

Jesse Wing, WSBA #27751
JesseW@mhb.com
Katherine C. Chamberlain, WSBA #40014
KatherineC@mhb.com
MacDonald Hoague & Bayless
705 Second Avenue, Suite 1500
Seattle, Washington 98104-1745
206-622-1604

Hon. Edward F. Shea

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PRISON LEGAL NEWS, a project of
the HUMAN RIGHTS DEFENSE
CENTER,

Plaintiff,

v.

CHELAN COUNTY; CHELAN
COUNTY SHERIFF'S OFFICE; BRIAN
BURNETT, individually and in his
capacity as Chelan County Sheriff;
MIKE HARUM, individually and in his
capacity as Chelan County Sheriff; PHIL
STANLEY, in his official and individual
capacity; and RON WINEINGER, in his
official and individual capacity,

Defendants.

No. CV-11-337-EFS

PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

Plaintiff Prison Legal News respectfully moves for an order preliminarily enjoining Defendants from enforcing unconstitutional policies to censor Plaintiff's subscription materials, book catalogs, and letters, mailed to prisoners at the Chelan County Jail and ordering Defendants to afford Plaintiff due process notice and an opportunity to be heard to challenge Defendants' censorship decisions.

1 The Court should grant Plaintiff's motion because Plaintiff is likely to
2 succeed on the merits of its First and Fourteenth Amendment claims, Plaintiff is
3 likely to suffer irreparable harm in the absence of preliminary injunctive relief, the
4 balance of equities tips in Plaintiff's favor, and an injunction is in the public
5 interest. This motion is based on Federal Rule of Civil Procedure 65(a), the
6 Memorandum of Points and Authorities in Support of Plaintiff's Motion for
7 Preliminary Injunction, the declarations of Paul Wright and Katherine
8 Chamberlain, the declarations of ten prisoners, and the exhibits attached to those
9 declarations, filed herewith.

10 DATED this 17th day of October, 2011.

11 MacDONALD HOAGUE & BAYLESS

12
13 By: 

14 Jesse Wing, WSBA # 27751

JesseW@MHB.com

15 Katherine C. Chamberlain, WSBA # 40014

KatherineC@MHB.com

16 Attorneys for Plaintiff
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CERTIFICATE OF SERVICE

I certify that on the date noted below I electronically filed this document entitled **PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

Counsel for Defendants:

Milton G. Rowland
Foster Pepper PLLC
422 W Riverside Avenue, Suite 1310
Spokane, WA 99201
Phone: 509/777-1600
Fax: 509/777-1616
Email: rowlm@foster.com

DATED this 17th day of October, 2011, at Seattle, Washington.


Brina Carranza, Legal Assistant

Jesse Wing, WSBA #27751
JesseW@mhb.com
Katherine C. Chamberlain, WSBA #40014
KatherineC@mhb.com
MacDonald Hoague & Bayless
705 Second Avenue, Suite 1500
Seattle, Washington 98104-1745
(206) 622-1604

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UNITED STATES DISTRICT COURT
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PRISON LEGAL NEWS, a project of
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CENTER,

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CHELAN COUNTY, et. al.,

Defendants.

No. No. CV-11-337-EFS

MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

WITH ORAL ARGUMENT

Prison Legal News respectfully moves for an order preliminarily enjoining Defendants from enforcing unconstitutional mail policies used to censor Plaintiff's subscription materials, books, book catalogs, and letters, and ordering Defendants to afford to Plaintiff due process notice and an opportunity to be heard to challenge Defendants' censorship decisions.

I. FACTS

A. Parties

Plaintiff Prison Legal News ("PLN") is a project of the Human Rights Defense Center, a non-profit corporation. Declaration of Paul Wright ¶2. PLN publishes a monthly journal of corrections, news, and analysis by the same name:

1 *Prison Legal News: Dedicated to Protecting Human Rights. Id.* ¶4. PLN has over
 2 7,000 subscribers in the U.S. and abroad, including attorneys, journalists, public
 3 libraries, judges, and prisoners at about 2,200 correctional facilities nationwide.
 4 *Id.* ¶7. PLN engages in protected speech and expressive conduct on matters of
 5 public concern, such as prison operations and conditions, prisoner health and
 6 safety, and prisoners' rights. *Id.* ¶¶8; Exs. EE through II;¹ *see Prison Legal News*
 7 *v. Lehman*, 397 F.3d 692 (9th Cir. 2005).

8 Defendants include Chelan County and the Chelan County Sheriff's
 9 Office—which operates the Chelan County Regional Justice Center (“RJC”) and
 10 satellite locations (collectively “the Chelan County Jail”) in Wenatchee. These
 11 facilities house convicted prisoners and pretrial detainees. *See* Ex. 2.

