

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

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

SUGGESTIONS IN SUPPORT OF PLAINTIFF'S MOTION  
FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(a), Plaintiff Bobbie Y. Lane has moved for an order preliminarily enjoining defendants, in their official capacities, and their officers, agents, servants, and employees, from continuing to violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution and specifically requiring defendants to provide plaintiff and all other publishers and distributors of publications notice and an opportunity to be heard when defendants and their officers, agents, and subordinate employees censor items mailed or shipped to inmates incarcerated by the Missouri Department of Corrections.

FACTS

1. Bobbie Y. Lane owns and operates a publishing company that does business as Caged Potential. Lane Declaration, ¶ 1.
2. Sultan Lane, her cousin, is an inmate at Crossroads Correctional Facility (hereafter "Crossroads") in Cameron, Missouri, a facility run by defendants George Lombardi, Dave Dormire and Mariann Atwell and the Missouri Department of Corrections (hereafter "MODOC"). Lane Declaration, ¶ 2.
3. Sultan Lane wrote *So Far From Paradise*, a novel, which Caged Potential published

and which is available through both Caged Potential and Amazon.com. Lane Declaration, ¶ 3.

4. Caged Potential received orders for *So Far From Paradise* from nine Crossroads inmates, and Caged Potential mailed copies of the novel to those nine inmates in November 2010 and January 2011. Lane Declaration, ¶ 4.

5. When those shipments arrived at Crossroads in November 2010 and January 2011, staff in the Crossroads mail room seized the novels and refused to deliver the books to the addressees. Lane Declaration, ¶ 5.

6. Neither Caged Potential nor Bobbie Lane received notice as to the seizure and non-delivery of the books after MODOC mailroom officials seized the novels and refused to deliver them to the inmates. Lane Declaration, ¶ 6.

7. On information and belief, MODOC's policies and procedures do not require mailroom staff to provide notice to publishers and other senders that publications have been seized and not delivered to the inmates to whom the publisher or sender addressed the shipment.

### ARGUMENT

#### *I. Preliminary Injunction Factors*

In considering whether to issue a preliminary injunction, courts apply a four-factor test that examines: (1) the likelihood that the moving party 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 moving party if the injunction is denied and any harm to other parties if the injunction is granted; and (4) the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981). *See also Winter v. National Resources Defense Council, Inc.*, 55 U.S. 7, 21 (2008).

*A. Plaintiff is Likely to Succeed on the Merits*

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). Once that is established, “the amount of process due 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.” *Bonner v. Outlaw*, 552 F.3d 673, 676 (8th Cir. 2009).

“The 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, 417 (1974), *overruled on other grounds by, Thornburgh v. Abbott*, 490 U.S. 401 (1989).

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.

*Procunier*, 416 U.S. at 408-9. *See Krug v. Lutz*, 329 F.3d 692, 697 (9th Cir. 2003) (inmates have a liberty interest in the receipt of subscription mailings sufficient to trigger procedural due process guarantees). In *Thornburgh*, the Court clearly held that this liberty interest extends to publishers: “[T]here 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.” 490 U.S. at 408.

In *Procunier v. Martinez*, moreover, the Court also held that “the decision to censor or withhold delivery of a particular letter must be accompanied by minimum procedural safeguards.” 416 U.S. at 417. The requisite “procedural safeguards” included, at minimum, notice of the seizure of mail and the opportunity to contest the seizure. *Id.* In *Procunier*, the Court required that the non-inmate author of a letter “be given a reasonable opportunity to protest [the censorship] decision, and that complaints be referred to a prison official other than the person who originally disapproved the correspondence.” 416 U.S. at 418. Such procedural safeguards are equally necessary when it comes to other mailed reading material, such as periodicals, newspapers, and books. For example, the federal regulations at issue in *Thornburgh* “provide[d] procedural safeguards for both the recipient and the sender,” including notice of the reasons for rejecting the publication and an opportunity to contest the rejection:

The warden must advise the inmate promptly in writing of the reasons for the rejection and must provide the publisher or sender with a copy of the rejection letter. The notice must refer to the “specific article(s) or materials(s) considered objectionable.” The publisher or sender may obtain an independent review of the warden’s rejection decision by a timely writing to the Regional Director of the Bureau.

