IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No._____

AMERICAN CIVIL LIBERTIES UNION OF COLORADO, INC., a Colorado not-for-profit corporation and
TAYLOR PENDERGRASS,

Plaintiffs,

v.

LOU VALLARIO, in his official capacity as Sheriff of Garfield County, Colorado

Defendant.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs seek an emergency temporary restraining order to prohibit the Defendant Garfield County Sheriff from preventing ACLU attorneys from conducting confidential interviews with prisoners in the Garfield County Jail who wish to speak with ACLU attorneys and law student interns working under their supervision.

On June 15, 2006, Sheriff Vallario denied ACLU attorneys the opportunity to conduct confidential interviews with three prisoners who had previously contacted the ACLU. According to the Sheriff, a deputy asked each prisoner "Who is your attorney?" Because the prisoners understandably named their criminal defense attorneys but did not name the ACLU or any of its staff (who have not yet agreed to represent any of the prisoners), the Sheriff refused to permit the ACLU attorneys to visit. Plaintiffs contend

that if the prisoners had been asked if they wanted a confidential visit with an ACLU attorney, the answer surely would have been "yes."

The Sheriff stated that this denial of attorney visits was carried out pursuant to what he characterized as his policy, (hereafter "the challenged policy"), and he announced that he would continue to enforce the challenged policy in the future. He was unable to produce a copy of the policy, however, because he said it was not in writing. He also acknowledged that the challenged policy had not been enforced against ACLU attorneys the previous month when they interviewed several prisoners in the jail's room that is available for confidential face-to-face contact visits with attorneys and other professionals.

The ACLU of Colorado Legal Department is investigating prisoners' requests for legal advice and legal assistance regarding a host of serious complaints about jail practices that violate and threaten to continue violating prisoners' constitutional rights. ACLU staff attorney Taylor Pendergrass is planning to return to Glenwood Springs on Tuesday, June 27, to conduct additional investigation, including additional interviews with prisoners. Without this Court's intervention, however, there is a substantial risk that Mr. Pendergrass will be thwarted once again in his efforts to conduct interviews with willing prisoners in a confidential setting.

The challenged policy in this case violates the rights of the Plaintiffs under the First Amendment and the Equal Protection Clause. It also violates the right of access to the courts –protected by the First Amendment and the Due Process Clause -- of prisoners who are prevented by the challenged policy from speaking with ACLU attorneys and their representatives. As will be shown below, the Plaintiffs have standing in this case to

challenge not only the violation of their own rights, but also to invoke and seek relief on behalf of prisoners whose interests in conducting face-to-face confidential interviews with ACLU attorneys have been thwarted. Without emergency injunctive relief from this Court, the Plaintiffs and the prisoners face an imminent threat that their rights will be violated again as early as June 27, 2006.

FACTS

Plaintiff American Civil Liberties Union Foundation of Colorado, Inc. (hereafter "ACLU") is a not-for-profit corporation incorporated under the laws of Colorado. Its mission is to protect, defend, and extend the civil rights and civil liberties of all people in Colorado through litigation, education, and advocacy.

To carry out its litigation program, the ACLU's Legal Department includes a full-time Legal Director and a full-time staff attorney. It also relies on the assistance of numerous volunteer attorneys who donate their time, as well other volunteers, law students, and interns who work under the supervision of the ACLU Legal Director.

Much of the ACLU of Colorado's work is concerned with the rights of prisoners in Colorado's jails and prisons, and the ACLU has a long history of advocacy and litigation to protect the rights of prisoners. Pendergrass Dec. ¶¶ 5-6. The ACLU regularly investigates allegations of serious violations of prisoners' constitutional rights for the purpose of engaging in legal advocacy and/or litigation on behalf of prisoners. All of the facts giving rise to this motion are described in the Pendergrass Declaration and are incorporated by reference here.

Since the spring of 2006, the ACLU of Colorado Legal Department has been investigating serious allegations of abusive and dangerous violations of prisoners'

constitutional rights in the Garfield County Jail in Glenwood Springs, Colorado. The facts that prompted the ACLU to begin investigating are described in the Declaration of Taylor S. Pendergrass, ¶¶ 7 – 12. The much wider range of serious allegations still under investigation are described in 15 separate bullet points in Paragraph 4 of the Pendergrass Declaration.

To carry out that investigation, members of the ACLU Legal Department staff, including Legal Director Mark Silverstein and Staff Attorney Taylor Pendergrass, have corresponded with current and former prisoners; sought and reviewed documents obtained through the open records laws, and conducted face-to-face interviews with prisoners currently housed at the Garfield County Jail. Pendergrass Dec., ¶¶ 4, 7, 9, 13, 18, 23, 36, 54.

