03-35608

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRISON LEGAL NEWS,
a Washington corporation; et al.,

Appellees,

v.

JOSEPH LEHMAN,
in his official and individual capacities; et al.,

Appellants.

On appeal from the United States District Court for the Western District of Washington (District Court No. C01-1911L)

The Honorable Robert S. Lasnik
United States District Judge

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

(Filed in Support of Appellees and Requesting Affirmance of the District Court's Decision)

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae American Civil Liberties Union of Washington, Inc. ("ACLU") is a nonprofit, tax-exempt corporation with foundations that handle its legal and educational work. It does not have a corporate parent, and no publicly held company owns ten percent or more of its stock.

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I. IDENTITY AND INTERESTS OF THE AMICUS CURIAE

A. Nature of Action

This civil rights action was filed by Prison Legal News ("PLN"), which publishes a monthly newsletter that reports on legal cases and news stories related to prisoner rights and prison conditions of confinement. In the District Court, PLN contended that the Washington Department of Corrections ("Department of Corrections" or "Department") violated its First Amendment rights by adopting regulations that preclude delivery to Washington inmates of any and all mail (other than periodicals to which inmates have a subscription) that is sent at "bulk mail" rates. It asserted additional claims under the First Amendment related to Department regulations that preclude the delivery of "catalogs" and certain "third-party legal materials". In addition, it asserted a due process claim based on the failure of prison officials to provide the basic procedural rights to which mail senders and recipients are entitled when prison authorities decline to deliver mail to inmates.

B. The ACLU and Its Interest in This Action

The American Civil Liberties Union of Washington ("ACLU") is a nonprofit, nonpartisan civil liberties organization with over 15,000 members in Washington State. It is affiliated with the national American Civil Liberties Union.

Consistent with its mission to protect constitutional rights, the ACLU often has participated as amicus curiae or as direct counsel in cases involving the First

Amendment and Due Process rights of prison inmates and persons, including publishers, who seek to communicate with prisoners. It was, for example, an amicus curiae before this Court in Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001), and provided counsel for the prisoner who was denied publications in Miniken v. Walter, 978 F. Supp. 1356 (E.D. Wash. 1997).

In addition to its general interest in the protection of constitutional rights, the ACLU has a direct, personal interest in some of the issues before the Court because it and/or affiliated entities sometimes correspond with prisoners utilizing the discounted, nonprofit bulk mailing rates approved by Congress and the United States Postal Service. For example, the ACLU publishes a quarterly newsletter for its members entitled *Civil Liberties*, which is mailed at the nonprofit rate. Some ACLU members are incarcerated, and therefore have had problems receiving their newsletters. Some of them have asked the ACLU to send *Civil Liberties* to the addresses of relatives outside the prison system, which leads to delays in the prisoners receiving their newsletters and additional mailing expenses for their relatives.

Similarly, The National Prison Project of the American Civil Liberties Union Foundation ("NPP-ACLUF") publishes a quarterly publication called the *National Prison Project Journal* ("*NPP Journal*"). Copies of the *NPP Journal* sent to subscribing prisoners in Washington State had been rejected by corrections officials solely because the publication is mailed at bulk rates, which led the NPP-ACLUF to become a plaintiff in Humanists of Washington v. Lehman, No. C97-

5499FDB (W.D. Wash. filed Aug. 7, 1997) (challenging Washington Department of Corrections regulations and rules that prohibited the delivery of subscription publications mailed at "bulk" rates, without notice that the publication was not being delivered to its intended recipient).

The effects of the regulations challenged here are not limited to publishers like PLN whose primary audience consists of prisoners and persons (such as attorneys) who work with prisoners. As Appellees observe in their Brief, the Department of Corrections has censored mailings from political, scientific and literary magazines, colleges, religious groups, and even the United States Department of Justice. Brief of Appellees at 9 & n.9 (Jan. 9, 2004). Moreover, the Department's regulations directly affect prison inmates, none of whom are parties to this action or appeal. Given its unique position as a guardian of the constitutional rights of all Americans, the ACLU offers this amicus brief to provide a broader perspective to the Court than the necessarily more fact-specific Briefs of the parties. The ACLU urges the Court not to overlook the effect that its ruling will have on both prisoners and nonprofit organizations of all kinds, in addition to publishers like PLN whose primary audience consists of prisoners.

