IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

BOBBIE Y. LANE d/b/a CAGED POTENTIAL, Plaintiff, v. GEORGE LOMBARDI, et al., Defendants.	))))))))))	Case No. 2:12-cv-4219-NKL

ORDER

Pending before the Court is Plaintiff Bobbie Lane's Motion for a Preliminary Injunction [Doc. # 2] requiring Defendants Lombardi, et al., to provide notice and opportunity to be heard to senders of materials censored by Defendants. For the reasons stated below, the Court GRANTS Plaintiff's Motion.

I. Background

Plaintiff Bobbie Lane owns and operates a publishing company, Caged Potential. This company has published a book, *So Far from Paradise*, written by Sultan Lane, Plaintiff's cousin and an inmate at the Crossroads Correctional Facility ("Crossroads"). Defendants are the Missouri Department of Corrections ("MODOC") and its administrators, George Lombardi, Dave Dormire and Mariann Atwell. Caged Potential received orders for *So Far from Paradise* from nine Crossroads inmates, and mailed copies of the novel to those inmates in November 2010 and January 2011. However, these shipments were seized by staff at Crossroads pursuant to MODOC's Censorship

Procedure, IS 13-1.2. Defendants did not notify Plaintiff as to the seizure and non-delivery of the books. MODOC's policies do not require that mailroom staff provide notice to publishers and other senders that publications have been seized and not delivered to recipients.

Plaintiff alleges that MODOC's policy not to give notice or the opportunity to appeal to senders regarding censorship decisions deprives senders of due process under the Fourteenth Amendment. Plaintiff has requested an injunction requiring Defendants to notify senders of censorship decisions and provide them with an opportunity to be heard.

II. Discussion

In considering whether to issue a preliminary injunction, courts apply a four-factor test that examines (1) the likelihood that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant in the absence of the requested injunction; (3) the balance between the harm to the movant if the injunction is denied and any harm to the other parties if the injunction is granted; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

A. Likelihood of Success

The Eighth Circuit has held that there are two possible standards in reviewing "likelihood of success" under the *Dataphase* test. *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008). The first, more rigorous standard of "likely to prevail on the merits" applies to injunctions brought to prevent implementation of a statute that was the product of the democratic legislative process. *Id*; *see also Aventure Communications Tech., L.L.C. v. Iowa Utilities Bd.*, 734 F. Supp. 2d

636, 655 (N.D. Iowa 2010). However, where the injunction is sought to enjoin state action that is not based on "the full play of the democratic process" the lower standard of "fair chance of success" applies. *Rounds*, 530 F.3d at 732 n.6. The "fair chance of success" does not require the Court to assess the "mathematical probability" of the movant's success; rather, "where the balance of other factors tips decidedly toward plaintiff[,] a preliminary injunction may issue if movant has raised questions so serious and difficult as to call for more deliberate investigation." *Dataphase Sys., Inc.*, 640 F.2d at 113.

To establish a procedural due process violation, a plaintiff must first demonstrate the deprivation of a protected liberty or property interest. *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006).

1. Protected Liberty Interest

As the Supreme Court has made clear, "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment." *Procunier v. Martinez*, 416 U.S. 396, 418, 94 S. Ct. 1800, 1814 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989). This liberty interest applies to both senders and receivers:

> Both parties to the correspondence have an interest in securing [communication], and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of

> freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.

Id. at 408-09, 1809; *see also Thornburgh*, 490 U.S. at 408, 109 S. Ct. at 1879 ("[T]here is no question that publishers who wish to communicate with those who… willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."); *Trudeau v. Wyrick*, 713 F.2d 1360, 1364 (8th Cir. 1983) ("[I]t is clear that the sender of a letter to an inmate has a right, grounded in the Constitution, to have that letter delivered to the inmate free of unjustified interference by state officials."). The Eight Circuit has emphasized that "the reasoning of *Procunier* applies to all forms of correspondence addressed to an inmate…. Thus, whenever prison officials restrict that right by rejecting the communication, they must provide minimum procedural safeguards, which include notice to an inmate that the correspondence was rejected." *Bonner v. Outlaw*, 552 F.3d 673, 677 (8th Cir. 2009); *see also Trudeau*, 713 F.2d at 1365.

