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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Michael Dewayne Outley, Jr.,

No. CV 21-00084-PHX-JAT (JFM)

10 Plaintiff,

11 v.

ORDER

12 David Shinn, et al.,

13 Defendants.
14

15 Plaintiff Michael Dewayne Outley, Jr., who is currently confined in the Red Rock
16 Correctional Center (RRCC), filed a pro se civil rights Complaint pursuant to 42 U.S.C.
17 § 1983. (Doc. 1.) Before the Court is Plaintiff's Motion for Preliminary Injunction
18 (Doc. 4).

19 **I. Background**

20 On screening under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated
21 a First Amendment claim against Defendants Shinn, the Director of the Arizona
22 Department of Corrections (ADC), and Stolc, the Warden of RRCC, solely in their official
23 capacities based on the ADC's telephone policy, which is implemented at RRCC. (Doc.
24 6.) The Court dismissed the remaining claims and Defendants. (*Id.*)

25 **II. Motion for Preliminary Injunction**

26 In his Motion, Plaintiff asserts that his rights to "freedom of expression" and
27 "intimate association" are burdened due to RRCC's telephone policy requiring Plaintiff to
28 get pre-approval prior to placing phone calls and only allowing Plaintiff to place two phone

1 calls per day. (Doc. 4.) Plaintiff asserts that he does not possess addresses of his friends
2 and family and will not be able to comply with RRCC’s policies, which “essentially bar[s]”
3 him from placing calls. (*Id.* at 2.) Plaintiff asserts that he should be permitted to place
4 “unlimited phone calls” and that RRCC will suffer “no type of safety or monetary
5 hardships” if he is permitted to do so. (*Id.* at 4.)

6 As relief, Plaintiff seeks an order: (1) preventing RRCC from requiring prior
7 approval for Plaintiff to place calls; (2) preventing RRCC from limiting Plaintiff to two
8 calls per day; and (3) preventing RRCC from limiting Plaintiff to receiving “secure
9 packages” from parties on a pre-approved list.

10 In response, Defendants assert that the telephone policy does not violate Plaintiff’s
11 First Amendment rights because there are legitimate governmental interests for the policy
12 and Plaintiff has alternative means of exercising his First Amendment rights.

13 **A. The Policy and Asserted Interests in the Policy**

14 Defendants support their Response with the following facts. Red Rock Correctional
15 Center (RRCC) is owned and operated by CoreCivic. At all times relevant to the
16 Complaint, RRCC incarcerated ADC prisoners pursuant to a correctional services
17 agreement between ADC and CoreCivic. (Doc. 13-1 at 2 ¶ 3.) RRCC is a medium-custody
18 facility that houses approximately 1950 prisoners. (*Id.* at 3 ¶ 9.) Prisoners are afforded
19 privileges consistent with their custody level classification and phase. (*Id.* ¶ 10.) A
20 prisoner’s custody level classification is based on their security risk. (*Id.* ¶ 11.) The
21 process for determining a prisoner’s custody level classification considers their behavior
22 and other objective factors that are available and relevant, such as the risk the prisoner
23 presents to the public, staff, and other prisoners. (*Id.*)

24 Prisoners classified as medium custody are those who represent a moderate risk to
25 the public and staff. (*Id.* ¶ 12.) These prisoners are not permitted to work outside the
26 secure perimeter of an institution and require controlled movement within the institution.
27 (*Id.*)

28 In addition to a prisoner’s custody level, prisoners are assigned phases through the

1 Earned Incentive Program (“EIP”). (*Id.* at 4 ¶ 13.) The EIP is a three-phase system of
2 graduated, earned incentives and sanctions to assist prisoners in learning and sustaining a
3 responsible, pro-social lifestyle and to incorporate ethics and values into their everyday
4 lives. (*Id.*) The EIP also enhances the safety and security of the facility by providing
5 incentives to prisoners based on their positive behavior. (*Id.*)

6 The third phase of the EIP affords prisoners the most privileges, the second phase
7 affords prisoners moderate privileges, and the first phase affords prisoners the fewest
8 privileges. (*Id.* ¶ 14.) EIP programming includes: academic and career and technical
9 education; substance abuse and sex offender education and treatment; and self-
10 improvement (e.g. cognitive restructuring and re-entry). (*Id.*) Prisoners receive EIP
11 incentives to participate in the program based on the prisoner’s EIP phase level. (*Id.* ¶ 16.)
12 These incentives include, but are not limited to: regular visitation, holiday visitation, and
13 food visitation; the allowable amounts for telephone calls; and the allowable property and
14 spending limitations for the store. (*Id.*)

