

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF ALABAMA
 JASPER DIVISION

AMERICAN CIVIL LIBERTIES)	
UNION FOUNDATION OF)	
ALABAMA and ALLISON NEAL,)	
)	
Plaintiffs)	
)	
v.)	CASE NO. 6:11-CV-00913-PWG
)	
RODNEY INGLE, in his official)	
capacity as Sheriff of Fayette County,)	
Alabama,)	
)	
Defendant.)	

**PLAINTIFFS’ BRIEF IN SUPPORT OF MOTION FOR TEMPORARY
 RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

Pursuant to Federal Rule of Civil Procedure 65, Plaintiffs American Civil Liberties Union Foundation of Alabama, Inc. and Allison Neal respectfully submit the following brief in support of their motion for a temporary restraining order and/or preliminary injunction.

PRELIMINARY STATEMENT

The ACLU of Alabama has been investigating allegations of serious violations of inmates’ constitutional rights at county jails across the state of Alabama. As part of this investigation, between July 2010 and January 2011, the ACLU of Alabama’s legal staff attempted on multiple occasions to meet with two inmates at the Fayette County Jail to discuss in detail conditions at the jail. Sheriff Ingle has refused to

respond to correspondence from the ACLU of Alabama requesting access to the jail and clarification of the legal visitation policy. The ACLU of Alabama's recent interaction with the Fayette County Jail shows that it is the policy of Sheriff Ingle to keep ACLU of Alabama attorneys from meeting with inmates.

The challenged policy violates the First Amendment rights of the Plaintiffs. Without this Court's intervention, there is a substantial risk that the ACLU of Alabama will never be allowed access to inmates at the Fayette County Jail. Consequently, the ACLU of Alabama and its attorney, Allison Neal, will be unconstitutionally restrained from carrying out its mission, and, as a result, abuses and constitutional violations occurring at the Fayette County Jail will be withheld from the public eye.

LEGAL STANDARD FOR PRELIMINARY INJUNCTION

This Court may grant a motion for a preliminary injunction upon a consideration of the following factors: "(1) whether there is a substantial likelihood that the party applying for preliminary relief will succeed later on the merits; (2) whether the applicant will suffer an irreparable injury absent preliminary relief; (3) whether the harm that the applicant will likely suffer outweighs any harm that its opponent will suffer as a result of the injunction; and (4) whether preliminary relief would disserve the public interest." *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir.

2010) (*citing Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1262-63 (11th Cir. 2004)). The moving party has the burden of establishing these four prerequisites. *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000).

STATEMENT OF FACTS

Plaintiff ACLU of Alabama is a not-for-profit organization incorporated under the laws of Alabama. Its mission is to protect, defend, and extend the civil rights and civil liberties of all people in Alabama through litigation, legislative advocacy, and public education. To carry out its litigation work, the ACLU of Alabama's legal staff includes a full-time Legal Director and a full-time Law Fellow. It also relies on the assistance of cooperating and volunteer attorneys and the assistance of law students and interns who work under the supervision of the ACLU Legal Director.

Each year, the ACLU of Alabama receives numerous legal requests from inmates at city and county jails and state and federal correctional facilities. Currently, the ACLU of Alabama is investigating serious allegations of violations of inmates' constitutional rights at county jails across the state of Alabama. The ACLU of Alabama legal staff, including Legal Director Allison Neal and Law Fellow Jared Shepherd, have been gathering information through correspondence with inmates and former inmates and conducting face-to-face interviews in county jails.

During this comprehensive effort to understand the extent of the constitutional

violations occurring in county jails, the ACLU of Alabama identified the Fayette County Jail as a facility that produced repeated allegations of abuses from both current and former inmates. Consequently, the ACLU of Alabama possesses a strong interest in discussing the present situation with current inmates who have written the organization requesting assistance.

The actions of Ingle, however, have made attending to the mission of the organization and providing legal services impossible. Sheriff Ingle repeatedly denied requests by the ACLU of Alabama to schedule visits with inmates who have written the organization to request legal consultations and assistance.

Felix Robinson, an inmate at the Fayette County Jail, contacted the ACLU of Alabama by a letter dated May 28, 2010. The inmate requested that staff from the ACLU of Alabama visit with him to discuss conditions at the Fayette County Jail.