12 Defendant Mike Harum was the Sheriff when the mail policies at issue in
 13 this case were created, approved, and implemented, and when the Jail started
 14 censoring PLN's mail. *See* Exs. 1, 4. Defendant Brian Burnett succeeded
 15 Mr. Harum as the Sheriff of Chelan County on January 1, 2011 and is the current
 16 Sheriff. *See* Exs. 3-4. The Sheriff is responsible for Jail operations, the training
 17 and supervision of its staff, including those who interpret and implement the mail
 18 policy for prisoners, and is the policy maker for the Jail. *See* RCW 36.28.010;
 19 *Davis v. Mason County*, 927 F.2d 1473, 1480-1481 (9th Cir. 1991).

20 Defendant Phil Stanley is the Director of the Chelan County Jail and
 21 approved the mail policies at issue in this case. *See* Ex. 1. Defendant Ron

22 ¹ All lettered exhibits are attached to the Declaration of Paul Wright; all numbered
 23 exhibits are attached to the Declaration of Katherine C. Chamberlain.

1 Wineinger is the Deputy Director of the Jail. *See* Exs. 10-11. They are responsible
 2 for developing, administering, and overseeing the operations of the Jail. *See* Ex. 5.

3 B. Chelan County Jail Censors PLN's Mail

4 In December 2010, Prison Legal News mailed its monthly journal, a soft-
 5 cover book entitled *Protecting Your Health and Safety*, informational brochures,
 6 and a catalog of books that PLN offers, addressed personally to prisoners at the
 7 Chelan County Jail. *See* Wright Dec. ¶¶9, 14-50; *e.g.*, Exs. A, M, EE through II.

8 The Jail censored at least thirty-seven (37) issues of the journal *Prison Legal*
 9 *News*. Wright Dec. ¶¶34 through 48; Bibles Dec. ¶6; Brixey Dec. ¶6; Dronen Dec.
 10 ¶6; Foust Dec. ¶6; Garcia Dec. ¶6; Lehrman Dec. ¶6; Quintana Dec. ¶6; Wilsey
 11 Dec. ¶6; Wilson Dec. ¶6; Yancey Dec. ¶6. For 14 of its censored journals, PLN
 12 received back a partial copy of the back cover marked "REFUSED" without
 13 stating any reason for the censorship. Wright Dec. ¶¶38, 41, 44, 48.

14 Similarly, the Jail censored at least twenty (20) copies of *Protecting Your*
 15 *Health and Safety* that PLN had mailed. *Id.* ¶¶14-33; Exs. A through J, RR
 16 through AAA. The Jail marked "REFUSED" on most of the books and returned
 17 nineteen of them to PLN. *Id.*

18 The Jail rejected the informational brochures, book catalogs, and book offers
 19 that PLN mailed to eight (8) prisoners. Wright Dec. ¶¶49-51; Exs. GG, HH, II.
 20 But the Jail did not return the mail to PLN. *See* Wright Dec. ¶¶51; Brixey Dec. ¶4;
 21 Dronen Dec. ¶4; Foust Dec. ¶4; Garcia Dec. ¶4; Quintana Dec. ¶4; Wilson Dec. ¶4;
 22 Yancey Dec. ¶4.

Although the Jail censored at least 65 pieces of mail,² the Jail sent PLN “Mail Denial Notice” forms for only two of them. Wright Dec. ¶52; Exs. BB and CC. The forms state that the Jail rejected PLN’s mail for the following reason: “Unauthorized attachments or enclosures in or on packages (no administrative review)” and “No Books/magazines.” *Id.* The Jail failed to provide a similar form or other notice to PLN for the other 63 items censored, nor did it provide any notice to PLN about how to appeal the censorship decisions. Wright Dec. ¶54.

C. Defendants Censored Mail Under Facially Unconstitutional Policies

1. *Ban on Incoming Periodicals and Magazines*

In September, 2010, the Chelan County Jail approved a policy that prohibits prisoners from receiving periodicals or magazines, except the *Wenatchee World*:

[The Chelan County Regional Justice Center] currently provides the Wenatchee World newspaper to general population inmates. *No subscriptions to any periodical or magazine will be allowed.*

See Ex. 1 at III. D (emphasis added).

In the two lone “Mail Denial Notice” forms that the Jail sent to PLN, Defendants reveal that they use this policy to censor PLN’s mail. *See e.g.* Ex. BB (“No Books/magazines”). Indeed, in response to prisoner Carlos Garcia’s grievance, the Jail wrote: “Jail Policy prohibits periodicals, Prison Legal News is such. Correspondence from Prison Legal News in [sic] placed in your property

² Since filing its Complaint, PLN has received additional censored mail.