15 A medium-custody prisoner at Phase II receives two 15-minute calls per day. (*Id.*
16 ¶ 17.) A medium-custody prisoner at Phase III receives five 15-minute calls per day. (*Id.*)
17 To receive the privilege of unlimited calls per day, a prisoner must be classified at the
18 minimum custody level and achieve Phase III of the EIP. (*Id.*)

19 Further, a medium-custody prisoner at Phase II may receive a Secure Package once
20 every other month. (*Id.* at 5 ¶ 18.) A Secure Package is one that is ordered directly from
21 an approved vendor and must comply with requirements for allowable and authorized
22 property. (*Id.*) To receive the privilege of receiving one Secure Package a month, a
23 prisoner must achieve Phase III of the EIP. (*Id.*)

24 Department Order (DO) 915 is the ADC policy for Prisoner Telephone Calls. (*Id.*
25 ¶ 19.) RRCC follows and enforces DO 915 among the prisoner population. (*Id.*) Pursuant
26 to DO 915, prisoners are afforded restricted access to telephones consistent with their
27 security classification, their EIP phase, and within the physical limits of the institution. (*Id.*
28 ¶ 20.) The frequency of telephone calls for each prisoner varies depending on their security

1 classification and phase in the EIP. (*Id.* ¶ 21.) Only approved individuals on a prisoner's
2 visitor list are authorized as recipients of prisoner telephone calls. (*Id.*)

3 Telephone calls are limited to the same individuals (maximum of 20) approved for
4 visitation. (*Id.* ¶ 23.) The visitor list is maintained in the prisoner's visitation file. (*Id.* ¶
5 24.) During processing, background checks on the individuals on the visitor list are
6 conducted. (*Id.* ¶ 25.) The background checks include a review of the individual visitor's
7 criminal history and warrant checks. (*Id.*) Background checks take approximately 30 days
8 to complete. (*Id.* ¶ 26.) A third-party vendor processes the background checks. (*Id.*)

9 ADC asserts that the purpose of these background checks is to enhance the safety
10 and security of the facility and to protect the general public against potential crime that
11 might occur if there were no restrictions regarding the visitor list. (*Id.* at 6 ¶ 27.) Prior to
12 approval, the accuracy of telephone numbers, the individuals, and the stated relationship is
13 verified. (*Id.*)

14 Although DO 915 generally requires prisoners to schedule personal telephone calls
15 in advance using a sign-up request and based on the facility's telephone call schedule, it
16 also gives the Wardens and Deputy Wardens the discretion to develop telephone schedules
17 that are conducive to the unit operational clock and the available telephones at their
18 institution. (*Id.* ¶ 29.) At RRCC, prisoners are not required to schedule use of the
19 telephones for personal telephone calls. (*Id.* ¶ 30.) RRCC houses 1950 prisoners on
20 average (with a max capacity of 2000), and has approximately 200 telephones on site. (*Id.*)
21 Of the 200 telephones, there are 6 telephones per dayroom. (*Id.*) Each dayroom houses a
22 maximum of 60 prisoners. (*Id.*)

23 When speaking to an approved individual on the telephone, the prisoner is permitted
24 to speak to other members within that household as well. (*Id.* ¶ 31.) For example, if a
25 prisoner's parent is listed as approved and he/she has a conversation with their parent, they
26 may speak to other members within their parent's household. (*Id.*)

27 In addition to the ability to communicate by telephone, prisoners may utilize
28 traditional mail and the facility's tablet messaging system, which allows for email

1 communications with friends and family. (*Id.* ¶ 32.)

2 Pursuant to the CARES Act, prisoners receive two free 15-minute calls per week.
3 (*Id.* ¶ 33.) Plaintiff and all other prisoners permitted to use the telephone, may utilize their
4 two free telephone calls per week by contacting an individual on their approved visitor/call
5 list pursuant to the CARES Act. (*Id.* ¶ 36.)

6 As of November 9, 2020, Plaintiff utilized his two free calls per week to call his
7 father, who is on his approved visitor/call list. (*Id.* ¶ 37.) From November 9, 2020 to
8 March 10, 2021, Plaintiff received 45 free calls. (*Id.* ¶ 38.)

9 There is no limitation on the amount of mail a prisoner may receive regardless of
10 custody, provided that the incoming mail meets requirements, does not violate policy, and
11 the mail is not between the prisoner and individuals including, but not limited to, released
12 offenders currently under community supervision (excluding immediate family members),
13 minors that are not the prisoner's natural or adopted child or minors that do not have
14 parents' or guardians' prior written approval, and current or former department/private
15 prison employees and/or current or former department volunteers (for a period of two
16 years). (*Id.* ¶ 39.)

