

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

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BEFORE THE HONORABLE JOHN A. MENDEZ, JUDGE

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

Plaintiff,

No. Civ. S-11-907

vs.

COUNTY OF SACRAMENTO, et  
al.,

Defendants.

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REPORTER'S TRANSCRIPT

MOTION FOR PRELIMINARY INJUNCTION

WEDNESDAY, MARCH 7, 2012

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Reported by: KELLY O'HALLORAN, CSR #6660

APPEARANCES

For the Plaintiff:

ROSEN, BIEN & GALVAN, LLP  
315 Montgomery Street, Tenth Floor  
San Francisco, CA 94104  
BY: ERNEST GALVAN

For the Defendant:

LONGYEAR, O'DEA & LAVRA, LLP  
3620 American River Drive, Suite 230  
Sacramento, CA 95864  
BY: AMANDA L. BUTTS

1 SACRAMENTO, CALIFORNIA

2 WEDNESDAY, MARCH 7, 2012, 9:30 A.M.

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4 THE CLERK: Civil S-11-907; Prison Legal News versus  
5 Jones, et al.

6 MR. GALVAN: Good morning, your Honor. Earnest Galvan  
7 for Prison Legal News, plaintiff.

8 THE COURT: Did you bring me a copy of your newspaper?

9 MR. GALVAN: Yes, sir, your Honor.

10 MS. BUTTS: Good morning. Amanda Butts for the County  
11 of Sacramento.

12 THE COURT: Hello, Ms. Butts.

13 Did you bring me your mailing envelopes and mailing  
14 label or did you just bring me the newspaper?

15 MR. GALVAN: Your Honor, I did not bring any mailing  
16 envelopes or a mailing label. There is a very good  
17 photograph or a scan of one in the Wright declaration. And I  
18 can point you to that exhibit.

19 THE COURT: Okay. All right. Interesting case.  
20 We're here on a motion for a preliminary injunction filed by  
21 the plaintiffs against the county, focusing primarily on the  
22 Main Jail and what we have referred to as RCCC. That's the  
23 Rio Cosumnes Correctional -- I can't remember what the last C  
24 is for.

25 MR. GALVAN: Center, your Honor.

1 THE COURT: Center. There you go. We always just  
2 referred to it as RCCC. So there are only those two  
3 facilities at issue; correct?

4 MR. GALVAN: Correct, your Honor.

5 THE COURT: All right. So, Ms. Butts, I go through  
6 all this paper, and I've looked closely at all the  
7 declarations and the opening brief and the opposition and the  
8 reply. And, Mr. Galvan, you tried to sneak in a declaration  
9 at the last minute. I'm not sure what authority you thought  
10 you had for filing this declaration. But nevertheless, did  
11 you get a copy of this?

12 MS. BUTTS: Yes.

13 THE COURT: It's a declaration from Lance Weber who is  
14 one of the attorneys in this case and contains hearsay  
15 information. So it doesn't help me a whole lot to get a  
16 declaration from an attorney that contains hearsay. But I  
17 guess your point was that The Sacramento Bee catalog that  
18 contained staples got through but that he did get his Prison  
19 Legal News with the staples removed.

20 MR. GALVAN: Correct, your Honor.

21 THE COURT: Okay. Be careful about filing things  
22 late. Federal judges like to impose sanctions. As much as  
23 lawyers like to get the last word in, you have to do it  
24 within the rules. So I'm actually not going to consider  
25 Mr. Weber's declaration since it was late filed, and you

1 didn't seek permission. Just so you know.

2 MR. GALVAN: Understood, your Honor.

3 THE COURT: Okay. Let me also, before we get into the  
4 merits of this motion, just talk a little bit about,  
5 Mr. Galvan, you filed objections to some of the materials  
6 submitted by the defendants. Ms. Butts, in particular, you  
7 submitted a declaration in which you attached a number of  
8 exhibits. Again, Mr. Galvan, your objections are actually  
9 well-taken. Ms. Butts is the attorney in this case. You  
10 really should have had your witnesses lay foundations or  
11 authenticate most of the exhibits that you submitted. You  
12 can't do it as the attorney. It's done often I know in  
13 discovery motions, but this is a motion for an injunction in  
14 which I have to follow the rules of evidence. And all the  
15 arguments raised by Mr. Galvan, frankly, are valid  
16 evidentiary objections. You haven't laid proper foundations  
17 to these exhibits.

18 You submit, for example, newspaper articles which are  
19 classic hearsay. You submit another article, that's your  
20 Exhibit 10, which is from the Internet and which isn't  
21 properly authenticated. You submit logs from the Main Jail,  
22 again, which easily could have been authenticated by one of  
23 your witnesses since they're, I'm sure, business records and  
24 maintained in the regular course of business. But you tried  
25 to shortcut that by attaching it to your declaration. So

1 those objections are sustained since those exhibits aren't  
2 properly before the Court.

3 In terms of Mr. Morrissey's declaration which is  
4 objected to, you object to a paragraph in which he says, "In  
5 2009, during shakedowns of cells, magazines with staples were  
6 found in prisoner cells and within the facility. Metal  
7 fasteners from envelopes and collections of staples,  
8 paperclips and other metal items were also found and  
9 confiscated. Heroin and other drugs mixed in envelope glue  
10 were making their way through security. At the same time,  
11 other contraband was still being discovered, such as razor  
12 blades and screwdriver bits in mail and greeting cards."