On July 21, 2010, Jared Shepherd, Law Fellow at the ACLU of Alabama, called the Fayette County Jail to schedule a visit with this inmate. The female staff member requested Shepherd's name and the inmate he wished to visit. The staff member stated that Shepherd would not be allowed a visit because he was not on Robinson's visitation list. Shepherd asked if lawyers had to be on the regular inmate visitation list; the staff member replied that they did not. The staff member asked Shepherd if he was the inmate's lawyer. Shepherd replied that the inmate had approached his

organization, the ACLU of Alabama, about legal assistance. Shepherd noted that the inmate was, therefore, a prospective client of the ACLU of Alabama.

Shepherd asked if other lawyers were required to provide some proof that they were an inmate's attorney of record. The staff member stated that this was not the Jail's policy because she knew all the attorneys. The staff member reiterated that he would not be allowed a visit with the inmate in question.

On July 21, 2010, Shepherd sent Sheriff Rodney Ingle a letter, detailing the problem of scheduling a visit with Robinson. The letter requested that Ingle allow a representative from the ACLU of Alabama to meet with the inmate. Shepherd requested a response by August 2, 2010. Ingle did not respond to the letter.

On or around August 10, 2010, Allison Neal, Legal Director for the ACLU of Alabama, called and spoke with Officer Matt McKay. Neal, once again, requested a visit with Robinson. Officer McKay refused to schedule a visit, stating that if inmates wanted to see an attorney other than their criminal defense attorney they would have to do it on their own time.

On November 24, 2010, the ACLU of Alabama received a letter from Patsy Sullivan. Patsy Sullivan wrote that a Fayette County Jail inmate, James Marion Tidwell, had expressed to her many times concerns about the conditions in the jail. Sullivan noted that Tidwell twice attempted to mail letters to the ACLU of Alabama,

but they never made it out of the jail.

Jared Shepherd, Law Fellow, called the Fayette County Jail on Monday, November 29, 2010, to determine whether James Marion Tidwell was still housed at that facility. Officer McKay confirmed that Tidwell was still at the facility. Allison Neal subsequently faxed a letter to Officer McKay and Sheriff Ingle stating that she would be visiting an inmate at the Jail on Wednesday, December 1, 2010, at 11:00 a.m. Neal requested that she be notified by Tuesday, November 30, 2010, if there was a scheduling issue.

On December 1, 2010, Neal and Shepherd traveled the three hours to Fayette, Alabama to meet with James Marion Tidwell. Upon arrival, the officer at the front desk informed her that Tidwell had been transferred to Kilby Correctional Facility on Tuesday afternoon.

On December 3, 2010, Shepherd spoke with Daphne Robinson, the wife of Felix Robinson. Ms. Robinson informed Shepherd that Robinson was still an inmate at the Fayette County Jail. She expressed that Robinson would still like to speak with a representative from the ACLU of Alabama.

Finally, on December 8, 2010, Neal and Shepherd, once again, traveled to the Fayette County Jail to attempt to visit the inmate. Upon arrival at the jail, Neal requested a legal visit with Robinson. The officer at the front desk claimed that she

must have a previously scheduled visit. The officer would not schedule a visit at that time, but suggested Neal call back on the following Monday morning.

On January 18, 2011, Neal sent a letter to Ingle via facsimile and mail, documenting the numerous problems of the ACLU of Alabama in accessing inmates at the facility. Neal requested a written response by Monday, January 24, 2011, clarifying the attorney-client visitation policy at the Fayette County Jail. Ingle did not respond to the letter.

ARGUMENT

I. Plaintiffs Are Substantially Likely to Prevail on Their Claim that the Challenged Policy Violates Their First Amendment Rights

A. Plaintiffs ACLU of Alabama and Allison Neal Possess a First Amendment Right to Communicate with Fayette County Jail Inmates

The First Amendment of the United States Constitutions protects the right of the Plaintiffs, ACLU of Alabama and Allison Neal, to consult with inmates at the Fayette County Jail. The ACLU of Alabama is a non-profit public interest organization which engages in litigation and advocacy as a method of advancing its social and political issues. The United States Supreme Court consistently holds that the activities of such organizations and their representatives are protected by the First Amendment. *See NAACP v. Button*, 371 U.S. 415, 430, 83 S.Ct. 328, 336 (1963).