C. Source of ACLU's Authority to File This Brief

The ACLU has filed a motion, contemporaneously with this Brief, in which it requests the Court to grant it permission to submit this Brief.

II. SUMMARY OF ARGUMENT

As a general matter, the ACLU agrees with Appellees that the regulations that preclude delivery to Washington inmates of "bulk mail", "catalogs" and "third-party legal materials" cannot survive scrutiny under the test enunciated by the Supreme Court in Turner v. Safley, 482 U.S. 78 (1987), as applied by this Court in cases such as Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001), and Morrison v. Hall, 261 F.3d 896 (9th Cir. 2001), and that the failure to provide notice to publishers and prisoners when mail is withheld constitutes a violation of Due Process under Cook and Frost v. Symington, 197 F.3d 348 (9th Cir. 1999). The ACLU will not repeat arguments already made by Appellees, but instead offers additional perspectives on the unconstitutionality of the Department's censorship and the harms it creates.

A. Bulk Mail

Congress determined long ago that communications between nonprofit organizations and their intended audience provide benefits not only to those organizations and the recipients of their mailings, but to society as a whole. Consequently, Congress established special mail rates, including discounted rates for bulk mailings, that are available only to nonprofit organizations. Congress did not create an exception to those rates for mail that is sent to prisoners.

The Washington Department of Corrections, however, has taken upon itself to "repeal" the special postage rates that Congress and the United States Postal Service have deemed appropriate for nonprofit organizations like the ACLU to use.

The Department of Corrections has no authority to do so. Only Congress can limit the application of laws that it has enacted. The Department's actions are thus preempted by federal law.

The Department's actions with respect to "bulk mail" also violate the First Amendment. The forced requirement that organizations such as the ACLU must pay more to send mail, including subscription-related communications, to Washington inmates than Congress has deemed appropriate is the equivalent of an unconstitutional tax that discriminatorily targets the speech of the ACLU and other similarly situated organizations.

B. Catalogs

As applied to this case, the Department of Corrections' ban on "catalogs" is directed only to the sale of books. By preventing publishers from sending to inmates a catalog of book titles—often taking the form of 1-2 page flyers—the Department improperly impedes the ability of publishers and prisoners to exercise their First Amendment rights. Indeed, if inmates cannot receive mailings which advise them of the availability of books that might interest them, and forms with which to order them, the publisher's (and author's) ability to share their ideas with the prisoners effectively has been stopped at the prison's walls. This is a particularly irrational approach to maintaining prison security, because not only does it not take into consideration the content of the books that might be ordered, but it fails to acknowledge the positive effects of reading on rehabilitation and prevention of recidivism.

C. Third-Party Legal Materials

The Department of Corrections' refusal to deliver "third-party legal materials" applies only to original source documents, such as complaints, briefs, settlement agreements and court orders. At the same time, however, the Department does not preclude prisoners from learning about the results of legal proceedings through reports in newspapers, television and other media. If knowledge about such proceedings is not a threat to institutional security, it defies logic that a ban on delivery of the source materials would constitute a threat either. It appears, therefore, that the real purpose underlying this form of censorship is the fact that possession of "third-party legal materials" can lead inmates to have a better idea as to how they can assert their rights when those rights are violated by the Department. Indeed, Department officials have admitted as much. This ban should not survive scrutiny, therefore, because of the improper burden it places on access to the courts by prisoners who believe they have been harmed by prison officials and seek to obtain relief and vindicate their rights.