Therefore, the number stated here is higher than in the Complaint, Dkt. 1.

1 and you will receive a mail denial notice.” Wright Dec. ¶¶61, Ex. OO.³

2 2. *Ban on All Books*

3 Defendants’ new mail policy prohibits “hardbound or paperback books of
4 any kind.” Ex. 1 at VII. 26. On its face, this policy prohibits all books, including
5 the paperback books that PLN mailed, which the Jail censored. *See, e.g.*, Exs. A
6 though J, RR through AAA. When rejecting sixteen (16) books, the Jail wrote
7 “REFUSED” on the packages without explanation. Exs. A, C-E, G, I, J, RR-VV,
8 XX-ZZ. For the other books, the Jail wrote “RETURN,” Ex. AAA, or wrote
9 nothing at all, Exs. B and F. The Jail failed to articulate its justification for
10 censoring the returned books, but it rejected them in accordance with its policy that
11 bans all books.

12 3. *Unconstitutional Lack of Procedural Due Process Protections*

13 Although Defendants’ policy states that when an “unauthorized item” arrives
14 in the mail the jail will complete a “Mail Denial Notice” “indicating the
15 unauthorized item” and will send a copy of the notice to the sender, *see* Ex. 1 at
16 VI.A., in practice, Defendants rarely do so. With only two exceptions, when
17 rejecting PLN’s monthly journal, soft-cover books, informational subscription
18 brochures, book catalogs, and book offers, Defendants failed to send a Notice or
19 otherwise identify the reason for their decision to censor PLN’s mail. Wright Dec.
20 ¶¶14-54. In fact, Defendants did not return 33 pieces of censored mail to PLN—
21 half of what they censored—so PLN had no idea the Jail had rejected its mail.

22 ³ But the Jail did not place the book in Mr. Garcia’s property; it returned the book
23 to PLN without any explanation. Wright Dec. ¶18; Ex. E.

1 Wright Dec. ¶¶21, 36, 39, 42, 46, 51. And, Defendants did not articulate their mail
 2 policy, or direct PLN to where it could locate the policy or how to appeal the Jail's
 3 censorship decisions. *Id.*; Exs. A-G; J-Z, R-AAA.

4 The Jail's mail policies do not afford the sender an opportunity to appeal the
 5 censorship, *see* Ex. 1 at VI. C. And, the "Mail Denial Notice" form explicitly
 6 denies the right to administrative review when the Jail rejects mail because of
 7 "unauthorized attachments or enclosures in or on packages"—the reason stated in
 8 the two forms that the Jail sent to PLN, *id.* and Exs. BB and CC.

9 By adopting and applying these policies to censor Prison Legal News's mail
 10 to prisoners, and by doing so without due process, the Jail is irrationally interfering
 11 with protected expressive activities and chilling future speech. Since PLN will
 12 continue to communicate with prisoners confined in the Chelan County Jail,
 13 Defendants' policies and practices will likely violate PLN's free speech rights in
 14 the future without due process, causing irreparable harm. Wright Dec. ¶¶63-66.

15 II. ARGUMENT

16 A. Preliminary Injunction Standard

17 When asked to grant a preliminary injunction where the public interest is at
 18 stake, a court must consider whether: (1) the plaintiff is likely to succeed on the
 19 merits, (2) the plaintiff is likely to suffer irreparable harm in the absence of
 20 preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction
 21 is in the public interest. *California Pharmacists Assoc. v. Maxwell-Jolly*, 563 F.3d
 22 847, 849 (9th Cir. 2009); *see also* Fed. R. Civ. P. 65(a).

1 B. PLN is Likely to Succeed on the Merits

2 1. Defendants' No-Publications Policy Infringes on Protected Speech

3 Plaintiff's right to correspond with prisoners through the mail is protected by
4 the First Amendment. *Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989) (publishers
5 have a protected First Amendment interest in access to prisoners); *see also Prison*
6 *Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) ("PLN I"); *Prison Legal*
7 *News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005) ("PLN II").

8 Prison Legal News's correspondence with prisoners is "core protected
9 speech" because it addresses issues of corrections policy and other social and
10 political matters of public concern, which "occupies the 'highest rung of the
11 hierarchy of First Amendment values,' and is entitled to special protection."
12 *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal citation omitted); *PLN I*, 238
13 F.3d at 1149. "[T]he conditions in this Nation's prisons are a matter that is both
14 newsworthy and of great public importance." *Pell v. Procunier*, 417 U.S. 817,
15 830, n.7 (1974). A "blanket prohibition against receipt of the publications by any
16 prisoner carries a heavy presumption of unconstitutionality." *Pepperling v. Crist*,
17 678 F.2d 787, 791 (9th Cir. 1982).