Plaintiffs possess a First Amendment right to advise inmates of their legal

rights. In *NAACP v. Button*, the NAACP sought to restrain enforcement of a Virginia statute banning “the improper solicitation of any legal or professional business,” which would prohibit the activities of that organization. 371 U.S. at 419. Under Virginia’s statute, “a person who advises another that his legal rights have been infringed and refers him to a particular attorney or group of attorneys . . . for assistance has committed a crime, as has the attorney who knowingly renders assistance under such circumstances.” *Id.* at 434.

The Court found that litigation by the NAACP was political expression because “it [was] a means for achieving the lawful objectives of equality of treatment by all governments, federal, state, and local, for the members of the Negro community in this country.” *Id.* at 429. The Court held that the activities of the NAACP and its affiliates are “modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business.” *Id.* at 428-429. Consequently, the Court noted that when “members of the NAACP urged Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia to exercise their legal rights and to retain members of the Association’s legal staff,” they “were advocating lawful means of vindicating legal rights.” *Id.* at 437.

Similarly, the Supreme Court reversed South Carolina’s application of its

disciplinary rules to a solicitation letter on behalf of the ACLU. *See In Re Primus*, 436 U.S. 412, 439, 98 S.Ct. 1893, 1908 (1978). In that case, Edna Smith Primus, an officer and cooperating lawyer with the Columbia, South Carolina branch of the ACLU, solicited by letter a woman with whom she had previously discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. *Id.* at 416-417. Primus communicated “an offer of free assistance by attorneys associated with the ACLU, not predicated on entitlement to a share of any monetary recovery.” *Id.* at 422. The Board of Commissioners on Grievance and Discipline of the Supreme Court of South Carolina found Smith guilty of soliciting a client on behalf of the ACLU in violation of several disciplinary rules. *Id.* at 418-419.

In assessing the constitutionality of that ruling, the U.S. Supreme Court noted that, “the ACLU and its local chapters, much like the NAACP and its local affiliates 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*, 371 U.S. at 419-420). The Court further highlighted that the ACLU has “engaged in the defense of unpopular causes and unpopular defendants” and “represented individuals in litigation that defined the scope of constitutional protection in areas such as political dissent, juvenile rights, prisoner’s rights, military law,

amnesty, and privacy.” *Id.* at 427-428. It found that litigation is a form of political expression and association for the ACLU as it was for the NAACP. *Id.* at 428. Determining that Primus’ solicitation letter came within the ambit of First Amendment protection, the Court emphasized that “the 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.” *Id.* at 431. This practice includes “[advising] another that his legal rights have been infringed and [referring] him to a particular attorney or group of attorneys . . . for assistance.” *Id.* at 432 (quoting *Button*, 371 U.S. at 434). Accordingly, the Court found that the disciplinary regulations at issue violated the First and Fourteenth Amendment. *Id.* at 439; *see also Jean v. Nelson*, 711 F.2d 1455, 1508-09 (11th Cir. 1982) (stating that if “*Button* and *Primus* mean anything they permit legal counsel to inform individuals of their legal rights when counsel does so as an exercise of political speech unaccompanied by expectation of renumeration”).

Under *Button* and *Primus*, the ACLU of Alabama and its representatives possess a clear First Amendment right to consult with inmates seeking legal assistance, advise them of their rights, and discuss the potential for litigation. Jail walls do not “bar free citizens from exercising their own constitutional rights by reaching out to those on the ‘inside.’” *Thornburgh v. Abbott*, 490 U.S. 401, 407, 109

S.Ct. 1874, 1878 (1988).

B. Ingle’s Policy of Denying Plaintiffs Access to Inmates is Not a Reasonable Regulation and, therefore, Violates the First Amendment.

While “a penal institution’s interests in maintaining security is inevitably implicated by its decision to permit practicing attorneys to confer with clients on its facilities,” *Sturm v. Clark*, 835 F.2d 1009, 1014 (1987), restrictions on attorney access must be reasonable, *see Massey v. Wheeler*, 221 F.3d 1030, 1036 (7th Cir. 2000) (“[t]he rule is clear . . . that attorneys enjoy rights of access to prison inmates, but that the prison may impose reasonable restrictions on the exercise of that right”).