17 Additionally, prisoners may communicate using the tablet messaging system
18 available on the tablet that each eligible prisoner receives. (*Id.* ¶ 40.) Tablets are
19 authorized for all ADC prisoners housed in the ADC or a contract facility, including
20 RRCC, excluding prisoners under watch status, who are assigned to reception centers, have
21 demonstrated destructive behavior involving a tablet or kiosk within the past 12 months,
22 are not compliant with the integrated housing program, or who are assigned to detention
23 units pending transfer to close custody management, restrictive housing, or enhanced
24 security. (*Id.* at 8 ¶ 41.) Tablets enable prisoners to access several applications, including
25 but not limited to: email application, which enables prisoners to send and receive photo
26 attachments and video gram messages; ecards, a digital version of a greeting card, utilized
27 for the exchange between friends and family and the prisoner; and video visitation. (*Id.* ¶
28 42.)

1 Prisoners can use the email and ecard applications to correspond with anyone. (*Id.*
2 ¶ 43.) Individuals with whom prisoners correspond using these applications do not need
3 to undergo a background check or any other approval. (*Id.*) Prisoners are also not limited
4 by the number of individuals they can correspond with, so long as the individual registers
5 as an active customer of the vendor contracted to provide the service. (*Id.*)

6 Plaintiff was admitted to RRCC on October 13, 2020. (*Id.* ¶ 44.) Plaintiff is a
7 medium-custody prisoner at Phase II of the EIP. (*Id.* at 9 ¶ 45.) Therefore, he receives
8 privileges afforded to Phase II prisoners, including the opportunity to make two telephone
9 calls per day and to receive one secure package every other month. (*Id.*) Secure packages
10 are packages sent from an approved vendor. (*Id.* ¶ 46.) Individuals on the prisoner's
11 approved visitor/call list may send the prisoner secure packages from approved vendors.
12 (*Id.*) Secure packages may not be sent from a non-approved vendor. (*Id.*)

13 Approved vendors are vendors that are specifically contracted with the facility for
14 the ordering, processing, and sending of packages ordered by prisoners or their friends and
15 family. (*Id.* ¶ 47.)

16 To receive the maximum of five telephone calls per day, Plaintiff must achieve
17 Phase III of the EIP. (*Id.* ¶ 48.) Phase III will grant him the privilege of five 15-minute
18 calls per day. (*Id.*) To receive one secure package per month, Plaintiff must achieve Phase
19 III of the EIP. (*Id.* ¶ 49.) Plaintiff has not yet completed the programs for graduation to
20 Phase III, and is not participating in the programs. (*Id.* ¶ 50.) Although Plaintiff has not
21 received secure packages since arriving at RRCC, the privilege is available to him. (*Id.* ¶
22 51.) Further, his custody and EIP phase do not prevent him from communicating by
23 telephone with individuals on his approved visitor list, or from using either traditional mail
24 or the prisoner messaging system to correspond with anyone not on his approved visitor
25 list. (*Id.*)

26 Additionally, since arriving at RRCC on October 13, 2020, Plaintiff has not
27 requested more than two individuals be added to his visitor/call list. (*Id.* at 10 ¶ 52.) The
28 two individuals that Plaintiff requested be added to his visitor/call list have been approved.

1 (*Id.* ¶ 53.) In addition to corresponding with his father on the telephone, Plaintiff utilizes
2 the tablet messaging system to correspond with his friends and other family members
3 regularly. (*Id.* ¶ 54.) He also has traditional mail available to him, and has utilized it to
4 send non-legal mail. (*Id.*) For example, as of March 23, 2021, Plaintiff has utilized the
5 tablet messaging system to send 375 emails and to receive 410 emails, including images.
6 (*Id.* ¶ 55.) He corresponds with five individuals, including his family members. (*Id.*) Most
7 of these individuals are not on his approved visitor/call list (as no prior approval is needed
8 for email correspondence). (*Id.*)

9 Individuals who have an extensive criminal history, are affiliated with a Security
10 Threat Group (STG), or who are known to engage in criminal activity are not approved to
11 be on the prisoner’s visitor call list. (*Id.* at 47 ¶ 29.) Prior to approval, the accuracy of
12 telephone numbers, the individual, and the stated relationship are verified and the caller
13 must give approval to receive calls from the prisoner. (*Id.* ¶ 31.) Defendants assert that
14 conducting a background check on a potential caller promotes safety and security by
15 preventing the prisoner from calling a victim, individuals with criminal histories, or
16 individuals associated with a STG. (*Id.* ¶ 33.)