18 To withstand First Amendment scrutiny, a prison policy must be "reasonably
19 related to legitimate penological interests" under the four "*Turner*" factors:

20 (1) whether the regulation is rationally related to a legitimate and
21 neutral governmental objective, (2) whether there are alternative
22 avenues that remain open to the inmates to exercise the right, (3) the
23 impact that accommodating the asserted right will have on other
guards and prisoners, and on the allocation of prison resources; and
(4) whether the existence of easy and obvious alternatives indicates
that the regulation is an exaggerated response by prison officials.

PLN II, 397 F.3d at 699 (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). The first

1 of these factors can be dispositive. *Id.*; *see also*, *PLN I*, 238 F.3d at 1151.

2 Defendants are required under *Turner* to articulate how their policy furthers
3 a legitimate penological interest; it may not be presumed:

4 The initial burden is on the State to put forth a “common-sense”
5 connection between its policy and a legitimate penal interest. If the
6 State does so, the plaintiff must present evidence that refutes the
7 connection. *Id.* at 357. The State must then present enough counter-
evidence to show that the connection is not so “remote as to render the
policy arbitrary or irrational.” *Id.*

8 *Clement v. Cal. Dept. of Corrections*, 220 F. Supp.2d 1098, 1109 (N.D. Cal. 2002)
9 (citing *Frost v. Symington*, 197 F.3d 348 (9th Cir. 1999)). Although corrections
10 officials often emphasize that courts afford deference to their experience, it is well-
recognized that the *Turner* test “is not toothless.” *Thornburgh*, 490 U.S. at 414.

11 Prison authorities cannot rely on general or conclusory assertions to
12 support their policies. Rather, they must first identify the specific
13 penological interests involved and then *demonstrate* both that those
14 specific interests are *the actual bases* for their policies and that the
policies are reasonably related to the furtherance of the identified
interests. An *evidentiary showing* is required as to each point.

15 *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990) (emphasis added). The
16 government may not pile “conjecture upon conjecture” to justify infringement of
17 First Amendment rights. *Reed v. Faulkner*, 842 F.2d 960, 963-64 (7th Cir. 1988).

18 a. First Factor: The Ban is Irrational

19 Applying *Turner*, the Ninth Circuit has repeatedly struck down prison mail
20 policies and rejected various rationales offered by the government to arbitrarily
21 restrict a publisher’s right to communicate by mail with prisoners. *See PLN II*, 397
22 F.3d 692, 699-701 (9th Cir. 2005) (non-subscription bulk mail and catalogs);
23 *Ashker v. Cal. Dept. of Corrections*, 350 F.3d 917, 924 (9th Cir. 2003) (requiring

1 approved vendor labels); *PLN I*, 238 F.3d 1145, 1149-1151 (9th Cir. 2001) (bulk
 2 rate non-profit subscription mail); *Morrison v. Hall*, 261 F.3d 896, 904-05 (9th Cir.
 3 2001) (for-profit bulk rate mail); *Crofton v. Roe*, 170 F.3d 957, 959-61 (9th Cir.
 4 1999) (gift subscriptions).

5 Here, the same outcome is likely. Other corrections institutions seem to
 6 have already covered the gamut of rationales to support such blanket bans, without
 7 success. Defendants cannot articulate any new justification for the Jail's extremely
 8 broad censorship policy, banning all mail that is a periodical, magazine, or book
 9 ("no-publications policy"). Plaintiff is likely to succeed on the merits.

10 (1) The Ninth Circuit Has Rejected Similar Restrictions Based on
 11 Claimed General Concerns About Security and Staff Time

12 In *PLN I*, the Oregon DOC asserted that banning all standard-rate mail
 13 enhanced prison security because staff could concentrate on "timely processing
 14 acceptable mail and thoroughly inspecting such mail for content and contraband."
 15 238 F.3d at 1151. The Ninth Circuit rejected this rationale: "all incoming mail
 16 must be sorted . . . distinguishing between non-profit organization standard mail
 17 and regular/commercial standard mail is not unduly cumbersome[.]" *Id.*

18 Similarly, in *PLN II*, when the Washington DOC claimed that it banned non-
 19 subscription bulk mail to reduce mail volume and increase security, the Court
 20 rejected this rationale again: "While mailroom staff may have to spend more time
 21 analyzing the content of non-subscription bulk rate mail and catalogs, such a
 22 ban . . . is not rationally related to the goal of reducing contraband." 397 F.3d at
 23 700.