In analyzing restrictions on the First Amendment involving both inmates and non-inmates, “the relevant inquiry is whether the actions of prison officials were ‘reasonably related to legitimate penological interest.’” *Thornburgh*, 490 U.S. at 409; *see also Jean*, 711 F.2d at 1508 (“a determination of proper access regulations requires balancing the government’s interest in detention and security against the plaintiff’s first amendment rights”).

In *Cruz v. Beto*, the former Fifth Circuit upheld a district court ruling that a prison official unlawfully interfered with an attorney-client relationship. 603 F.2d 1178, 1185 (5th Cir. 1979). The district court had found that the alleged “threat to prison security consisted of nothing more than [the lawyer’s] attempts to seek redress

in the courts on behalf of her clients.” *Id.* Similarly, Ingle’s policy implicates no institutional security issue. It is solely aimed at restricting the ACLU of Alabama’s access to inmates. *See Sturm*, 835 F.2d at 1015 (finding the plaintiff-attorney stated a valid First Amendment claim based upon being the sole subject of restrictive directives at a federal correctional institution). Ingle’s de facto ban of ACLU of Alabama legal staff from his jail is not related to any penological interest.

Moreover, even if there was some security issue, banning Plaintiffs from the jail is an unreasonable regulation. The denial of access to Plaintiffs clearly is not reasonably related to a legitimate penological interest. Consequently, it violates Plaintiffs’ First Amendment rights.

II. Plaintiffs Will Suffer Irreparable Injury If This Court Does Not Grant Preliminary Relief.

Plaintiffs are unable to access and consult with an inmate at the Fayette County Jail who has requested their assistance. The Fayette County Sheriff’s refusal to allow Plaintiffs to meet with the inmate is the injury at issue. Since it cannot be redressed without the Court’s intervention, it is irreparable without preliminary injunctive relief.

Generally, “an injury is irreparable ‘if it cannot be undone through monetary remedies.’” *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (quoting *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987)). “[C]hilled free speech and invasions of privacy, because of their intangible nature, [cannot] be compensated

for by monetary damages; in other words, plaintiffs ... [cannot] be made whole.” *Northeastern Fla. Chapter of the Ass’n of Gen’l Contractors of America v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). It is well-established that “harms to speech rights ‘for even minimal periods of time, unquestionably constitute [] irreparable injury’ supporting preliminary relief.” *Scott*, 612 F.3d at 1295 (quoting *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n.2 (5th Cir. Unit B June 1981)); *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271 (11th Cir. 2006); *Northeastern Fla. Chapter of the Ass’n of Gen’l Contractors of America*, 896 F.2d at 1285. Consequently, Plaintiffs have suffered an irreparable injury meriting preliminary relief.

III. The Continuing Harm to Plaintiffs’ First Amendment Rights Clearly Outweighs the Defendant’s Interest in Continuing His Policy.

Plaintiffs, as discussed in Part II above, are suffering irreparable injury to their First Amendment rights by the policy. Defendant would not suffer any harm from this Court ordering temporary relief requiring Defendant to allow constitutionally-required confidential visits between Plaintiffs and inmates. Attorney-client visitation, standing alone, does not burden the efficient management of the jail. Accordingly, the balance of harms favors the Plaintiffs.

IV. Preliminary Injunctive Relief In Favor of Plaintiffs Is in the Public Interest.

The ACLU of Alabama and Allison Neal are currently prohibited from investigating allegations of serious violations of inmates' constitutional rights. The public has a definite interest in the availability of legal advice to citizens who may be suffering violations of their civil rights. The public has an interest in protecting the civil rights of all people under the Constitution. Because a discrete constitutional right is at stake in this case, an injunction would be advance the public interest. *See White v. Baker*, 696 F. Supp. 2d 1289, 1313 (N.D. Ga. 2010).

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to enter an immediate temporary restraining order and/or a preliminary injunction prohibiting Ingle from enforcing the challenged policy and allowing Plaintiffs to consult with inmates at the Fayette County Jail.

Respectfully submitted,

s/ Henry F. Sherrod III

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all parties or their counsel of record by regular mail as follows, on this the 16th day of March, 2011.

s/ Henry F. Sherrod III

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