D. Notice

There is no justification for the Department of Corrections' refusal even to give notice to publishers and prisoners that mail sent to Washington prisoners, whether it be in the form of "bulk mail" or a "catalog", is not being delivered. The refusal to provide such notice is a denial of the publishers' and the prisoners' Due Process rights.

III. ARGUMENT

A. WASHINGTON'S BAN ON RECEIPT OF MAIL RELATED TO SUBSCRIPTION PUBLICATIONS, SOLELY BECAUSE IT IS MAILED AT "BULK" RATES, IS UNCONSTITUTIONAL

At issue in this lawsuit is the ability of prisoners to receive and of publishers to send subscription-related mail, where the publisher chooses to take advantage of special, discounted mailing rates established at the direction of Congress by the United States Postal Service. These include publishers whose publications contain political and religious speech, both of which are entitled to the highest protection under the Constitution. See McIntyre v. Ohio Elections Commission, 514 U.S. 334, 347 (1995) ("[n]o form of speech is entitled to greater constitutional protection than" political speech); Widmar v. Vincent, 454 U.S. 263, 276 (1981) (holding, in religious speech case, that "[o]ur cases have required the most exacting scrutiny in cases in which a state undertakes to regulate speech on the basis of the content").

1. Washington's "Bulk Mail" Regulations Conflict With the Purposes and Objectives of Congress and Therefore Are Preempted

When action of a state government, whether under its police powers or otherwise, collides with the Federal Constitution or an act of Congress, the action of the state "must give way by virtue of the Supremacy Clause." Morris v. Jones, 329 U.S. 545, 553 (1947) (citing U.S. Const. art. VI, cl. 2). Here, the Washington Department of Corrections' bulk mail regulations directly conflict with federal laws and policies that encourage the use of special, discounted bulk mailing rates by

nonprofit organizations. Those regulations, therefore, are subject to preemption under the Supremacy Clause. See Hankins v. Finnel, 964 F.2d 853, 861 (8th Cir.) (holding unconstitutional a Missouri law that required prisoners to reimburse the state for the cost of their incarceration because the law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'") (quoting Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)), cert. denied, 506 U.S. 1013 (1992).

a) Congress affirmatively encourages communication of nonprofit organizations by granting them the right to use discounted, bulk-mailing rates.

For more than 50 years, Congress has acknowledged the importance of communications by "qualified nonprofit organizations" by granting to them a lower bulk mailing rate than it provides to other senders of "bulk mail." Qualified nonprofit organizations include "religious, educational, scientific, philanthropic, agricultural, labor, veterans' and fraternal organizations or associations which are not organized for profit and for which none of the net income inures to the benefit of any private stockholder or individual." See 39 U.S.C. § 3626(a)(1)-(3) (providing reduced rates for qualified nonprofit organizations, as specified in former 39 U.S.C. § 4452(b)); 39 U.S.C. § 4452(d) (repealed 1970) (defining categories of qualified nonprofit organizations entitled to use reduced bulk mailing rates under former 39 U.S.C. § 4452(b)); accord Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 237-38 (1987) ("The United States Postal Service . . . grants a special bulk rate to written materials disseminated by certain nonprofit

organizations—religious, educational, scientific, philanthropic, agricultural, labor, veterans' and fraternal organizations.") (Scalia, J., dissenting). Thus, "[o]rganizations and groups eligible for the Nonprofit Standard Rate are permitted to mail letters and other materials for about forty-three percent less than the rate paid by businesses operated for profit." United States v. American Targeted Advertising, Inc., 257 F.3d 348, 352 (4th Cir. 2001).