The question before the Court is whether a publisher is entitled to notice and an opportunity to be heard before the publisher's First Amendment rights are limited by prison censorship. All four circuit courts that have considered the issue have found a due process violation. In *Montcalm Pub. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996), the Fourth Circuit held that a magazine publisher had a First Amendment interest in communicating with inmate-subscribers, and that it was entitled to some degree of process when prisoners were prevented from receiving their subscriptions. In *Prison Legal News v. Cook*, 238 F.3d 1145 (9th Cir. 2001), the Ninth Circuit similarly held that

"publishers who wish to communicate with inmates by sending requested subscriptions have a 'legitimate First Amendment interest in access to prisoners.'" *Prison Legal News*, at 1149 (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 408, 109 S. Ct. 1874 (1989)). The court further determined that because the publishers and prisoners had a constitutional right to receive subscription mail, "such mail must be afforded the same procedural protections as first class and periodicals mail under Department regulations." *Id*. at 1153. Relying on *Montcalm* and *Prison Legal News*, the Tenth Circuit, in *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004), also held that "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners," and that "both inmates and publishers have a right to procedural due process when publications are rejected." *Jacklovich*, 392 F.3d at 433 (internal quotes omitted). Finally, the Sixth Circuit in *Martin v. Kelly*, 803 F.2d 236 (6th Cir. 1986), held that "the First Amendment rights of free citizens" who wished to send letters to prisoners "were implicated by the censorship of prisoners' mail," and that the defendant prison's "mail censorship regulation is insufficient because it fails to require that notice and an opportunity to protest the decision be given to the author of the rejected letter." *Martin*, 803 F.2d at 243-44.

2. Process Required

Given that a protected liberty interest in communication with prisoners exists, the next question is the amount of process due to protect that interest. *Bonner v. Outlaw*, 552 F.3d at 676. Defendants argue that the appropriate analysis for determining whether

MODOC's policy provides due process is that laid out in *Turner v. Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2260-61 (1987). In *Turner*, the Supreme Court stated that in cases involving infringements on prisoners' constitutional rights, the standard of review is not strict scrutiny; rather, the relevant inquiry is "whether a prison regulation that burdens fundamental rights is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns." *Id.*; *see also Thornburgh*, 490 U.S. at 409, 109 S. Ct. at 1879. In determining the reasonableness of a regulation restricting a prisoner's constitutional right, the court should consider: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether there are "alternative means of exercising the right that remain open to prison inmates"; (3) what impact accommodation of the constitutional right will "have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether there are "ready alternatives for furthering the government interest available." *Beard v. Banks*, 548 U.S. 521, 529, 126 S. Ct. 2572, 2578 (2006) (quoting *Turner*, 482 U.S. at 89-90, 107 S. Ct. at 2260-61).

However, in *Bonner v. Outlaw*, which involved a prison policy that returned prisoners' packages without giving the inmates notice, the Eighth Circuit expressed doubt about the applicability of *Turner* "to the restriction of a specific constitutional right, e.g., notice, the Supreme Court has already declared applicable in a given situation." *Bonner v. Outlaw*, 552 F.3d at 678. The Court noted that *Turner* was particularly ill-suited to cases involving procedural due process rights that the Supreme Court has already

recognized, since recognition of those rights involves "weighing the exact same considerations – governmental interest, alternative means of exercising the right, and additional burdens – as are also relevant in determining whether a prison regulation is reasonable under *Turner*, and were already considered by the Supreme Court in declaring such a right to exist in the first place." *Id*. The Court instead stated that "the amount of process due [the movant] is determined by balancing the specific interest affected, the likelihood the challenged action would result in an erroneous deprivation of that right, and the burden of providing additional procedures, including administrative costs and burdens." *Id.* at 676. The Eighth Circuit proceeded to analyze Bonner's claims under the *Procunier v. Martinez* standard, finding that "whenever prison officials restrict [the prisoner's liberty interest in uncensored communication] by rejecting the communication, they must provide minimum procedural safeguards, which include notice to an inmate that the correspondence was rejected." *Id*. at 677. However, the Court also stated that even if *Turner* applied, there was no government interest advanced by the regulation, no alternative means for inmates to receive notice, and no additional burdens on the prison officials by requiring that notice be given. *Id*. at 678; *see also Prison Legal News v. Cook*, 238 F.3d 1145, 1151 (9th Cir. 2001) (applying *Turner* to publishers' rights to send material to prisoners, but finding that a ban on standard mail was not rationally related to a legitimate penological objective).