1 Here, too, Defendants' no-publications policy is a grossly overbroad and
2 arbitrary means of achieving their goals.

3 (a) The Policy is Not Rationally Related to Saving Time and Money

4 Inspecting and delivering periodicals, magazines, or books is not
5 significantly more burdensome than censoring them, which includes: stamping the
6 mail "Return to Sender"; writing "REFUSED"; returning the mail; filling out a
7 notice form; and delivering the notice to the prisoner. And, if Defendants provided
8 constitutionally required notice and an opportunity to be heard, the Jail would also
9 send a Denial Notice to the sender, and respond to grievances and inquiries about
10 the censorship. *See e.g.* Exs. JJ through QQ (grievance communications). Thus,
11 any assertion that the Jail's policy saves time and money is meritless.

12 Even if it could show that its no-publications policy leads to some savings of
13 time or money, the Jail nevertheless cannot place constitutionally-protected speech
14 on the chopping block to cut costs. In other contexts where the constitutionality of
15 prison regulations has been challenged, the Ninth Circuit has held that "efficiency
16 and cost effectiveness" are not "valid *security* concerns." *Jeldness v. Pearce*, 30
17 F.3d 1220, 1230 (9th Cir. 1994) (emphasis in original)

18 (b) Defendants' Policy Restrictions are Overbroad and Arbitrary

19 The no-publications policy is a substantially overbroad means of enhancing
20 security, if that is the Jail's intent. Since before September 2010, the Jail has
21 screened for true security threats; its mail policy banned:

22 . . . [m]aterial that threatens or is *detrimental to the safety, security, or*
23 *discipline of the facility* . . . mail containing information that, if
communicated, could create a risk of *violence* and/or *physical harm* to

1 any person . . . *gang-related* material. . . *contraband*. . . plans to
2 escape . . . instructions for the manufacture or use of *weapons*,
3 *ammunition, explosives* . . . *threats of physical harm* . . .

4 *See* Ex. 1 at VII, (emphasis added). But its new ban captures *all* publications,
5 including those least likely to contain contraband—like books from publishers.

6 Defendants have no legitimate justification for banning all magazines,
7 periodicals, and books or for censoring all book catalogs, subscription information,
8 and book offers—which the Jail’s policy does not explicitly prohibit but in practice
9 the Jail censors. Censorship of all these materials is arbitrary—and harmful.

10 Journals, books, newspapers, and book catalogs, often contain core political and
11 social speech. They facilitate the exchange of information on poor jail conditions
12 and legal rights, and on how to address medical, psychological, and educational
13 needs. *See e.g.* Exs. EE and FF. For centuries, books, magazines, and newspapers
14 have facilitated learning, awareness of civil rights, and the exchange of ideas.

15 Defendants’ blanket ban on all books, magazines, periodicals, and their
16 practice of censoring book catalogs, subscription information, and book offers
17 leaves prisoners at the Chelan County Jail with no meaningful alternative way to
18 obtain educational and political materials while incarcerated or learn the news—
19 other than the topics that the *Wenatchee World* decides are newsworthy and the Jail
20 decides to keep in its library.

21 Instead of limiting the amount of property that an inmate may retain, or
22 censoring only mail that contains prohibited material such as pornography or
23 instructions on manufacturing explosive materials, the Defendants have censored

1 all publications. In addition to censoring all of PLNs' journals and books,
 2 Defendants' policies require censorship of all publications from *Merriam-*
 3 *Webster's Dictionary* to *The New York Times* and *National Geographic*, and not to
 4 mention publications on police practices, disability rights, religious freedom, and a
 5 variety of other topics from the United States Department of Justice.

6 (c) Defendants' Blanket Ban Deters Speech

7 If Defendants' new mail policy saves them time and money, then it is
 8 because the restrictions deter, chill, and suppress protected speech. Banning all
 9 books, periodicals, and magazines, and censoring all informational brochures
 10 substantially reduces speech by deterring publishers, booksellers, and others from
 11 communicating at all.

12 Nearly every time that the Jail censored and returned a PLN book or journal,
 13 the post office charged PLN for the mail's return trip from Washington to
 14 Vermont. *See* Wright Dec. ¶¶14-18, 20, 22, 23, 27-29, 31, 32, 38, 41, 44, 48.
 15 Censorship and the costs associated with it likely deter publishers from sending
 16 mail to Chelan County Jail. *See, e.g., Ashker v. California Dept. of Corrections*,
 17 350 F.3d 917, 921 (9th Cir. 2003). If mail volume has decreased it is because
 18 Defendants have stamped out protected speech.

19 (d) The Policy Impedes Rehabilitation

20 Defendant's restrictive mail policy hampers the penological objective of
 21 rehabilitation. The Supreme Court has recognized that "the weight of professional
 22 opinion seems to be that inmate freedom to correspond with outsiders advances
 23 rather than retards the goal of rehabilitation[.]" *Procunier v. Martinez*, 416 U.S.

