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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

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

Plaintiff,

v.

COLUMBIA COUNTY; COLUMBIA  
COUNTY SHERIFF'S OFFICE; JEFF  
DICKERSON, individually and in his capacity  
as Columbia County Sheriff,

Defendants.

No. 3:12-CV-71-SI

PLAINTIFF'S TRIAL BRIEF

Plaintiff Prison Legal News respectfully submits the following trial brief addressing the issues raised by the Court at oral argument on Plaintiff's motion for summary judgment.

### I. Who Decides What at Trial

Under Supreme Court and Ninth Circuit precedent, PLN believes that the Court will decide the following:<sup>1</sup>

1. Whether Defendants' policies and practices (Postcard-Only and Magazine Ban) violated the First Amendment, and under what standard (e.g., *Turner v. Safley* or *Procunier v. Martinez*);
2. Whether Defendants' policies and practices (relating to due process notice and opportunity to be heard) violated the Fourteenth Amendment;
3. The specific acts of censorship and lack of notice and opportunity to be heard committed by Defendants that constituted violations of the Constitution, since that is part and parcel of applying *Turner* or *Martinez* and due process precedent;<sup>2</sup>
4. Declaratory relief, since it is a form of equitable relief;
5. Injunctive relief, since it is a form of equitable relief; and
6. Nominal damages, since they are mandatory under Ninth Circuit law.<sup>3</sup>

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<sup>1</sup> See *Turner v. Safley*, 482 U.S. 78, 89-90 (1987), *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), overruled in part on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989), and *Prison Legal News v. Lehman*, 397 F.3d 692, 696 (9th Cir. 2005).

<sup>2</sup> And, in any event, Defendants have admitted the acts of censorship as well as the acts of failure to afford due process. They just dispute the legal consequences of their acts. Under the circumstances, it is unnecessary to ask the jury to "find" what acts occurred just so the Court can decide whether those admitted acts violated the Constitution.

<sup>3</sup> See *Schneider v. County of San Diego*, 285 F.3d 784, 794-95 (9th Cir. 2002) (plaintiff "legally entitled to judgment with a mandatory nominal damages award of \$1.00 as a symbolic vindication of her constitutional right").

In turn, once the Court has decided issues numbered one through six above, and has instructed the jury of its findings and conclusions, Plaintiff believes that the jury will decide the following fact issues and decide the appropriate relief:

1. Whether to award compensatory (economic and presumed) damages and, if so, how much.
2. Whether to award punitive damages and, if so, how much.

## **II. What to Tell the Jury, and When**

PLN believes that the Court should approach this jury trial in the same manner as it approaches trials where it is asked to render a directed verdict or judgment as a matter of law only after the jury is impaneled. That is, at the beginning of the trial, the Court should issue typical jury instructions about the nature of the case and the parties' respective positions about their claims. *See* PLN's proposed Jury Instruction No. 2. PLN has articulated in its proposed findings of fact and conclusions of law and its proposed Jury Instruction Nos. 21 and 22 what it anticipates the Court will find and then instruct the jury on.

But, for the following reason, PLN believes that the Court should wait to explain to the jury that the Court has decided or will decide the legal issues until it has done so:

1. Regardless of the scope of the jury's role, the jury members should pay the same attention to the evidence because most of the evidence relating to liability also relates to the issues of compensatory and punitive damages;
2. Telling the jury that their role is limited in some way may inadvertently tend to reduce the attention that they pay to certain evidence or skew their focus on the evidence, or it may confuse them about what to pay attention to; and
3. Once the Court actually makes its decisions it will have clarity on what to instruct the jury, which has the added advantage of reducing the chances of having to correct prior pronouncements.

### III. Issues of Law in Dispute

In addition to the core dispute over the constitutionality of Defendants' policies and practices and the issues raised in the parties' respective motions in limine, PLN believes that the Court will need to address the proper standard for determining whether Defendants' censorship of *outgoing* prisoner mail violated the First Amendment. PLN contends that Defendants' conduct is governed by *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), whereas Defendants contend that it is governed by *Turner v. Safley*, 482 U.S. 78, 89-90 (1987). PLN relies on its prior briefing, *see* Dkt. 15 at 17-18, Dkt. 71, Dkt. 98 at 13-14, and on its oral argument on the preliminary injunction regarding this issue.

Respectfully submitted,

DATED this 30<sup>th</sup> day of December, 2012.

MACDONALD HOAGUE & BAYLESS

*/s/Jesse Wing*

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 30, 2012, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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