17 **B. Legal Standard**

18 “A preliminary injunction is ‘an extraordinary and drastic remedy, one that should
19 not be granted unless the movant, by a clear showing, carries the burden of persuasion.’”
20 *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520
21 U.S. 968, 972 (1997) (per curiam)); *see also Winter v. Natural Res. Def. Council, Inc.*, 555
22 U.S. 7, 24 (2008) (citation omitted) (“[a] preliminary injunction is an extraordinary remedy
23 never awarded as of right”). A plaintiff seeking a *mandatory* preliminary injunction must
24 show that (1) the facts and law clearly favor the plaintiff, (2) he is likely to suffer irreparable
25 harm without an injunction, (3) the balance of equities tips in his favor, and (4) an
26 injunction is in the public interest. *See Winter*, 555 U.S. at 20; *Comm. of Cent. Am.*
27 *Refugees v. INS*, 795 F.2d 1434, 1441 (9th Cir. 1986) (citation omitted) (discussing the
28 heightened burden when a *mandatory* preliminary injunction is sought).

1 The movant “has the burden of proof on each element of the test.” *See Envtl.*
2 *Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016, 1027 (E.D. Cal. 2000).

3 The Prison Litigation Reform Act imposes additional requirements on prisoner
4 litigants who seek preliminary injunctive relief against prison officials and requires that
5 any injunctive relief be narrowly drawn and the least intrusive means necessary to correct
6 the harm. 18 U.S.C. § 3626(a)(2); *see Gilmore v. People of the State of Cal.*, 220 F.3d 987,
7 999 (9th Cir. 2000).

8 **C. Discussion**

9 In examining regulations that restrict communications with prisoners, a court must
10 first determine whether any First Amendment interest is implicated. *Hrdlicka v. Reniff*,
11 631 F.3d 1044, 1048-49 (9th Cir. 2011) (citing the two-step analysis in *Thornburgh v.*
12 *Abbott*, 490 U.S. 401, 408 (1989)). If such an interest is implicated, the court must apply
13 the four-factor *Turner* test to decide whether that interest gives rise to a protected First
14 Amendment right. *Hrdlicka*, 631 F.3d at 1048; *Thornburgh*, 490 U.S. at 408.

15 The Ninth Circuit Court of Appeals has defined the First Amendment right at issue
16 as the right to communicate with persons outside prison walls and has identified use of a
17 telephone as a *means* of exercising this right. *See Valdez v. Rosenbaum*, 302 F.3d 1039,
18 1048 (9th Cir.2002); *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir.1996), *amended*, 135
19 F.3d 1318 (9th Cir. 1998); *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986);
20 *see also Halvorsen v. Baird*, 146 F.3d 680, 689 (9th Cir. 1998) (pretrial detainee).

21 Having defined the constitutional right at issue, the Court next considers whether
22 the restrictions on Plaintiff’s telephone usage violate the right. *Valdez*, 302 F.3d 1048-49.
23 A prison regulation that impinges on a prisoner’s constitutional right “is valid if it is
24 reasonably related to legitimate penological interests.” *Turner v. Safely*, 482 U.S. 78, 89
25 (1987). In making the “reasonableness” inquiry, the Court considers the four factors
26 articulated in *Turner*: (1) whether there is a valid, rational connection between the
27 restriction and the legitimate governmental interest put forward to justify it; (2) whether
28 there are alternative means of exercising the right; (3) whether accommodating the asserted

1 constitutional right will have a significant negative impact on prison guards and other
2 prisoners, and on the allocation of prison resources generally; and (4) whether there are
3 obvious, easy alternatives to the restriction showing that it is an exaggerated response to
4 prison concerns. *Id.* at 89-90.

5 Regulations prohibiting certain communications are valid despite the unquestioned
6 First Amendment interest if the *Turner* factors are met. *Hrdlick*, 631 F.3d at 1048;
7 *Thornburgh*, 490 U.S at 408.

8 With regard to Plaintiff's argument that his First Amendment rights are violated if
9 he is not given "unlimited calls per day," Defendants have shown that they have
10 rehabilitative and security-related reasons for limiting prisoners at Plaintiff's custody level
11 to two calls per day and that Plaintiff has alternative means of communicating with
12 individuals outside of prison, including by email and regular mail. Plaintiff has made no
13 showing that the limitation of phone calls per security level is an exaggerated response to
14 prison concerns. On this record, the Court cannot conclude that the facts and law clearly
15 favor Plaintiff as to his contention that his First Amendment rights will be violated unless
16 he is allowed "unlimited" phone calls.