1 396, 412-413 (1974), overruled in part on other grounds by *Thornburgh v. Abbott*,
 2 490 U.S. 401 (1989). Indeed:

3 Constructive, wholesome contact with the community is a valuable
 4 therapeutic tool in the overall correctional process. . . .
 5 Correspondence with members of an inmate's family, close friends,
 6 associates and organizations is beneficial to the morale of all confined
 7 persons and may form the basis for good adjustment in the institution
 8 and the community.

9 *Martinez*, 416 U.S. at 412 n. 13 (quoting Policy Statement 7300.1A of the Federal
 10 Bureau of Prisons and Policy Guidelines for the Association of State Correctional
 11 Administrators); *see also Morrison v. Hall*, 261 F.3d 896, 904 n. 7 (9th Cir. 2001).

12 Education during incarceration is widely recognized as “a path to increased
 13 employment, reduced recidivism, and improved quality of life.” The Urban
 14 Institute Justice Policy Center, *From the Classroom to the Community: Exploring*
 15 *the Role of Education during Incarceration and Reentry* (2009), at 2 (Ex. 13). The
 16 Bureau of Prisons states:

17 Research demonstrates that education can change thinking, encourage
 18 pro-social behavior, increase employment, and reduce recidivism.
 19 Education’s power to transform lives in both tangible and intangible
 20 ways makes it one of the most valuable and effective tools we may
 21 have for helping people rebuild their lives after incarceration, as well
 22 as for combating and reducing criminal justice costs.

23 *Id.* at 42 (Ex. 13). Defendants’ blanket ban on publications severely impedes
 prisoners’ ability to educate themselves during incarceration and thus retards the
 penological goal of rehabilitation.

As in *PLN I* and *PLN II*, Plaintiff will likely show Defendant’s policy
 banning all books, periodicals, newspapers, book catalogs, magazines, and

1 correspondence is not rationally related to a legitimate penological objective.

2 **b. Second Turner Factor: Alternatives for Plaintiff**

3 The second *Turner* factor is whether Defendants afford Plaintiff an
4 alternative means to exercise its constitutional rights. They do not. PLN has no
5 practical way to reach its intended audience.

6 PLN cannot effectively or reasonably communicate its written speech by
7 telephone or fly from Vermont to Washington to meet with prisoners. And,
8 Defendants' practice of censoring PLN's book catalogs, subscription brochures,
9 and book offers—which are not printed in the form of a book or periodical—shows
10 that Defendants will squelch any effort by PLN to deliver the information
11 contained in its journal or books via some other printed form.

12 Courts have rejected mail policies requiring speech to be communicated in a
13 particular medium. In *Morrison v. Hall*, 261 F.3d 896 (9th Cir. 2001), the Ninth
14 Circuit rejected the Oregon DOC's argument that it could ban bulk-rate mail
15 because prisoners may listen to radio or watch television instead: "radio and
16 television . . . should not be considered a substitute for reading newspapers and
17 magazines." *Id.* at 904. *See also Mann v. Smith*, 796 F.2d 79, 83 (5th Cir. 1986).

18 Costly alternatives have likewise been held inadequate. In *PLN I*, 238 F.3d
19 at 1149, and *Morrison*, 261 F.3d at 904, the Ninth Circuit denied the governments'
20 claims that banning bulk rate mail was permissible because publishers could send
21 mail via first or second class, holding that forcing a publisher to "take additional
22 costly steps" to communicate with prisoners is unconstitutional.

23 **c. Third Turner Factor: Effect on Defendants' Resources**

1 The third *Turner* factor is the effect on prison staffing and resource
 2 allocation. *Turner*, 482 U.S. at 90. “[T]he policies followed at other well-run
 3 institutions [are] relevant to a determination of the need for a particular type of
 4 restriction.” *Morrison*, 261 F.3d at 905 (quoting *Martinez*, 416 U.S. at 414 n.14).

5 PLN has sent its letters, catalogs, and brochures to thousands of prisoners
 6 country-wide since its founding in 1990. Wright Dec. ¶6. PLN distributes its
 7 journal to about 2,200 correctional facilities, including the Federal Bureau of
 8 Prisons (“BOP”) housing 217,582 prisoners and the Washington Department of
 9 Corrections (“WDOC”) housing over 18,000, Exs. 7, 9; Wright Dec. ¶7.