The discounted bulk rate granted to qualified nonprofit organizations—including the ACLU—reflects a congressional recognition that mailings by the specified types of nonprofit groups yield benefits for society as a whole. See Richard B. Kielbowicz and Linda Lawson, Reduced-Rate Postage for Nonprofit Organizations: A Policy History, Critique, and Proposal, 11 Harv. J.L. & Pub. Pol. 347, 348 (1988) (hereinafter "Kielbowicz & Lawson"); cf. Bob Jones University v. United States, 461 U.S. 574, 591 (1983) (stating, in regard to tax exemptions for 501(c)(3) organizations, "Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues"). This special treatment for nonprofit organizations can be traced back to at least 1951, when Congress exempted nonprofit bulk mailings from a rate increase that was applied to commercial mailers. See Kielbowicz & Lawson, supra, at 354 (citing Act of Oct. 30, 1951, Pub. L. No. 82-233, § 2, 65 Stat. 672). This decision followed substantial congressional testimony by representatives of nonprofit

organizations that any increase in bulk mailing rates that applied to them would severely undercut the services they provided. See id. at 354-55.[1]

When Congress in 1970 reorganized the Post Office Department into the United States Postal Service, it sought, in part, to modernize the way in which postal rates are created, and established a requirement that each class of mail must bear the costs attributable to it as well as its share of general overhead. See id. at 366-67 (citing 39 U.S.C. § 3622(b)(3)). In essence, Congress sought to make each class of mail pay its own way. Id. at 367. Congress made an exception to this general requirement, however, for nonprofit mail: "[t]he continuation of below-cost rates for nonprofit mailers thus veered markedly from general policy established by the [Postal] Reorganization Act." Id. at 367; H.R. Rep. No. 91-1104, reprinted in 1970 U.S.C.C.A.N. 3649, 3659 ("The same groups that enjoy the benefits of free or reduced rate mail today will continue to enjoy these benefits until changed by law, if and to the extent that Congress appropriates to the Postal Service the revenue foregone by the free or reduced rates"). The continued provision of lower rates for nonprofit organizations again reflected "that the public

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[1] Arguments made to dissuade Congress from raising bulk mail rates applicable to nonprofit organizations included: (1) nonprofit organizations devote the income they obtain from mailings to their charitable activities; (2) if bulk mail rates were increased, these organizations might need to curtail some of their services in order to cover the higher postal costs (even though the Post Office would gain little revenue); and (3) these nonprofit organizations were helping people who otherwise would have to turn to the Government for aid. See Kielbowicz & Lawson, supra, at 356.

benefits from nonprofit mail." Kielbowicz & Lawson, supra, at 367; see also Greenberg v. Bolger, 497 F. Supp. 756, 776 (E.D.N.Y. 1980) (discounted postal rates "are public facilities designed to promote public communication").

Thus, Congress repeatedly has recognized the important social benefits that nonprofit organizations provide to society and their need to use discounted bulk mail rates to communicate with their target audiences, through means such as newsletters, periodicals and brochures.[2] Congress's goals in granting nonprofit organizations the right to use discounted bulk-mailing rates would be unduly impeded, and the impact of this Court's decisions in Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001), and Morrison v. Hall, 261 F.3d 896 (9th Cir. 2001), unduly restricted, if organizations such as the ACLU could use bulk-mail rates only for their publications, and not for other communications to subscribers and potential subscribers, including on matters directly related to the publications.

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[2] Programs and services that nonprofit organizations provide could be severely restricted if they had to use their limited funds to pay for higher postage rates. See Kielbowicz & Lawson, supra, at 354-56. Therefore, if denied the right to use the discounted bulk-mailing rates that Congress and the U.S. Postal Service have granted to them, some nonprofit organizations could be forced to choose between reducing expenditures on other programs and services or reducing (or even eliminating) communications with Washington State inmates, even if the inmates, by their subscriptions, have indicated a desire to receive the nonprofit organization's message. See Miniken v. Walter, 978 F. Supp. 1356, 1363 (E.D. Wash. 1997) (holding that there was no reasonable alternative where the "entire nonprofit operation [of the publisher] is centered on mailing the publication third class as an economic and logistical matter").

b) Local laws and regulations that conflict with federal postal laws and regulations are preempted.