17 Likewise, although Plaintiff argues that the Court should prevent RRCC from
18 limiting Plaintiff to receiving "secure packages" from parties on a pre-approved list,
19 Plaintiff simply makes the conclusory assertion that the policy regarding secure packages
20 violates his constitutional rights, but the Court cannot conclude from this assertion that the
21 facts and law clearly favor Plaintiff.

22 Plaintiff presents some evidence suggesting that the policy requiring a background
23 check on an individual before a prisoner can call that individual is an exaggerated response
24 to the security concerns at issue. Plaintiff asserts that the following measures are already
25 in place to allay the security concerns provided by Defendants: (1) all calls are recorded
26 and monitored; (2) prior to placing a call, Plaintiff must state his full name and enter his
27 ADC inmate number, (3) if an individual wants to accept a call from a prisoner, they must
28 prepay for an account through ICS Solutions, and (4) any individual a prisoner calls is

1 given the opportunity to deny the call or permanently block any calls before the call will
2 go through. (Doc. 4 at 14.)

3 Here, the question of whether background checks for phone calls are an exaggerated
4 response to the identified security interests is necessarily fact specific, and there are
5 questions going to the merits that counsel hesitation before the Court renders an opinion as
6 to the application of the *Turner* factors. See, e.g., *Beaulieu v. Ludeman*, 690 F.3d 1017,
7 1038–40 (8th Cir. 2012) (“In the prison context, we have concluded that ‘the extent of
8 inmates’ First Amendment right to communicate with the outside world is a fact-intensive
9 universe.’”) (quoting *Holloway v. Magness*, 666 F.3d 1076, 1079 (8th Cir. 2012); *Pell v.*
10 *Procunier*, 417 U.S. 817, 827–28 (1974) (Considerations of security and rehabilitation “are
11 peculiarly within the province and professional expertise of corrections officials, and, in
12 the absence of substantial evidence in the record to indicate that the officials have
13 exaggerated their response to these considerations, courts should ordinarily defer to their
14 expert judgment in such matters. . . . [W]hen the issue involves a regulation limiting one
15 of several means of communication by an inmate, the institutional objectives furthered by
16 that regulation and the measure of judicial deference owed to corrections officials in their
17 attempt to serve those interests are relevant in gauging the validity of the regulation.”).

18 Here, Plaintiff has not met his burden of showing that the law and facts *clearly favor*
19 his position. See *Pell*, 417 U.S. at 828 (holding that in light of “the alternative channels of
20 communication that are open to prison inmates, a restriction on one manner in which
21 prisoners can communicate with persons outside of prison was not unconstitutional as long
22 as the restriction operates in a neutral fashion, without regard to the content of the
23 expression, falls within the ‘appropriate rules and regulations’ to which ‘prisoners
24 necessarily are subject,’ and does not abridge any First Amendment freedoms retained by
25 prison inmates.”) (internal citations omitted).

26 Moreover, the Court is not persuaded by Plaintiff’s argument that he suffers
27 irreparable harm because he cannot obtain addresses of those individuals he wishes to call.
28 There is no showing that this difficulty, which is particular to Plaintiff, would render an

1 otherwise reasonable regulation unreasonable because of Plaintiff's particular
2 circumstances. *See, e.g., Coronel v. State of Hawaii, Dep't of Corr.*, 993 F.2d 882 (9th
3 Cir. 1993) (where prisoner could not make calls to his wife during regular hours because
4 she was at work and her employer would not let her accept personal calls and the regulation
5 was reasonable under the *Turner* factors, Plaintiff's particular situation with his wife did
6 not render it unreasonable because "[p]rison officials are not required to set up and then
7 shoot down 'every conceivable alternative method of accommodating the constitutional
8 complainant'") (internal citation omitted).

9 For the foregoing reasons, Plaintiff's Motion for Preliminary Injunction will be
10 denied.

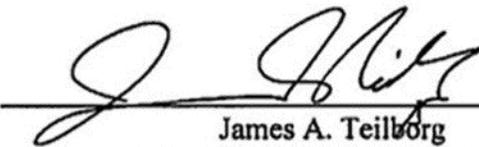
11 **IT IS ORDERED:**

12 (1) The reference to the Magistrate Judge is withdrawn as to Plaintiff's Motion
13 for Preliminary Injunction (Doc. 4).

14 (2) Plaintiff's Motion for Preliminary Injunction (Doc. 4) is **denied**.

15 Dated this 3rd day of June, 2021.

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James A. Teilborg
Senior United States District Judge