10 Neither the BOP nor the WDOC ban books, periodicals, newspapers,
 11 catalogs, or magazines, and other jails allow these materials as well. *See* Exs. 6, 8,
 12 14-16 (King County, Pierce County, and Spokane County Jail mail policies). This
 13 is strong evidence the third *Turner* factor favors PLN. And, before September
 14 2010, the Jail managed without its draconian blanket ban, and now must still
 15 handle all mail it receives, which includes sending due process notice for all mail
 16 that it censors—undermining any argument that delivering mail rather than
 17 censoring the mail is a drain on resources.

18 **d. Fourth Turner Factor: Defendants’ Alternatives**

19 The fourth *Turner* factor is whether prison authorities have “readily
 20 available” alternatives. “[T]he existence of obvious, easy alternatives may be
 21 evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to
 22 prison concerns.” *Turner*, 482 U.S. at 90. Regardless of the Defendants’ claimed
 23 justifications, the fact that more than 2,000 correctional facilities nationwide accept

1 PLN's materials suggests that the Jail's ban is an exaggerated response. *See*
 2 *Hrdlicka v. Reniff*, 631 F.3d 1044, 1055, (9th Cir. 2011) (holding widespread
 3 distribution of publisher's materials suggests jails' ban is exaggerated response).
 4 Indeed, until September of last year, the Jail accepted books and periodicals too.

5 2. The Ninth Circuit has Held that Banning Book Catalogs is Irrational

6 Prison Legal News is likely to show that Defendants' censorship of catalogs
 7 is unconstitutional. In *PLN II*, the Ninth Circuit held that a blanket ban on catalogs
 8 violates the First Amendment and affirmed a permanent injunction on the ban by
 9 the Washington DOC. 397 F.3d 692, 696 (9th Cir. 2005). A political subdivision
 10 of Washington, the Chelan County Jail is bound by Ninth Circuit precedent.

11 Book catalogs can spark interest in science, literature, music, art, and human
 12 rights. PLN's 2010 book catalog describes 43 books and resource materials on the
 13 rights of prisoners regarding health and safety, self-representation in court, job
 14 searches, successful reentry upon release, and the mental health crisis in prisons.
 15 *See* Ex. GGG. Since the Ninth Circuit has already held that censoring catalogs is
 16 irrational, and unconstitutional, no analysis under the other factors is warranted.

17 3. Defendants Fail to Afford Due Process

18 The Supreme Court long ago recognized that a publisher's right to
 19 communicate with prisoners is rooted not only in the First Amendment, but also in
 20 the Fourteenth Amendment. *Pell v. Procunier*, 417 U.S. 817, 832 (1974). Thus,

21 [T]he decision to censor or withhold delivery of a particular letter
 22 must be accompanied by minimum procedural safeguards. The
 23 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

1 Amendment even though qualified of necessity by the circumstance of
2 imprisonment. As such, it is protected from arbitrary governmental
invasion.

3 *Martinez*, 416 U.S. at 417-18. Repeatedly, the Ninth Circuit and Eastern District
4 of Washington have reaffirmed this core principle that the Constitution requires
5 notice and an opportunity to appeal prison censorship. *See, e.g., PLN I*, 238 F.3d
6 at 1152-53; *PLN II*, 397 F.3d at 701; *Krug v. Lutz*, 329 F.3d 692, 696-98 (9th Cir.
7 2003); *Miniken v. Walter*, 978 F.Supp. 1356, 1363-64 (E.D. Wa. 1997).

8 Publishers have a right to procedural due process because:

9 Without notifying the free citizen of the impending rejection, he
10 would not be able to challenge the decision which may infringe his
11 right to free speech . . . [and] since the inmate-recipient would not
have seen the contents of the withheld letter, he may require the aid of
the author to meaningfully challenge the rejection decision.

12 *Martin v. Kelley*, 803 F.2d 236, 243-44 (6th Cir. 1986); *see also, Montcalm Pub.*
13 *Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996); *Cofone v. Manson*, 409 F.Supp.
14 1033, 1042 (D. Conn. 1976).

15 Although Defendants are constitutionally mandated to afford due process
16 protections to publishers when censoring prisoner mail, Defendants have plainly
17 failed to do so. For all but two of 65 the censored items, Defendants gave PLN *no*
18 notice of the reason they censored its mail. They merely marked the books and
19 journals "REFUSED," without any explanation. *See* Exs. A, C, D, E, G, I, M
20 through V, Y, RR through AAA. This perfunctory notation did not inform PLN
21 what the Jail claims was objectionable, what policy applies, and how the publisher
22 could cure any defect. And when Defendants censored PLN's brochures and book
23 offers, they did not return them, so PLN did not even know they were refused. *See*

1 Wright Dec. ¶¶49-51; *See* Brixey Dec. ¶4; Dronen Dec. ¶4; Foust Dec. ¶4; Garcia
2 Dec. ¶4; Quintana Dec. ¶4; Wilson Dec. ¶4; Yancey Dec. ¶4.