Court repeatedly have recognized that state and local laws that conflict with federal laws and policies related to the United States Postal Service are subject to federal preemption. For example, in United States v. City of Pittsburg, 661 F.2d 783, 784 (9th Cir. 1981), this Court ruled that a local law which prohibited postal workers from crossing private lawns unless they obtained the resident's prior consent was preempted. The Court indicated that

> [l]ocal law will be found to be preempted by federal law whenever the "challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"

Id. at 785 (citations omitted). Focusing on whether the city's ordinance "obstructs the execution of Congressional objectives in the area of mail delivery," id., the Court held that the ordinance was preempted because it conflicted with and frustrated the congressional goal to increase postal efficiency. Id. at 785-86.

Other courts likewise have concluded that local laws that infringe upon the execution of congressional objectives related to the delivery of mail are subject to preemption. For example, in United States Postal Service v. Town of Greenwich, 901 F. Supp. 500 (D. Conn. 1995), the court held that the Postal Service was not subject to local building codes and building permit fee schedules, when it sought to erect a new Post Office building, because Congress had not unambiguously authorized that the Postal Service be subjected to such codes and fees. Id. at 505. The court concluded that the preemptive effect of federal law also applied

derivatively to efforts by the Town of Greenwich to subject to the building code and permit fees a lessor of the building and the private contractor engaged to build it. The court ruled that the building code was preempted to the extent it actually conflicted with federal law, holding that "the state law in this case conflicts with a federal scheme by infringing on the Postal Service's mandate to construct and operate post offices as authorized under the Postal Reorganization Act." Id. at 507. The court added:

> Any regulation of the post office project, whether against the property, the lessor, or the building contractors "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); see also Township of Middletown v. N/E Regional Office, United States Postal Service, 601 F. Supp. 125, 127 (D.N.J. 1985) (holding that Postal Service is not subject to local zoning regulations because, "unless Congress clearly and affirmatively declares that federal instrumentalities shall be subject to state regulation, the federal function must be left free of such regulation"); Grover City v. United States Postal Service, 391 F. Supp. 982, 986-87 (C.D. Cal. 1975) (holding that local ordinance which directed that curbside mailboxes be removed and located at least six inches behind the sidewalk conflicted with postal regulations and therefore was preempted under the Supremacy Clause).

These rules apply to the present case because, in prohibiting the delivery of mail sent by nonprofit organizations at bulk mailing rates, the regulations enacted

by the Department of Corrections "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." See City of Pittsburg, 661 F.2d at 785. State prison officials simply may not override the decision of Congress to allow nonprofit organizations, like the ACLU, to use discounted bulk-mailing rates to communicate with actual and potential subscribers, including for purposes related to renewal and solicitation of subscriptions.

2. Forcing Nonprofit Organizations—or, Indeed, Any Organization That Qualifies to Use Bulk-Mailing Rates—to Use More Expensive Rates of Mail Is Equivalent to Imposing an Unconstitutional Tax or Surcharge

"Freedom of speech, freedom of the press, freedom of religion are available to all, not merely those who can pay their own way." Murdock v. Pennsylvania (City of Jeannette), 319 U.S. 105, 111 (1943). Accordingly, states "may not impose a charge for the enjoyment of a right granted by the Federal Constitution." Id. at 113; cf. Follet v. Town of McCormick, 321 U.S. 573, 577 (1944) (stating, in holding that an ordinance which imposed a license fee for selling books was an unconstitutional burden on a Jehovah Witness's free exercise of religion: "The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious . . . as the imposition of a censorship or a previous restraint.").

These concerns have special relevance when a state authority imposes increased costs on persons exercising their First Amendment right to free speech.

For example, in Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), the Supreme Court held unconstitutional a Minnesota statute which had enacted a "use tax" on ink and paper used in publications, with the first $100,000 of ink and paper consumed in any calendar year exempt from the tax. Id. at 577-78. Not only did this special use tax apply only to publications, but it affected only publications large enough to have annual ink and paper expenditures in excess of $100,000. Id. at 581.