On May 11, Mr. Pendergrass and Mr. Silverstein traveled to the Garfield County Jail and interviewed several prisoners. The ACLU lawyers were permitted to conduct the face-to-face interviews in a confidential setting. They interviewed two prisoners with whom they had corresponded previously. One prisoner arrived at the interview with releases signed by additional prisoners authorizing the ACLU to examine otherwise confidential records. Pendergrass Dec., ¶ 17. During these interviews, ACLU attorneys learned the name of another prisoner who was interested in speaking with ACLU attorneys. Mr. Silverstein and Mr. Pendergrass also conducted an interview with this third prisoner, with whom the ACLU had not corresponded previously. Pendergrass Dec., ¶ 17.

The following day, the ACLU sent a letter requesting copies of reports and jail records regarding five additional prisoners and former prisoners whose releases the

ACLU had obtained. Pendergrass Dec., ¶ 18. The ACLU later supplemented that request after receiving four additional releases from current or former prisoners.

While the requests for documents were pending, Mr. Pendergrass and Mr. Silverstein made plans to review those documents and conduct additional interviews with prisoners at the jail on June 14, 15, and 16. Prior to traveling to the jail on June 14, the ACLU attorneys engaged in extensive communications with the Assistant County Attorney Denise Lynch about the document requests. Pendergrass Dec., ¶¶ 21 – 26.

The ACLU attorneys also engaged in a series of communications with jail officials about visiting with prisoners on June 14-16. The Plaintiffs supplied a list of seven prisoners that would be interviewed and received confirmation that additional prisoners could be added to the list after the ACLU began its review of documents and began interviewing prisoners. Pendergrass Dec., ¶¶ 27 – 33.

On June 14, Mr. Pendergrass and Mr. Silverstein, along with two summer law students working at the ACLU, arrived at the jail. They received a brief tour of the jail, reviewed documents, and interviewed one prisoner late in the day. Pendergrass Dec., ¶¶ 34-37. At the end of the business day on June 14, Mr. Pendergrass provided Jail Commander Scott Dawson with the names of several prisoners that Mr. Pendergrass intended to interview the following day. Pendergrass Dec., ¶ 37.

On the morning of June 15, Commander Dawson told Mr. Pendergrass that he was forbidden to visit with three of the prisoners. Each of these three prisoners had previously supplied a written communication to the ACLU indicating an interest in ACLU legal assistance. Pendergrass Dec., ¶¶ 43-44, 60.

Commander Dawson said that the confidential attorney visits were denied on the basis of a jail policy. Pursuant to that policy, a deputy asked each of the three prisoners "Who is your attorney?" Because none of the prisoners' responses mentioned Mr. Pendergrass or the ACLU, the visit was not permitted. Commander Dawson acknowledged that the prisoners were not told that an ACLU attorney was present and willing to talk with them. Commander Dawson read Mr. Pendergrass the names that the three prisoners supplied as the names of their attorneys. Mr. Pendergrass recognized the names as those of the prisoners' criminal defense attorneys. Pendergrass Dec., ¶¶ 43-44. If the prisoners had been asked if they wanted to speak with an ACLU attorney in a confidential setting, the answer would have been "yes." Pendergrass Dec. ¶ 47.

In a meeting held later on June 15, Sheriff Vallario confirmed that the visits were denied based on the Sheriff's policy. Pendergrass Dec. ¶ 46. ACLU staff members explained to Sheriff Vallario that ACLU attorneys do not represent any of the prisoners at this point in time. Nevertheless, the prisoners have a constitutional right to meet with attorneys to seek legal advice or to discuss the possibility of representation, even when the attorneys have not been retained. ACLU staff members further explained that the three prisoners in question had each communicated with the ACLU in writing indicating an interest in seeking the services of ACLU attorneys. Pendergrass Dec. ¶ 47-48.

Sheriff Vallario refused to make an exception to what he characterized as his "policy." When asked for a copy of the policy, Sheriff Vallario said it did not exist in written form, Pendergrass Dec. ¶ 46, but he made it clear that his policy would be enforced in the future. Pendergrass Dec. ¶¶ 52-53.

After the meeting with the Sheriff, Mr. Pendergrass was allowed to conduct interviews with three prisoners, each of whom had apparently answered the "Who is your attorney?" question to the satisfaction of jail deputies. Each stated that before the ACLU's June visit, they had never been asked such a question as a prerequisite to an attorney visit. Pendergrass Dec. ¶¶ 54-56. In addition, Mr. Pendergrass has spoken with two criminal defense attorneys who have practiced in Glenwood Springs, one for five years and the other for ten years. Neither has ever heard of the policy that the Sheriff relied on to bar Mr. Pendergrass's visit. Indeed, one attorney said that he has been retained by friends or family members and has succeeded in meeting with the prisoner in the jail even though the prisoner did not have any prior knowledge of the attorney's name or his intention to visit. Pendergrass Dec., ¶ 58.

There is a substantial risk that even prisoners who know in advance that ACLU lawyers are coming and who wish to meet with the attorneys will nevertheless fail to supply the "magic words" in answer to the deputy's question "Who is your attorney?" Pendergrass Dec. ¶ 56.