3 Defendants' policy does not provide an opportunity for the sender to appeal
4 the Jail's censorship decisions. *See* Ex. 1 at VI. A. and C. And their "Mail Denial
5 Notice" form explicitly denies the prisoner and sender the opportunity to appeal if
6 the mail is censored because it contains unauthorized attachments or enclosures.
7 *See* Exs. BB and CC.

8 Indeed, Defendants failed to provide Plaintiff with *any* opportunity to
9 challenge the censorship decisions. Defendants' handwritten note or stamp
10 ("REFUSED") provides *no* information about how to challenge rejection
11 decisions, who to contact, what the appeal must contain, or any deadlines. *See e.g.*
12 Ex. A. The two "Mail Denial Notice" forms that Defendants sent to PLN fail to
13 identify the mail that was censored and wrongfully deny administrative review of
14 the censorship decisions. *See* Exs. BB and CC ("no administrative review").

15 An opportunity to be heard is a crucial, constitutionally-mandated chance to
16 correct errors and challenge censorship decisions, which Defendants routinely
17 denied to PLN. PLN has a strong likelihood of showing that Defendants have
18 violated, and will continue to violate, PLN's procedural due process rights.

19 C. PLN Continues to Suffer Irreparable Harm as a Result of the Censorship

20 "[A]n alleged constitutional infringement will often alone constitute
21 irreparable harm." *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th
22 Cir. 1997) (internal citation omitted). Indeed, the Fourth Circuit has held that the
23 court "has no discretion to deny relief by preliminary injunction to a person who

1 clearly establishes by undisputed evidence that he is being denied a constitutional
2 right.” *Henry v. Greenville Airport Com’n*, 284 F.2d 631, 633 (4th Cir. 1960).

3 Here, Defendants continue to inflict irreparable harm on PLN by enforcing
4 their blanket policies to censor PLN periodicals, books, book catalogs, and
5 correspondence mailed to prisoners, and deny PLN due process notice and the
6 opportunity to challenge the censorship. Wright Dec. ¶¶63-66. “The loss of First
7 Amendment freedoms, for even minimal periods of time, unquestionably
8 constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

9 D. The Balance of Hardships Tips In Favor of Plaintiff

10 Here, the irreparable harm suffered by Prison Legal News is concrete,
11 severe, and ongoing. The government will continue to censor PLN mail to
12 prisoners, without due process, banning PLN’s core protected speech that criticizes
13 government policies, educates prisoners on their rights, and offers insights on the
14 criminal justice system and jail conditions. In contrast, any potential injury to
15 Defendants is minimal and speculative. No great cost or expenditure of time is
16 required to lift the policies to allow PLN and other publishers to communicate with
17 prisoners. The balance of hardships strongly favors Plaintiff.

18 E. The Public Interest Favors Free Flow of Information

19 The First Amendment furthers a compelling public interest. “[P]rior
20 restraints on speech and publication are the most serious and the least tolerable
21 infringement on First Amendment rights.” *Nebraska Press Ass’n v. Stuart*, 427
22 U.S. 539, 559 (1976). The public has an important interest in protecting the
23 “marketplace of ideas” wherever it may be found, and in the continued vitality of

1 the Bill of Rights. At the heart of the First Amendment is the right of the press to
2 disseminate and exchange information on important issues of public concern, in
3 particular when that discussion is critical of the government. The public interest
4 weighs strongly in favor of preliminarily enjoining Defendants from enforcing
5 their unconstitutionally overbroad restrictive mail policy.

6 III. CONCLUSION

7 Plaintiff has shown a strong likelihood of success on the merits and
8 irreparable harm, whereas Defendants will suffer no meaningful harm from entry
9 of a preliminary injunction. Accordingly, Plaintiff respectfully asks the Court to
10 enter a preliminary injunction, and waive any bond.

11 DATED this 17th day of October, 2011.

12 MacDONALD HOAGUE & BAYLESS

13 By: 

14 Jesse Wing, WSBA # 27751

15 JesseW@mhb.com

16 Katherine Chamberlain, WSBA # 40014

KatherineC@mhb.com

Attorneys for Plaintiff


CERTIFICATE OF SERVICE

I certify that on the date noted below I electronically filed this document entitled **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following persons:

Counsel for All Defendants:

Milton G. Rowland
Foster Pepper PLLC
422 W Riverside Avenue, Suite 1310
Spokane, WA 99201
Phone: 509/777-1600
Fax: 509/777-1616
Email: rowlm@foster.com

DATED this 17th day of October, 2011, at Seattle, Washington.


Brina Carranza, Legal Assistant