Because taxes that burden First Amendment rights "cannot stand unless the burden is necessary to achieve an overriding governmental interest," id. at 582, the Court concluded that Minnesota's ink and paper tax was unconstitutional. The Court explained that "differential treatment, unless justified by some special characteristics of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." Id. at 585. The Court then described some of the detrimental results of upholding such a tax:

> When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on Government.

Id. at 585; see also Grosjean v. American Press Co., 297 U.S. 233, 250 (1936) ("A free press stands as one of the great interpreters between the Government and the people. To allow it to be fettered is to fetter ourselves").

Here, Congress rationally determined that all persons who satisfy certain conditions may mail their communications at bulk rates that are lower than "first-class" rates. Congress also determined that certain qualified nonprofit organizations deserve even lower bulk mailing rates. Nevertheless, the Washington Department of Corrections in effect tells all persons who qualify to use bulk mail rates that they may not do so, that acts of Congress related to the mails are unenforceable in Washington prisons and that, if they wish to communicate with Washington State prisoners, they must pay more for that privilege than Congress has determined they must.

The difference between the bulk mailing rates authorized by Congress and the higher rates required by the Department of Corrections effectively constitutes a tax or surcharge on persons who qualify under federal law to use bulk mailing rates—and even more so on qualified nonprofit organizations, which are deprived of the *special discounted rates* that Congress and the Postal Service have made available to them. By contrast, the Department of Corrections does not require persons who do not qualify for bulk mail rates, because they do not have large enough mailings, to pay more for postage than Congress determined they should; they are not subject to a surcharge.

This surcharge is no different in its effect than the use tax that the Supreme Court found unconstitutional in Minneapolis Star & Tribune. Both burden the free speech rights of American citizens. Therefore, it cannot stand unless the burden it imposes "is necessary to achieve an overriding governmental interest." Minneapolis Star & Tribune, 460 U.S. at 582. The Department of Corrections simply cannot demonstrate that this burden on the First Amendment rights of persons qualified to utilize the Postal Service's bulk mailing rates—including nonprofit organizations who are entitled to an even lower bulk rate than persons or entities whose communications are not deemed to provide the same societal benefits—is necessary to achieve an overriding governmental interest. See Brief of Appellees at 22-29.

B. PROHIBITING BOOK ORDER FORMS ON GROUNDS THAT THEY ARE "CATALOGS" DEFEATS RECOGNIZED GOALS OF PRISONER REHABILITATION

The Department of Corrections asks the Court to believe that if PLN's book order forms are allowed into Washington prisons, the floodgates will open wide and every conceivable catalog will flow into prison mailrooms, requiring review. The Department fails to acknowledge the extremely limited nature of the issue before the Court as relates to "catalogs". PLN does not attempt to sell everything imaginable that could be sold by catalog, nor does it send its book order forms indiscriminately to every prisoner in Washington State. Rather, it seeks to sell to its subscribers one and only one thing: books. The Court, therefore, should limit its review to targeted solicitations related to the sale of books.

The objective of the Department of Corrections in enforcing its catalog ban against PLN's book order forms is especially troubling, given the obvious First Amendment interests involved. See Thornburgh v. Abbott, 490 U.S. 401, 407 (1989) ("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"). Indeed, Appellees point out that the Washington catalog ban has even been used to preclude PLN from sending renewal notices to its active subscribers. Brief of Appellees at 8 & n.8. Clearly, the right of any publisher to mail its publication to its subscribers is heavily burdened if the Department can prevent subscribers from renewing an existing subscription through the simple expedient of calling a one-page letter, or even a postcard, concerning renewal a "catalog".