For example, one jail prisoner with whom ACLU attorneys have corresponded extensively received a letter advising him that ACLU attorneys would visit with him on June 14, 15, or 16. When ACLU attorneys met with this prisoner, he confirmed that he had been asked "Who is your attorney?" He said that he had never been asked that question on any previous occasion of an attorney visit. Despite this prisoner's knowledge that ACLU attorneys were coming to visit him, this prisoner responded to the "Who is your attorney?" question by providing only the name of his criminal defense attorney. It was only because a more savvy prisoner yelled out that he should also "say

the ACLU" that this prisoner learned of the "magic words" the deputies were requiring before allowing a prisoner to visit with an ACLU attorney. Because this prisoner then said the "magic words," the ACLU attorneys were permitted to interview him. Pendergrass Dec. ¶ 55.

Similarly, ACLU attorneys were permitted to interview another prisoner who was brought to the same section of the jail and learned from another prisoner about the "magic words." The three prisoners whom Mr. Pendergrass could not visit, however, were housed in a different section of the jail. Pendergrass Dec. ¶ 54.

Mr. Pendergrass intends to return to the jail for additional interviews on Tuesday, June 27, and additional members of the ACLU Legal Department staff intend to travel to the Garfield County Jail again in the near future to conduct additional attorney visits with prisoners. Pendergrass Dec. ¶ 65.

Accordingly, it is nearly certain that the challenged policy will once again infringe and violate the rights of the Plaintiffs and the rights of the prisoners who are interested in visiting with them but do not supply a satisfactory answer to the deputy who asks "Who is your attorney?" Pendergrass Dec. ¶ 66.

I. THE PLAINTIFFS HAVE STANDING TO INVOKE THE RIGHTS OF PRISONERS WHO WISH TO COMMUNICATE WITH ACLU ATTORNEYS IN FACE-TO-FACE INTEREVIEWS IN A CONFIDENTIAL SETTING

This case is an exception to the general rule that litigants are ordinarily permitted to assert only their own legal rights. The ordinary rule prohibits what is called *jus tertii* or third-party standing. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties").

In certain cases, however, courts permit litigants to assert and seek relief on the basis of the rights of parties who are not before the court. *See, e.g., U.S. Dept. of Labor v. Triplett*, 494 U.S. 715, 720-21 (1990) (holding that attorney has standing to assert clients' due process right to legal representation); *Caplin & Drysdale v. United States*, 491 U.S. 617, 623 n.3 (1989) (holding that attorney had third-party standing to challenge government's forfeiture of client's assets); *Craig v. Boren*, 429 U.S. 190, 194 (1976) (holding that bartender had standing to challenge, on behalf of his patrons, gender-discriminatory laws that regulate sale of alcohol); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (holding that physicians had standing to litigate their patients' right to receive medicaid benefits for abortions). This is one of those cases.

As Justice Scalia explained in *Triplett*: "When . . . enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist." *Triplett*, 494 U.S. at 720. In this case, the challenged policy has prevented the Plaintiffs from conducting a confidential attorney-client interview that is part and parcel of the (contractual) attorney-client relationship that the prisoners have a legal entitlement to seek.

Courts have established a two-part test for evaluating whether a litigant may assert and rely on the rights of third parties. First, the party before the court must demonstrate that he has personally suffered some concrete injury-in-fact that is "adequate to satisfy Article III's case-or-controversy requirement." *Caplin & Drysdale*, 491 U.S. at 624 n.3. Second, the courts consider whether "prudential considerations which we have

identified in our prior cases point to permitting the litigant to advance the claim." *Id.* In this case, both prongs of the test are easily met.

A. Both the Plaintiffs have suffered the requisite injury in fact and are at risk of suffering the same injury if the challenged policy is not enjoined.

The injury-in-fact requirement is easily satisfied here. Indeed, the denial of visits in a confidential setting adversely impacted and denied the rights of the attorneys as well as the prisoners. Mr. Pendergrass was denied the opportunity to conduct any interview with three specific prisoners who had either written to the ACLU requesting legal assistance or had signed one of the ACLU's release forms authorizing ACLU legal staff to review otherwise confidential documents. *See* Pendergrass Dec. ¶¶ 43, 53, 60. A face-to-face interview to discuss legal issues and the possibility of representation is particularly important when the potential clients are prisoners. As the Supreme Court has noted, a disproportionately large percentage of the prisoner population is illiterate or functionally illiterate, *Johnson v. Avery*, 393 U.S. 483, 487 (1969), and reliance solely on written questions and answers as a basis for representation is often wholly insufficient. As far as the ACLU itself is concerned, the challenged policy has prevented the organization's employee from fully performing his job duties, which include face-to-face interviewing of the three prisoners in question. The ACLU expects to continue receiving additional letters from prisoners in the Garfield County Jail, and the continued enforcement of the challenged policy clearly poses a substantial risk of repeated and continuing injury-in-fact.

