers were directed to “black out” or remove the attorney control number before distributing legal mail, but on occasion, the number is not removed or completely blacked out, thus allowing people to learn the number and pass it along to others. The DOC suspects there may be other ways in which attorney control numbers can be learned by others and used to disguise non-legal mail as legal mail.

69. The DOC suspects that this illegitimate or fake legal mail may be another possible source of entry for these drugs or other substances.

70. To account for this possibility, the New Legal Mail Policy institutes a wholesale change to the procedures for processing all incoming legal mail. Now, rather than simply opening the mail in front of the individual to check for contraband, all legal mail is inspected and copied, with the copy given to the recipient and the original stored at the facility.

71. Specifically, the new policy provides that:

- a. “Incoming privileged correspondence will be opened and inspected for contraband in the presence of the inmate to whom it is addressed.
- b. The incoming privileged correspondence will then be photocopied in the presence of the inmate and the photocopies of the contents shall be delivered to the inmate.

- c. Incoming privileged correspondence delivered to an inmate as described above is to be noted on the Legal Mail Log. The inmate must sign the Legal Mail Log for the mail or the fact that the inmate refused to sign shall be noted.
- d. The original incoming privileged correspondence (including the original envelope or packaging) will be sealed in a manila or opaque envelope(s) in the presence of the inmate. The envelope(s) shall be secured with evidence tape.
- e. The envelope(s) will be marked with the inmate's name and number and the sealed envelope(s) will be deposited into a locked/secured receptacle [that is maintained by a vendor]. . .”

Exhibit 4, page 1-12.

72. Under the New Legal Mail Policy, each DOC facility is responsible for procuring the services of a vendor for the confidential destruction of incoming legal mail. The original incoming legal mail will be maintained for 45 days and then destroyed by the vendor unless the DOC receives a timely request by an individual to access or preserve the original legal mail. The opening of incoming privileged mail in the presence of the inmate also will be video-recorded.

Exhibit 4, page 1-12.

73. Concerned about the impact of this new policy on the confidentiality of attorney-client communications and the privileged nature of those communications, Plaintiff organizations sought clarification from the DOC. During one conversation, undersigned counsel was advised by the DOC that the inspection prior to copying would be looking for oil spots, strips of drugs, or other evidence of drugs on any pages of the mailing. During a subsequent conversation, undersigned counsel was advised that there would be no visual inspection other than necessary to remove staples and binding and place the documents into a copier. Therefore, the policy seems to be evolving and changing, further exacerbating the risk of compromising the confidential and privileged nature of these communications.

74. The mere fact that the original legal mail has been opened and is being stored outside the presence of the incarcerated individual eviscerates the assurances of confidentiality that the First Amendment requires. Further, any page-by-page inspection of legal mail would be equivalent to skimming or reading that mail.

75. Plaintiff organizations have been advised by experts in professional ethics that the new policy raises sufficient concerns that they should no longer communicate with their clients by mail under this new policy.

76. The New Legal Mail Policy threatens lawyers' obligation to communicate with their clients in a manner that prevents inadvertent disclosure of confidential client information to unauthorized recipients, a group that obviously includes corrections officers and other DOC staff. Pa. Rules of Prof. Conduct r. 1.6(d).

77. The New Legal Mail Policy also threatens lawyers' duty of communication with their clients. Pa. Rules of Prof'l Conduct r. 1.4(a)(3), 1.4(b). A lawyer cannot meaningfully represent her client, and the client cannot make informed decisions regarding the course of the representation, unless the two are able to communicate freely and openly.

78. The New Legal Mail Policy's interference with attorney-client communications implicates other professional responsibilities, including a lawyer's obligation to "abide by a client's decisions concerning the objectives of representation," Pa. Rules of Prof'l Conduct r. 1.2(a); to provide "competent representation to a client," *id.* r. 1.1; and to "act with reasonable diligence and promptness in representing a client," *id.* r. 1.3.