Furthermore, precluding PLN (or any other publisher) from sending order forms to Washington prisoners is irrational in light of the fact that rehabilitation is one of the recognized goals of incarceration. See Gerber v. Hickman, 291 F.3d 617, 622 (9th Cir.), cert. denied, 537 U.S. 1039 (2002). As this Court recognized in Morrison, reading is highly conducive to rehabilitation and prevention of recidivism. In that case, the Court rejected prison officials' arguments that access to radio and television was an adequate substitute for access to reading materials:

> Although radio and television are alternative media by which inmates may receive information about the "outside" world, they should not be considered a substitute for reading newspapers and magazines. . . .

> Watching television and listening to the radio do little to improve literacy rates among inmates. . . . *The Los Angeles Times* also noted the link between higher rates of literacy and lower rates of recidivism.

Morrison, 261 F.3d at 904 & n.7 (other footnotes omitted).[3]

The irrationality of the Department of Corrections' catalog ban is all the more apparent by comparing the Federal Bureau of Prisons' ("Bureau") position on the receipt of such materials—including 1-2 page flyers. The Bureau does not preclude receipt of catalogs or advertising *per se*, but treats them like any other subscription publication, such as a newspaper or a magazine:

> Except when precluded by statute (see Sec. 540.72), the Bureau of Prisons permits an inmate to subscribe to or to receive publications without prior approval and has established procedures to determine if an incoming publication is detrimental to the security, discipline, or good order of the institution or if it might facilitate criminal activity. The term publication, as used in this subpart, means a book, booklet, pamphlet, or similar document, or a single issue of a magazine, periodical, newsletter, newspaper, plus such other materials

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[3] Some prison systems have kept rehabilitative goals in mind, even as they attempt to preclude the admission of certain categories of mail. For example, in Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977), prison officials barred prisoners from receiving mail in bulk, for subsequent distribution by them to other inmates. Id. at 130-31 & nn.7-8. Certain organizations were excluded from the ban, however—the Jaycees, Alcoholics Anonymous and the Boy Scouts—because their purpose in sending mail in bulk to prisoners was viewed as advancing the goal of rehabilitation. Id. at 133-36 & nn. 10-11. See also Allen v. Wood, 970 F. Supp. 824, 829 (E.D. Wash. 1997) (prison regulations distinguished catalogs for curio and hobby craft from other catalogs).

> addressed to a specific inmate such as advertising brochures, flyers, and catalogs.

28 C.F.R. § 540.70. The Department of Corrections' interpretation of its own "catalog" regulation thus is overly broad, in violation of publisher and prisoner First Amendment rights.

C. THE DEPARTMENT'S RESTRICTION ON RECEIPT OF THIRD-PARTY LEGAL MATERIALS IMPEDES PRISONERS' EXERCISE OF THEIR CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS

The Department of Corrections' prohibition on delivery of certain third-party legal materials to inmates is irrational, as Appellees explain at pages 35-38 of their Brief. Of even greater concern is the suspect motivation behind it. As Appellees explain,

> PLN had an admission from the defendant Blodgett himself that "one of the problems" that justified the censorship of these materials "might" be the kind of articles PLN carries, instructing prisoners of their rights and the Department's violations. SER 504. "Maybe that isn't the type of articles that we would really like circulated among the population. . . ."

Brief of Appellees at 38. The District Court similarly concluded that "[f]or certain pieces of censored mail PLN may be correct" that "the Department's real motivation . . . 'is that the materials embarrass the [Department] and educate

inmates how to file claims.'" Prison Legal News v. Lehman, 272 F. Supp. 2d 1151, 1162 (W.D. Wash. 2003).[4]

There can be little doubt that legal materials from other lawsuits can be a font of information for prisoners who otherwise might not realize that they even have a potential claim against prison authorities, or know how to pursue that claim once asserted. It is logical, moreover, to believe that the original source materials—the pleadings, motions, briefs, affidavits and orders on file—may contain more useful information for a prisoner-litigant than the highly truncated information that appears in the newspaper stories and television broadcasts to which Washington inmates are granted access. Moreover, to the extent PLN through its newsletter performs an educational function for prisoners, and helps them to recognize their rights and the types of claims they may be entitled to assert, that function also is stymied if its inmate-contributors are denied access to original source materials. Thus, either directly or indirectly (through PLN), the likely result is that prisoners with legitimate claims are precluded from pursuing those claims with the full cache of information that would be at their disposal but for the Department's restriction on inmate access to third-party legal materials.