B. The prudential considerations are also satisfied here.

In evaluating the prudential factors, the Supreme Court has considered three factors: "the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." *Caplin & Drysdale*, 491 U.S. at 624 n.3.

The first factor is clearly satisfied here, as it was in *Caplin & Drysdale*. As the Court explained, "The attorney-client relationship . . . is one of special consequence." *Id.* (comparing the attorney-client relationship to the doctor patient relationship held sufficient for third-party standing in *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972)). Lower courts have agreed. *See, e.g.*, *Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1281 (D.C. Cir. 1994) (citing attorney-client relationship as example of a recognized special relationship between litigants and third parties); *Amato v. Wilenetz*, 952 F.2d 742, 751 (3rd Cir. 1991) (interpreting *Caplin & Drysdale* and *Triplett* to stand for the proposition that the lawyer-client relationship is a relationship of "special consequence" in considering third-party standing). The critical rationale driving the inquiry into the relationship between the litigant and the absent third party whether there is a "congruence of interests" between the plaintiff and the third party. *Powers*, 499 U.S. at 414 (stating that white defendant in criminal case had standing to raise the equal protection rights of African-American jurors allegedly excluded from jury service because of race because of congruence of interests in eliminating racial discrimination from the courtroom). The requisite congruence of interests is clearly present here. The ACLU attorneys wish to meet with prisoners who have indicated an interest in meeting with them. The prisoners may be interested in contracting with the Plaintiffs to provide

legal representation, and the Plaintiffs might be interested in providing that representation. *See Triplett*, 494 U.S. at 720 (holding that third-party standing exists when enforcing a restriction against the litigant prevents the third party from entering into a contractual relationship with the litigant).

The third factor also is satisfied easily, as it was in *Caplin & Drysdale*. In that case, the Court explained that continued enforcement of the challenged statute would "materially impair" the ability of persons in the third-party's position to exercise their constitutional rights. *Caplin & Drysdale*, 491 U.S. at 624 n.3. Similarly, in this case, the continued enforcement of the challenged policy will impair the ability of prisoners in the Garfield County Jail to exercise their Due Process and First Amendment right to seek the assistance of attorneys they choose to communicate with. "The right of access to counsel is not limited to those already represented by an attorney of record, but extends equally to prisoners seeking any form of legal advice or assistance." *Ruiz v. Estelle*, 503 F.Supp. 1265, 1372 (S.D. Tex. 1980) (citing *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970)).

In *Caplin & Drysdale*, the Court permitted third-party standing after concluding that two of the three factors in the prudential analysis favored the plaintiff. 491 U.S. at 624 n.3. In this case, the remaining factor—the ability of the third party to advance his own rights—also favors permitting the Plaintiffs in this case to assert the prisoners' right of access to the courts. While indigent pretrial detainees enjoy the right to appointed counsel to defend against the state's criminal charges, they must either retain their own attorneys to challenge prison and jail conditions or attempt the onerous and nearly-impossible task of challenging them *pro se*. The Third Circuit recognized the difficulty prisoners face in litigating their own claims when it granted third-party standing to an

inmate law clerk who challenged a prison rule that prevented him from assisting other prisoners in preparing their legal materials. *See Rhodes v. Robinson*, 612 F.2d 766, 769 (3rd Cir. 1979) (explaining "that many prisoners are unable to prepare legal materials and file suits without assistance"). In this case, prisoners not yet retained by ACLU attorneys have requested legal assistance or otherwise asked the ACLU to investigate on their behalf. They need the assistance of counsel and cannot successfully contest, on their own, the Sheriff's policy that prevents them from exercising their constitutional right to meet with attorneys who are willing to meet with them. Thus, the remaining factor also favors allowing third-party standing in this case.

II. THE LEGAL STANDARD FOR GRANTING INTERIM INJUNCTIVE RELIEF

To obtain interim injunctive relief, the moving party must demonstrate "(1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; (4) the injunction is not adverse to the public interest." *Kikumura v. Hurley*, 242 F.3d 950, 955 (10th Cir. 2001).

When a plaintiff demonstrates the last three factors listed above, "then the first factor becomes less strict – i.e., instead of showing a substantial likelihood of success, the party need only prove that there are 'questions going to the merits . . . so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.'" *Prairie Band of Potowatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001) (quoting *Fed. Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir. 1999)).