a. *Bonner-Procunier* Analysis

The Court agrees that the *Bonner-Procunier* analysis is applicable in this case. As noted above, the Supreme Court has already recognized that prisoners and their

correspondents have a constitutional liberty interest in uncensored communication. It follows that some form of procedural due process is required in order to protect this right. *Procunier*, 416 U.S. at 418-19, 94 S. Ct. at 1814 (procedural safeguards include notice, opportunity to be heard, and opportunity for appeal to prison official who was not involved in original censorship decision). As noted above, the Fourth, Sixth, Ninth, and Tenth Circuits have held that due process requires prison officials to notify senders of the seizure or censorship of written material mailed to prisoners. *See Montcalm Pub. Corp.*, 80 F.3d at 109; *Martin*, 803 F.2d at 244; *Prison Legal News*, 238 F.3d at 1153; *Jacklovich*, 392 F.3d at 433. Failure to provide due process regarding a censorship decision – here, notification and an appeals process – interferes with the protected liberty rights of both senders and inmate recipients. *See Thornburgh*, 490 U.S. at 408, 109 S. Ct. at 1879. Furthermore, without minimum procedural safeguards, such as notice, the decision to censor or withhold delivery of a communication may be arbitrary or erroneous. *Procunier*, 416 U.S. at 397, 94 S. Ct. at 1803. Finally, there is no indication that providing senders with notice and an opportunity to appeal the censorship decision is unduly burdensome on prisons. *See Bonner*, 552 F.3d at 676; *Procunier*, 416 U.S. at 419. Defendants argue that requiring notification of senders will increase administrative costs, namely for postage. However, other courts to consider the issue have found that this burden is not substantial enough to justify infringements on First and Fourth Amendment rights. *See, e.g., Procunier*, 416 U.S. at 419, 94 S. Ct. at 1814 (determining that requiring notice to inmates and opportunity to appeal does "not appear to be unduly burdensome"); *Montcalm Pub. Corp.*, 80 F.3d at 109 (finding that "providing a copy of this notice to

publishers of disapproved publications and allowing the publishers to respond in writing would pose a minimal burden on corrections officials."); *Jacklovich*, 392 F.3d at 434 ("providing adequate individualized notice to the publisher would appear to impose a minimal burden"). Therefore, under the *Bonner-Procunier* analysis, Plaintiff has articulated a due process right to sender notification of censorship decisions. Under current precedent, Plaintiff has a fair chance of success on the merits.

b. *Turner* Analysis

Even if the Court were to apply the *Turner* analysis, however, Plaintiff would still have a fair chance of prevailing on the merits. The first *Turner* consideration is whether there is a rational connection between the prison regulation and the governmental interest. Defendants argue that the policy of not informing senders that their material has been censored is rationally related to inmate safety and security and the achievement of rehabilitative goals. However, they have offered no evidence that their refusal to notify senders of non-delivery due to censorship promotes these penological interests.

The second *Turner* consideration asks whether an alternative means for exercising the right in question exists. Defendants argue that prisoners are informed of censorship decisions and have the option of filing a grievance, and that senders may object to censorship decisions, once they are informed of them by the prisoners, by calling or writing to prison officials. However, as the Fourth Circuit has noted, "[a]n inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication, and while the inmate is free to notify the publisher and ask for help in challenging the prison authorities' decision, the publisher's First Amendment right

must not depend on that." *Montcalm Pub. Corp.*, 80 F.3d at 109; *see also Jacklovich*, 392 F.3d at 433 (holding that "the publisher's rights must not be dependent on notifying the inmate…. [Otherwise,] the publisher may never know (or know well after the fact) that the publication has been rejected by the facility.").

The third *Turner* consideration is the impact on prison staff and inmates if notice and a hearing is required. Defendants argue that providing notice to the sender will somehow conflict with the inmate's property rights. However, they have cited no cases in support of this claim, and the Court finds it unlikely that such a conflict exists. The publisher seeks only a hearing on the issue of censorship, not the return of the publication. If anything, providing an appeals process for the sender would bolster the inmate's claim to the censored material. As the Fourth Circuit noted, the sender is in a better position to challenge the censorship decision than the recipient, because the sender will actually know the content of the material. *Montcalm Pub. Corp.*, 80 F.3d at 109. Defendants also argue that providing notification to senders will be unduly costly. However, as noted above, other courts that have considered the issue have found that the cost of providing notice and an appeals process to protect a constitutional liberty interest is at most a minimal burden, given the interests at stake.