This is a matter of grave concern. As this Court has observed,

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[4] Even if the Department's concern is simply that it not be embarrassed by legal materials that describe illegal action by prison officials, the motivation is still inappropriate. See Procunier v. Martinez, 416 U.S. 396, 413, 415 (1974), overruled in part on other grounds by Thornburgh v. Abbott, 490 U.S. 401 (1989).

> A prisoner's constitutional right of meaningful access to the courts, which underlies the issue here, is fundamental. *Bounds v. Smith*, 430 U.S. at 828, 97 S. Ct. at 1498. The reality and substance of any of a prisoner's protected rights are only as strong as his ability to seek relief from the courts or otherwise to petition the government for redress of the deprivation of his rights.

Bradley v. Hall, 64 F.3d 1276, 1280 (9th Cir. 1995). This constitutional right of "meaningful" access to the courts can best be protected by allowing inmates access to information that will allow them to recognize and assert their rights, especially when the Department has all but conceded that the information it strives to prevent prisoners from accessing in its original, unedited and unfiltered form, does not threaten any legitimate penological interest because inmates can review the same information (albeit in a highly condensed form) in a newspaper, magazine or other publication, or through a radio or television broadcast.

D. IF MAIL IS REJECTED, PUBLISHERS AND INMATES ARE ENTITLED TO RECEIVE NOTICE

Any restriction on mail sent to prisoners must be accompanied by procedural protections. As this Court held in Prison Legal News v. Cook, because publishers and prisoners "have a constitutionally protected right to receive subscription non-profit organization standard mail, it follows that such mail must be afforded the same procedural protections as first class and periodicals mail under Department regulations." 238 F.3d at 1152-53; accord Frost v. Symington, 197 F.3d 348, 353 (9th Cir. 1999) (holding that a prison inmate "has a Fourteenth Amendment due

process liberty interest in receiving notice that his incoming mail is being withheld by prison authorities"). The same result is mandated here.[5]

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[5] In Procunier v. Martinez, the Supreme Court determined that due process is satisfied where (1) the inmate is notified of the rejection of mail written or sent to him; (2) the author is given reasonable opportunity to protest; and (3) complaints are directed to a prison official other than the one who disapproved the correspondence. 416 U.S. at 418-19. These are considered to be the minimal procedural safeguards required when mail is withheld. See McKinney v. DeBord, 507 F.2d 501, 505 (9th Cir. 1974). Although Thornburgh v. Abbott, 490 U.S. 401 (1989), overruled Procunier in other respects, the Court in Thornburgh did not overrule Procunier's holding that restrictions of prisoner mail must be accompanied by procedural protections. Indeed, the Court explicitly pointed out that the regulations at issue in Thornburgh established procedural protection, including providing the publisher or sender of rejected publications a copy of the rejection letter and allowing the publisher to obtain independent review of the decision. 490 U.S. at 406.

IV. CONCLUSION

For the reasons set forth above, the Court should affirm the District Court's injunctive orders with respect to bulk mail, catalogs and notice of withheld mail, and its decision to leave open until trial issues of qualified immunity with respect to third-party legal materials.

RESPECTFULLY SUBMITTED this _____ day of January, 2004.

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CERTIFICATION OF COMPLIANCE

I certify, pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C), that the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 5853 words.

DATED this _____ day of January, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) full, true and correct copies of the foregoing AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON ("Amicus Brief") to be served on the following parties by causing the same to be deposited in the United States mail, first-class, postage prepaid, on this 16th day of January, 2004:

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In addition, on the same day the original and fifteen (15) copies of the Amicus Brief were dispatched via first-class U.S. Mail to the Clerk of the Court as follows:

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A D D E N D U M