As Plaintiffs will demonstrate, they and the prisoners who wish to communicate with them are suffering irreparable harm and will continue to do so without this Court's intervention; the balance of harms weighs in Plaintiffs' favor; and temporary injunctive relief is consistent with the public interest. Accordingly, Plaintiffs' burden in demonstrating likelihood of success is reduced. In this case, however, Plaintiffs do not need to avail themselves of that reduced burden. As Plaintiffs will demonstrate below, they clearly have more than a substantial likelihood of prevailing on the merits.[1]

III. PLAINTIFF IS ENTITLED TO INTERIM INJUNCTIVE RELIEF

A. Plaintiffs Are Substantially Likely To Prevail On Their Claim That the Challenged Policy Unjustifiably Infringes On the Due Process and First Amendment Rights of Prisoners Who Wish to Speak With ACLU Legal Staff

The Supreme Court has long recognized that prisoners enjoy a constitutional right of access to the courts that must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). As the Supreme Court has explained: [I]nmates must have a reasonable opportunity to seek and receive the assistance of attorneys. Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974). Similarly, the Tenth Circuit has explained that

[1] The requested interim relief does not fall into one of the Tenth Circuit's three "disfavored" categories. *See O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004) (en banc) (per curiam), aff'd 126 S. Ct. 1211 (2006). First, it would restore, not alter the status quo. As Judge Seymour explained in Part II of her opinion in *O Centro*, which was joined by a majority of the en banc panel, the status quo is the "last peaceable uncontested status existing between the parties before the dispute developed." *O Centro*, 389 F.3d at 1006 (quoting 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948 n.14 (2d ed. 1995)). Second, the requested injunction is not mandatory; it would prohibit the Defendant from continuing to enforce the challenged policy against the ACLU, its attorneys, and person working under their supervision. Finally, the temporary injunction would not afford the Plaintiffs all the relief they could obtain after a trial. If the Plaintiffs lose this case, the Sheriff can enforce the challenged policy against the Plaintiffs. Finally, if the requested injunction were disfavored, and it is not, Plaintiffs have nevertheless met the Tenth Circuit's requirement of a "strong showing" that they are likely to succeed on the merits and that the balance of harms favors granting the requested relief. *See O Centro*, 389 F.3d at 975-76.

restrictions on access "will not be upheld if they unnecessarily abridge the defendant's meaningful access to his attorney and the courts. The opportunity to communicate privately with an attorney is an important part of that meaningful access." *Mann v. Reynolds*, 46 F.3d 1055, 1061 (10th Cir. 1995), quoting *Ching v. Lewis*, 895 F.2d 608, 609 (9th Cir. 1990). "The right of access to counsel is not limited to those already represented by an attorney of record, but extends equally to prisoners seeking any form of legal advice or assistance." *Ruiz v. Estelle*, 503 F. Supp. 1265, 1372 (S.D. Tex. 1980) (citing *Nolan v. Scafati*, 430 F.2d 548 (1st Cir. 1970)). As the Tenth Circuit has explained, "First Amendment rights of association and free speech extend to the right to retain and consult with an attorney." *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) (explaining that "[t]he right to retain and consult with an attorney . . . implicates not only the Sixth Amendment but also clearly established First Amendment rights of association and free speech").

The challenged policy in this case "unjustifiably obstruct[s]" prisoners' right of access, in violation of both the Due Process Clause and the First Amendment. Although prisoners have the right to consult with attorneys whom they have not yet retained, as is the case here, the Sheriff's policy denies confidential interviews to prisoners who want to speak with ACLU attorneys but who do not name an ACLU staff person when asked "Who is your attorney?" The potential conflict with the Sheriff's policy cannot be reliably cured simply by informing prisoners that they should tell the deputies that the ACLU represents them. At this stage of the investigation, ACLU attorneys do not yet represent the prisoners, except for the issues raised in this particular lawsuit regarding access to attorneys.

Moreover, it is entirely too easy for a prisoner to slip and fail to say the "magic words" that will satisfy the challenged policy. As Mr. Pendergrass related in his declaration, the ACLU has conducted extensive correspondence with Mr. Vandehey, and Mr. Pendergrass wrote Mr. Vandehey in advance to advise him of the impending visit on June 14-16. Nevertheless, Mr. Vandehey failed to provide the magic words when a deputy asked him "Who is your attorney." The opportunity for a legal visit was saved only because Mr. Vandehey was housed at the time in the same pod as Mr. Langeley, who caught on quickly and yelled to Mr. Vandehey to also mention the ACLU. *See* Pendergrass Dec. ¶ 55. That fortuity saved Mr. Vandehey's legal visit, but he or other prisoners could easily forget to say the magic words in the future. Similarly, if prisoner Sam Lincoln had been housed in a different section of the Garfield County Jail, he might not have known to say the magic words, and he would have lost the opportunity to meet with Mr. Pendergrass. Moreover, when ACLU attorneys learn during a visit that additional prisoners would like to meet with ACLU lawyers, there is no way the ACLU lawyers can advise these prisoners in advance that their legal visit depends on saying the magic words when asked "Who is your attorney."[2]

The flaws in the Sheriff's policy are illustrated by the situation described in an article that appeared on the front page of the Glenwood Springs Post-Independent on June 16, 2006, while ACLU staffers were still in town. *See* Pendergrass Dec. ¶ 49; Exhibit G. The article discusses the case of a former advertising executive held on drug charges in the Garfield County Jail as a pretrial detainee. His bond is $3.2 million.