79. Plaintiff organizations' failure to heed these professional obligations would subject their lawyers to disciplinary proceedings and professional sanctions. Pa. Rules of Prof'l Conduct, pmbl. ¶ 18 ("Failure to comply with an



obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”).

80. Given the significant professional concerns created by the DOC’s New Legal Mail Policy, Plaintiff organizations have ceased sending privileged communications to clients and prospective clients incarcerated within DOC facilities.

81. Since DOC implemented the new policy, Plaintiff organizations have been unable to send meaningful, substantive responses to hundreds of DOC prisoners who have requested legal assistance and advice.

82. The new policy also is adversely affecting Plaintiffs’ ability to represent clients in ongoing litigation. For instance, ACLU-PA and ALC lawyers, who are class counsel for death-sentenced prisoners in *Reid v. Wetzel*, have been unable to discuss defendant DOC’s outstanding settlement proposals with class representatives via mail. Because the named plaintiffs in *Reid* are housed at opposite ends of the state – at SCI-Greene in Waynesburg in southwest Pennsylvania and SCI-Phoenix in Skippack Township, just northeast of Philadelphia – counsel has not had the means to schedule visits with representative plaintiffs.

## **The DOC's New Legal Mail Policy Is an Exaggerated Response that Does Not Address the Problem Sought to Be Solved**

83. There is no valid, rational connection between the risk being addressed (which does not involve legitimate legal mail at all) and the wholesale changes now being implemented.

84. The New Legal Mail Policy effectively prevents Plaintiff organizations and their clients from using the mail to engage in confidential communications.

85. Given the limited access and means by which attorneys and their clients in SCIs can speak by telephone, and the difficulties associated with in-person meetings, communication by mail is essential.

86. Plaintiff organizations do not have the staff and resources necessary to arrange for and attend in-person visits for all such communications. Often, attorneys for Plaintiff organizations must travel hours and incur substantial additional costs for in-person visits, which necessarily limits what these attorneys can do for these and other clients.

87. In addition, SCIs prohibit attorneys from hand-delivering documents to their clients during in-person visits unless the attorney receives special permission from the DOC. Although attorneys may share documents with clients during in-person visits, those visits often take place in public visiting rooms if no

private attorney rooms are available, and such sharing is impractical when an attorney needs a client to review a lengthy document.

88. For clients in higher security settings, the only alternative to mail is to place documents up to a glass for the client to read page-by-page—a procedure that is impractical for documents more than few pages in length.

89. Given the absence of any link between bona fide legal mail and the “unknown substances” that have been introduced into DOC facilities, there is no increased burden or adverse impact on the DOC in allowing people incarcerated in their facilities to continue receiving original incoming legal mail.

90. To the contrary, the DOC’s interest can be better addressed by improving its attorney control number procedure to prevent or minimize the opportunity for fake legal mail.

91. The New Legal Mail Policy is precisely the type of “exaggerated response” of which the U.S. Supreme Court disapproves. With respect to legal mail, the burden on First Amendment rights and the attorney-client privilege is not reasonably related to the DOC’s stated interest or any legitimate penological interest.

92. As a direct and proximate result of Defendants’ New Legal Mail Policy, Plaintiff organizations have been and continue to be harmed. The new policy chills the exercise of the organizations’ and their employees’ First

Amendment rights. It substantially impedes the organizations' ability to zealously and competently represent their clients. For example, PILP has experienced significant delays in executing settlement agreements in four separate cases, been unable to prepare clients for deposition and hearing testimony by providing them with documents to review in advance, postponed filing multiple federal civil rights claims due to the difficulty of reviewing pleadings over the phone or in person, and have been prevented from providing advice to pro se individuals with pressing litigation deadlines.

93. The Plaintiff organizations also have incurred extra costs in both time and money as a result of having to make personal visits with their clients in SCIs in lieu of mail communications.