The final *Turner* factor involves whether alternatives for furthering the government interest exist. Defendants argue that it is Plaintiff's burden to show a less costly alternative. Plaintiff points to the Federal Bureau of Prisons' policy upheld in *Thornburgh* as regulations that "provide procedural safeguards for both the recipient and the sender." *Thornburgh*, 490 U.S. at 406. The censorship policy in *Thornburgh* set out

a list of criteria by which the warden was to assess the content of publications; required the warden to advise the inmate promptly in writing of the decision to reject; obliged the warden to provide the publisher or sender with a copy of the rejection letter referring to the specific article or material considered objectionable; and permitted the sender to obtain an independent review of the warden's decision from a third party. *Id*. at 405, 1878. Importantly, the Supreme Court upheld the policy in *Thornburgh* after applying the *Turner* analysis. *Id*. at 419. The *Thornburgh* policy is in marked contrast to the policy at issue in this case, which provides no notice or appeals process for the sender at all. Therefore, even if the *Turner* analysis applied in this case, the Court finds that Plaintiff would still have a fair chance of prevailing on the merits of her due process claim.

B. Irreparable Harm

The Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976); *see also Marcus v. Iowa Pub. Television*, 97 F.3d 1137, 1140 (8th Cir. 1996) (holding that where a movant's "First Amendment rights have been violated, this constitutes an irreparable harm"); *Nichols v. Nix*, 810 F. Supp. 1448, 1468 (S.D. Iowa 1993) (denial of religion publication to inmate "constitutes ongoing irreparable injury"), *aff'd*, 16 F.3d 1228 (8th Cir. 1994). Where "such injury was both threatened and occurring at the time of [movant's] motion" and the movant "sufficiently demonstrated a probability of success on the merits," a preliminary injunction is appropriate. *Elrod*, 427 U.S. at 374, 96 S. Ct. at 2690. In the instant case,

the alleged deprivation of the Plaintiff's liberty interest in uncensored communication without due process, in violation of her First and Fourteenth Amendment rights, constitutes an ongoing irreparable harm.

C. Balance of Harm

As noted above, based on Defendants' lack of evidence and the findings of other courts that have considered this issue, the Court has determined that providing notice and opportunity to appeal for senders whose material is censored is not unduly burdensome. Although requiring the Department of Corrections to implement additional procedures may cause some increase in administrative costs, where negligible administrative costs pair off against an alleged constitutional violation, the balance of equities favors the latter. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008) (stating that "[t]he balance of equities… generally favors the constitutionally-protected freedom of expression"), *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.*, 2012 WL 4868215 (8th Cir. Oct. 16, 2012). Therefore, the balance of harm favors the Plaintiff.

D. Public Interest

The Eighth Circuit has made clear that "it is always in the public interest to protect constitutional rights." *Nixon*, 545 F.3d at 690 (8th Cir. 2008); *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998). As the Supreme Court has noted, this is true even when the constitutional rights are claimed by prison inmates: "federal courts must take cognizance of the valid constitutional claims of prison inmates…. Prison walls do not form a barrier separating prison inmates from the protections of the

Constitution." *Turner*, 482 U.S. at 84, 107 S. Ct. at 2259. The Court finds that providing due process protection for the liberty interest of prisoners and their correspondents in uncensored communication constitutes an important public interest.

III. Conclusion

Plaintiff has demonstrated that she has a fair chance of success on the merits; that harm to Plaintiff outweighs any comparable harm to Defendants; and that injunctive relief would be in the public interest. For the above stated reasons, therefore, Plaintiff's Motion for a Preliminary Injunction [Doc. # 2] is GRANTED. Defendants are required to provide notice and an opportunity to appeal to senders whose communications with prisoners are censored or seized by Defendants or their officers, agents, or subordinate employees.

s/ Nanette K. Laughrey
NANETTE K. LAUGHREY
United States District Judge

Dated: November 15, 2012
Jefferson City, Missouri