[2] Indeed, Sheriff Vallerio refused the ACLU's request to hand-deliver a letter explaining the Sheriff's new policy regarding attorney visits to the three prisoners whose visit with Mr. Pendergrass were denied. Such a hand-delivered letter was the only means of advising the prisoners of the "magic words" in time, as a letter sent by mail would not have arrived until after the ACLU attorneys returned to Denver on June 16. *See* Pendergrass Dec. ¶ 51.

Because the prisoner owns a $1 million home in Carbondale, Colorado, the article says, he is not eligible for the services of the public defender. *See* Bobby Magill, *Court Refuses to Lower $3.2 Million Bond*, Glenwood Springs Post Independent, June 16, 2006, at A1. This prisoner therefore has no lawyer. If he were to communicate with private criminal defense attorneys in an effort to secure representation, any such attorney would surely seek a face-to-face interview before deciding whether to take on the case. But under the Sheriff's policy challenged in this case, the attorney visit would be denied unless the prisoner was savvy enough to respond falsely to the question "Who is your attorney" by providing the name of an attorney who wants to visit but has not agreed to take on the representation.

In some cases, of course, a prisoner might have no idea of the name of an attorney who seeks a confidential visit to consider representation. For example, a criminal defense attorney might be contacted by family members and might initiate the visit without first contacting the prisoner. Indeed, Mr. Pendergrass spoke with a criminal defense attorney who practices in Glenwood Springs who has visited prisoners in precisely that situation. He reports that he has never been thwarted by the policy challenged in this case; indeed, he said that until Mr. Pendergrass contacted him, he had never heard of it. *See* Pendergrass Dec. ¶ 58.

With regard to pretrial detainees, the appropriate legal test is whether the Sheriff can demonstrate that the challenged restriction is reasonably related to a legitimate government purpose. *Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1106 (10th Cir. 2005), citing *Bell v. Wolfish*, 441 U.S. 520, 538-40 (1979). For convicted prisoners, courts must apply the test of *Turner v. Safley*, 482 U.S. 78 (1987). *See Mann v. Reynolds*,

46 F.3d 1055, 1060-61 (10th Cir. 1995) (applying *Turner*, and concluding that prison officials had failed to justify a rule forbidding death row and maximum-security prisoners to conduct face-to-face contact visits with attorneys). "[*A*]*ny* burden placed upon a prisoner's constitutional rights requires a federal court to take the next step to determine whether it is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Mann*, 46 F.3d at 1061 (quoting *Turner*, 482 U.S. at 87). In answering that question, courts consider four factors:

> (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) what the impact accommodation of the constitutional right will have on guards, on other inmates, or on the allocation of prison resources; and (4) whether the regulation or policy is an exaggerated response to prison concerns.

Id. at 1060 (citing *Turner*, 482 U.S. at 90-91).

Whether the prisoners are pretrial detainees or already convicted, the Sheriff cannot meet his burden of satisfying the applicable legal standard. Indeed, the Sheriff has not offered any legitimate government purpose for the challenged policy that forbids confidential interviews with prisoners who fail to answer the question "who is your attorney" by identifying the ACLU or its employees. *See* Pendergrass Dec. ¶¶ 47-52. Even if the Sheriff were able to articulate an arguably legitimate government purpose, he will not be able to demonstrate the necessary reasonable relationship.

Indeed, this case is similar to *Mann*, where the district court found that the asserted justifications to be unfounded "because the policy is randomly and arbitrarily applied." *Mann*, 46 F.3d at 1061. Indeed, the Tenth Circuit questioned "whether any policy exists in the first instance." *Id.* The same is true here. The challenged policy was applied to ACLU attorneys for the first time on June 15 and 16 but not during the ACLU

visit on May 11. Three prisoners reported that they had never before been asked "who is your attorney" as a prerequisite to participating in an attorney interview. Two criminal defense attorneys contacted by Mr. Pendergrass had never heard of such a policy. Finally, the Sheriff cannot produce a written copy of the challenged policy. As in *Mann*, the government cannot meet its burden of justifying an arbitrarily-applied and arguably non-existent policy that thwarts prisoners' right of access to attorneys. Plaintiffs are substantially likely to prevail on the merits.