94. As a direct and proximate cause of Defendants' New Legal Mail Policy, the Plaintiff organizations' clients have been and continue to be harmed. In particular, the policy infringes upon and limits their exercise of their First Amendment rights to communicate confidentially with their attorneys.

95. Unless this Court enjoins, preliminarily and permanently thereafter, Defendants from implementing the new policy, the First Amendment rights of plaintiffs, their employees, and their clients and prospective clients will continue to be abridged.

## COUNT I – VIOLATION OF FIRST AMENDMENT RIGHTS

96. Plaintiffs incorporate by reference paragraphs 1 through 95 of this Complaint as though set forth fully herein.

97. The First Amendment, as incorporated in the Fourteenth, prohibits states from "abridging the freedom of speech." U.S. Const. Amend. I.

98. Plaintiff organizations have a protected First Amendment right to free speech. *See, e.g., Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979); *Kuchka v. Kile*, 634 F. Supp. 502, 511 (M.D. Pa. 1985) (citing *Hirschkop*). Implicit in this right is the right of attorneys employed by Plaintiff organizations to communicate with their clients, including those that are incarcerated. *Thornburgh v. Abbott*, 490 U.S. 401, 407-08 (1989) (those who wish to communicate with prisoners "have a First Amendment interest in access to prisoners"); *Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S. Ct. 1800 (1974) (both incarcerated people and those with whom they correspond have First Amendment rights that can be infringed by unjustified government interference).

99. Further, the attorneys employed by Plaintiff organizations generally have a duty to communicate with their clients and to protect the confidentiality of materials protected by the attorney-client privilege. *See* 204 Pa. Code § 81.4, Pa. Rules of Prof'l Conduct, r. 1.4 (Communication), 1.6 (Confidentiality of Information). The New Legal Mail Policy interferes with their duty to

communicate with their clients, their duty to protect the confidentiality of client communications, and their duty to advocate zealously on behalf of their clients currently incarcerated in DOC facilities.

100. People who are incarcerated “do not forfeit their First Amendment right to use of the mails.” *Bieregu v. Reno*, 59 F.3d 1445, 1452 (3d Cir. 1995).

101. A pattern and practice of opening legal mail outside the presence of the addressee interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the incarcerated individual’s right to freedom of speech. *Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006). Any such practice “deprives the expression of confidentiality and chills the inmates’ protected expression, *regardless of the state's good-faith protestations that it does not, and will not, read the content of the communications.*” *Id.* (emphasis added). “[T]he only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed.” *Bieregu*, 59 F.3d at 1456 (citing *Wolff v. McDonnell*, 418 U.S. 539, 576–77 (1974)).

102. The New Legal Mail Policy is not rationally related to a legitimate penological interest, and is therefore void on its face.

103. Unless injunctive relief is granted, the First Amendment rights of Plaintiff organizations, their employees, their clients and prospective clients, will continue to be infringed upon and chilled, and attorney-client communications will lose their confidential, privileged character.

WHEREFORE, Plaintiffs, on behalf of themselves, their employees, and their current and prospective clients, seek judgment in their favor and against Defendants, and in particular seek:

- A. A declaration that Defendants' actions violate their rights under the First Amendment to the United States Constitution;
- B. An injunction—preliminary and permanent thereafter—enjoining Defendants from copying legal mail and retaining the originals for any amount of time, and disallowing any inspection that would enable officers to skim or read the mail;
- C. Costs, interest and attorney's fees; and
- D. Any other relief deemed just and appropriate.

Respectfully submitted,

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Dated: October 30, 2018

VERIFICATION

I, \_\_[name and position] am authorized to sign this verification on behalf of \_\_\_\_\_, and swear under the penalty of perjury pursuant to 28 U.S.C. 1746 that the information herein is true and correct to the best of my knowledge, information and belief.

\_\_\_\_\_

[name]

Dated: \_\_\_\_\_