490 U.S. at 406 (internal citations omitted).

The Fourth, Ninth, and Tenth Circuits have each held that the Due Process Clause of the Fourteenth Amendment requires prisons to provide publishers and other senders with notice of the seizure or censorship of written material mailed to a prisoner. *See Montcalm Publ’g Corp. v. Beck*, 80 F.3d 105, 106 (4th Cir. 1996); *Prison Legal News v. Cook*, 238 F.3d 1145, 1153 (9th Cir. 2001); *also Jacklovich v. Simmons*, 392 F.3d 420, 433-434 (10th Cir. 2004). Cf. *Krug*, 329 F.3d

at 697 (inmates have due process right to notice and an opportunity to contest censorship/seizure of publication); *Bonner*, 552 F.3d at 676 (same). Failure to provide such due process interferes with the First Amendment rights of both the publishers or senders and the inmates. “Publisher and Prisoners have a constitutionally protected right to receive subscription mail” and that protected right requires procedural protections. *Prison Legal News v. Cook*, 238 F.3d at 1153. “Publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate-subscribers.” *Montcalm Publ’g Corp.*, 80 F.3d at 106. *See Jacklovich*, 392 F.3d at 433-434 (same).

Without minimum procedural safeguards, the decision to censor or withhold delivery of a particular mailing may be arbitrary or erroneous. *Procunier*, 416 U.S. at 397. Without the notice that a publication has been seized and not delivered, a publisher has no way to know that the publication has not reached its intended recipient and, thus, the publisher no way to know that an appeal of the decision to withhold the publication is necessary. There is great risk that inmates and publishers alike will be erroneously denied their Constitutional right to communicate ideas if the publisher is not afforded notice that the prison has seized or censored their publications and other mailings.

In *Bonner*, the Eighth Circuit found that providing notice and an opportunity to appeal the decision to censor or seize written material is not unduly burdensome on prisons. 552 F.3d at 676. In *Procunier v. Martinez*, moreover, the Supreme Court found that notifying the inmate and the author of the letter of the censorship and giving both parties an opportunity to protest that decision was not “unduly burdensome.” 416 U.S. at 419. Therefore, requiring that MODOC give publishers of seized publications notice that the publication did not reach the intended

recipients and an opportunity to appeal that denial of delivery would not unduly burden MODOC or the individual mail room employees at its prisons.

Plaintiff did not receive notice or the opportunity to appeal the decision to censor her publications and prevent them from being delivered to the recipients. Thus, she is unconstitutionally denied the due process as guaranteed by the Fourteenth Amendment.

*B. Plaintiff has suffered and will continue to suffer irreparable harm as a result of the denial of due process.*

The Supreme Court has held that “[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *Cf. Nichols v. Nix.*, 810 F. Supp. 1448, 1468 (S.D. Iowa 1993) (prison’s “denial of the religious publications constitutes ongoing irreparable injury” to inmate), *aff’d*, 16 F.3d 1228 (8th Cir. 1994). Although the denial of procedural due process alone might not constitute irreparable harm, the confluence of First Amendment rights with the right to due process involved here make the prison’s failure to give publishers and other senders of written materials notice of censorship and an opportunity to contest such censorship irreparable harm in this case.

*C. The balance of harms favors plaintiff.*

Here, the irreparable harm suffered by plaintiff and other publishers is concrete and ongoing. Without an injunction, MODOC will continue to censor plaintiff’s mailings of publications and prevent them from reaching the inmates who have requested them without affording plaintiff notice and the opportunity to be heard. In contrast, any potential injury to defendants is minimal. As discussed previously, courts have found that providing notice and opportunity for appeal to publishers is not “unduly burdensome.” Thus, the failure to provide this procedural due process weighs more heavily on the harm caused to plaintiff. *Procunier*, 416 U.S. at 418. The balance of hardships strongly favors plaintiff.

*D. An Injunction would benefit the public interest.*

“[I]t is always in the public interest to protect constitutional rights.” *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008). Both protecting the First Amendment right to the open and uninhibited communication of ideas and ensuring due process enhance the public interest. Therefore, denying the First Amendment rights of publishers and inmates without due process is directly adverse to public interest. Because the requested injunction in this case will protect plaintiff’s rights of free speech and due process, granting the requested injunction will further the public interest.

CONCLUSION

Because plaintiff has demonstrated that she is likely to succeed on the merits and because the harm to plaintiff and other publishers outweighs any comparable harm to defendants, and because injunctive relief would be in the public interest, plaintiff respectfully requests that this court enter a preliminary injunction requiring defendants to provide sender of materials the notice and opportunity to be heard required by the Due Process Clause of the Fourteenth Amendment when defendants’ officers, agents, and subordinate employees censor or seize publications and other written materials.

Respectfully submitted,

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COUNSEL FOR PLAINTIFF



### **CERTIFICATE OF SERVICE**

I hereby certify that on August 10, 2012, I mailed a copy of this motion, first-class postage pre-paid, to the following:

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