B. Plaintiffs Are Substantially Likely to Prevail On The Merits of Their Claim That The Challenged Policy Violates Their First Amendment Rights

The Supreme Court explained long ago that the First Amendment protects the activities of nonprofit public interest organizations that engage in litigation and advocacy in order to advance their views on social and political issues. *NAACP v. Button*, 371 U.S. 415, 430 (1963). The Court reaffirmed its position several years later in *In re Primus*, 436 U.S. 412 (1978), when an ACLU attorney challenged, as a violation of the First Amendment, a disciplinary sanction imposed by a state bar panel for an alleged violation of a state rule against soliciting clients. In holding for the ACLU, the Court explained that the ACLU and its local affiliates, like the NAACP chapters in *Button*, "'[engage] in extensive educational and lobbying activities' and 'also [devote]much of [their] funds and energies to an extensive program of assisting certain kinds of litigation on behalf of [their] declared purposes.'" *Id.* at 427, quoting *Button*, 317 U.S. at 419-20 (brackets in original). The Court further explained that the ACLU "has engaged in the defense of unpopular causes and unpopular defendants and has represented individuals in litigation that has defined the scope of constitutional protection in areas such as political dissent,

juvenile rights, prisoners' rights, military law, amnesty, and privacy." *Id.* at 428. For both the ACLU and the NAACP, the Court said, litigation is not simply a technique for resolving private disputes but instead is a form of "political expression" and "political association" that is protected by the First Amendment. *Id.* (quoting *Button*, 371 U.S. at 429, 431). As the Court further explained:

> The ACLU engages in litigation as a vehicle for effective political expression and association, as well as a means of communicating useful information to the public. . . . [T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. . . . The First and Fourteenth Amendments require a measure of protection for "advocating lawful means of vindicating legal rights," *Button*, 371 U.S. at 437, including "[advising] another that his legal rights have been infringed and [referring] him to a particular attorney or group of attorneys . . . for assistance," *Id.*, at 434.

Primus, 436 U.S. at 431-32. Thus, the First Amendment protects the efforts of ACLU attorneys to conduct interviews with willing prisoners to discuss their legal rights and discuss the prospect of litigation. This First Amendment protection applies even to initiation of conversations with prisoners who have not specifically requested legal assistance from the ACLU.

Numerous courts have recognized that the First Amendment protects the efforts of individuals to communicate with attorneys about legal advice, legal rights, and discussion of possible representation. *E.g., Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001) (holding that "First Amendment rights of association and free speech extend to the right to retain and consult with an attorney"). Similarly, the First Amendment protects the right of attorneys to initiate and participate in those dialogues, just as, in a more general sense, "[t]he First Amendment protects the right of every citizen to 'reach the minds of willing listeners and to do so there must be opportunity to win their attention.'"

Heffron v. Int'l Soc'y. for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949)).

The evidence demonstrates that it was not until the ACLU began investigating prisoners' complaints about jail practices that the Defendant invented a new policy forbidding attorney visits unless the prisoner answers the question "who is your attorney" to the deputies' satisfaction. The Sheriff was unable to provide a copy of the policy because it is not committed to writing. The policy was not enforced when ACLU attorneys conducted several interviews with jail prisoners in May 2006. Moreover, the three prisoners that Mr. Pendergrass was permitted to interview in June all stated that they had never before been asked "who is your attorney" before being called out to an attorney visit. In *Sturm v. Clark*, 835 F.2d 1009 (3rd Cir. 1987), an attorney involved in litigation on behalf of prisoners sued to challenge new restrictions on attorney visits with prisoners that the prison applied only to her. The Court held that the attorney stated a claim for content discrimination that violated her First Amendment rights. *Id.* at 1015.

Plaintiffs have established that their efforts to conduct interviews with prisoners are activities that are protected by the First Amendment. They have also established that the challenged policy infringes on those constitutionally-protected activities, and, indeed, has already thwarted Plaintiffs' plan to conduct interviews on June 15 and June 16.

Once a plaintiff establishes that his activities are protected by the First Amendment, the government bears the burden of proving that the regulations are justified by some overriding government interest. *ACORN v. Municipality of Golden*, 744 F.2d 739, 746 (10th Cir. 1984) (explaining that when "a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality");

Greater New Orleans Broad. Assn. v. United States, 527 U.S. 173, 183 (1999) ("The Government bears the burden of identifying a substantial interest and justifying the challenged restriction").

Plaintiffs recognize that their First Amendment rights to communicate with prisoners can be limited by the necessities of their detention in the Garfield County Jail. Thus, the infringement on Plaintiffs' First Amendment rights must be evaluated under the same legal standards identified in subsection A, above. With regard to Plaintiffs' efforts to visit with pretrial detainees, the Sheriff must demonstrate that the challenged restrictions on visits are reasonably related to a legitimate government purpose. *Peoples v. CCA Detention Centers*, 422 F.3d 1090, 1106 (10th Cir. 2005), citing *Bell v. Wolfish*, 441 U.S. 520, 538-40 (1979). For convicted prisoners, courts must determine whether the challenged policy is "'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Mann*, 46 F.3d at 1061 (quoting *Turner*, 482 U.S. at 87). For the same reasons discussed in Section A, the Sheriff will be unable to demonstrate that the challenged policy meets either legal standard.

C. Plaintiffs Are Substantially Likely to Prevail On the Merits of Their Claim That the Challenged Policy Violates Their Right to Equal Protection of the Law

In *Sturm v. Clark*, 835 F.2d 1009 (3rd Cir. 1987), an attorney who represents prisoners filed suit to challenge a new regulation that imposed restrictions on her attorney visits. She alleged that the regulation was applied only to her, and the Third Circuit held that she properly stated a claim under the Equal Protection Clause:

> To constitutionally apply the directives to Sturm alone, Allenwood must demonstrate that her actions necessitated the application of its security interest to her. We have no doubt that the directives would rationally advance defendants' interest, if in fact Sturm threatened it. Absent such a demonstration, the directives are arbitrary, and correspondingly fail the "rational relation" test. Accordingly, in the present posture of the case, we must hold that it was error to dismiss plaintiff's equal protection claim.

Id. at 1017. Although the Sheriff stated that the challenged policy is his "policy," the evidence indicates that it was not developed or imposed until the ACLU attorneys were conducting interviews on June 15 and 16. Prisoners who have spent time in the Garfield County Jail told Mr. Pendergrass that they had never before been asked ""Who is your attorney" as a prerequisite to a confidential interview with an attorney. A public defender with five years' experience practicing in Garfield County told Mr. Pendergrass she had never heard of such a policy. The Sheriff was unable to provide a written copy of the policy.

The Supreme Court has "recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The purpose of the Fourteenth Amendment, the Court stated, "is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination." *Id.* (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)). The "policy" that the Sheriff stated and relied upon in denying access to ACLU attorneys is "intentional and arbitrary discrimination." Accordingly, the challenged policy violates the Plaintiffs' rights under the Equal Protection Clause as well as the First Amendment.

D. Plaintiffs and the Prisoners With Whom They Wish to Communicate Are Suffering Irreparable Injury and Will Continue to Suffer Irreparable Injury Without This Court's Intervention

"A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citation omitted). In this case, compensatory damages for deprivation of the confidential attorney interviews in this case would be neither adequate nor ascertainable.

In a statement that applies to prisoners as well as free persons, the Tenth Circuit has explained that the "First Amendment rights of association and free speech extend to the right to retain and consult with an attorney." *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001); *Deloach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990) ("The right to retain and consult an attorney implicates . . . clearly established First Amendment rights of association and free speech"). Similarly, the First Amendment protects the right of ACLU attorneys to initiate confidential conversations with prisoners who wish to participate in them. *In re Primus*, 436 U.S. 412, 431-32 (1978); *accord NAACP v. Button*, 371 U.S. 415, 430-31 (1963).

The loss of constitutional rights is itself irreparable injury that merits equitable relief: "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Howard v. United States*, 864 F. Supp. 1019, 1028 (D. Colo. 1994) (quoting 11 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2948 (1973)). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Accordingly, when government

action threatens First Amendment rights, as in this case, there is a presumption of sufficient irreparable injury to warrant a preliminary injunction. *Cmty. Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981).

E. The Threatened Injury To The Plaintiffs Outweighs Whatever Injury The Sheriff Will Suffer If The Injunctive Relief Is Granted

In this case, the balance of harms clearly favors the Plaintiffs. As explained in the previous subsection, the Plaintiffs are enduring irreparable injury. The challenged policy prevents Mr. Pendergrass from conducting confidential interviews with willing participants, in violation of his rights under the First Amendment and the Equal Protection Clause. The ACLU and Mr. Pendergrass are thereby impaired in their ability to investigate allegations about jail practices that may involve serious violations of prisoners' constitutional rights. The prisoners are also injured by the Sheriff's violation of their Due Process and First Amendment right to seek the assistance of attorneys. The harm to the Plaintiffs and the prisoners clearly outweighs whatever arguable harm the Sheriff would suffer if the requested temporary relief were granted. Indeed, the Sheriff has not explained how the operation of the Sheriff's Department would be impaired by allowing constitutionally-required confidential visits between attorneys and prisoners who want to speak with them.

F. The Requested Injunctive Relief Is Not Adverse to the Public Interest

Injunctions blocking regulations that would otherwise interfere with First Amendment rights are consistent with the public interest. *E.g., ACLU v. Johnson*, 194 F.3d at 1163; *Elam Constr. v. Reg. Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir.1997). The requested injunction in this case furthers the public interest. "[A]s far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights

serves everyone's best interest." *Local Org. Comm., Denver Chap., Million Man March v. Cook*, 922 F. Supp. 1494, 1501 (D. Colo. 1996). Indeed, an injunction that orders government officials to obey the law furthers the public interest. *See Washington v. Reno*, 35 F.2d 1093, 1103 (6th Cir. 1994) (court explained that injunction furthered the public interest in having government officials follow federal law).

CONCLUSION

For the foregoing reasons, the Plaintiffs ask this Court to enter an immediate temporary restraining order prohibiting the Sheriff from enforcing the policy that is challenged in this case.

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Respectfully submitted,

s/Mark Silverstein
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