13 And the plaintiff argues that paragraph is mainly  
14 irrelevant, other than the words "staples" and "were found  
15 and confiscated," but also even that may be irrelevant since  
16 Sergeant Morrissey didn't specify what type of staples were  
17 involved, and also arguing prejudice. And, again, those are  
18 valid evidentiary objections with respect to that paragraph.  
19 So I'm granting the evidentiary objections.

20 Okay. So let's get into this. As I understand it,  
21 and I don't think that, Ms. Butts, your client really  
22 disputes this, at least I can't tell. But according to  
23 Mr. -- is it Walczak? W-A-L-C-Z-A-K.

24 MR. GALVAN: Walczak, yes.

25 THE COURT: That this Prison Legal news has been

1 provided for over 20 years, been in existence, and there have  
2 been no problems prior to this policy which is at issue in  
3 this case coming into play, and there are different dates.  
4 It appears according to Mr. Morrissey that there was a policy  
5 that allowed staples prior to April of 2009, and then in  
6 2009, because of activities involving contraband, together  
7 with -- and I think this is significant and probably the main  
8 reason why the policy changed -- together with a decrease in  
9 staff at the jail due to budget cuts, there was a change in  
10 the procedure for screening mail and publications. And so  
11 these policies which are at issue, in part, Operation Orders  
12 6/15 and 6/16, come into play.

13 So as I understand it, there's no dispute that up to  
14 around April 2009, and apparently because there are also  
15 plenty of deputy sheriffs at the jail, the Prison Legal News  
16 came in and went through without any problems. And there's  
17 this staple and mailing envelope policy that's imposed, and  
18 suddenly the Prison Legal News starts being returned to  
19 sender, not even delivered to the inmates or the prisoners,  
20 at least at the Main Jail. Just focusing on the Main Jail  
21 right now.

22 Factually, do you dispute that at all?

23 MS. BUTTS: As to the mailing label, slightly. The  
24 written policy has not changed since 2007. The practice at  
25 the Main Jail changed in April of 2009 only as to staples.

1 THE COURT: Okay.

2 MS. BUTTS: Well, no, that's not true. Scratch that,  
3 or strike that. It did change as to mailing labels. I  
4 apologize.

5 THE COURT: Okay. I asked Mr. Galvan to bring me a  
6 Prison Legal News. At least the mailing address on this  
7 that's before the Court and was attached as an exhibit is a  
8 stamp. So Prison Legal News uses a stamp now, not a mailing  
9 label?

10 MR. GALVAN: Your Honor, it's actually printed. When  
11 the printer runs this out on the giant printing machine,  
12 it's --

13 THE COURT: So it's not a label that you have to  
14 remove?

15 MR. GALVAN: This is not a label, no. There is a  
16 little sticker that the post office puts on.

17 THE COURT: Okay. That's my other question. So does  
18 the county jail have a problem with the sticker that the post  
19 office puts on?

20 MS. BUTTS: No. The county jail doesn't have issues  
21 with stickers or mailing labels coming from verified  
22 publishers or from the United States Postal Service.

23 THE COURT: Okay. So I assume the jail doesn't have a  
24 problem also with a printed label like this.

25 MS. BUTTS: No.

1 THE COURT: Okay. So let's focus then on what's gone  
2 on. So April 2009, this policy causes some of these Prison  
3 Legal News newspapers to be sent back to Prison Legal News  
4 without being delivered to the inmates.

5 You agree with that?

6 MS. BUTTS: Yes.

7 THE COURT: I didn't take it that you were disputing  
8 their numbers that, although you may dispute the actual  
9 numbers, but there were at least several hundred of these  
10 newspapers that were returned to Prison Legal News.

11 Are you disputing that?

12 MS. BUTTS: No, we don't have any way to know.

13 THE COURT: Okay. How did you come up with that  
14 number, by the way? Do you actually have the return to  
15 sender?

16 MR. GALVAN: We keep them all.

17 THE COURT: You do. Okay. And so I read through all  
18 of this, and then I finally get to Deputy Lewis's  
19 declaration. And, honestly, I just shook my head, because  
20 suddenly as of February 13, 2012, after this lawsuit is  
21 filed -- and I don't know if it's after you filed your  
22 opposition or not, but obviously then the lawyers start  
23 talking to the deputies, and lo and behold, now at the Main  
24 Jail, they now accept Prison Legal News. They just remove  
25 the staples. And so that apparently is what's been going on

1 for the last three weeks.

2 And so you know what I'm going to ask you. Why the  
3 change of heart? Because the judge in me says, and I'm sure  
4 Mr. Galvan, the plaintiff's lawyer in him, says, well, I  
5 guess our lawsuit did some good. Somebody finally got hit  
6 over the head and realized let's just go back to the way we  
7 did things.

8 So tell me what happened, without disclosing  
9 attorney-client privileged communications.

10 MS. BUTTS: Right. I'm going to do my best on that.

11 I think when the change -- or I know when the change  
12 in practice occurred in 2009, it was implemented as a genuine  
13 belief that this would keep items that the jail considered to  
14 be a problem out in a better fashion. And that was the way  
15 it continued to practice for two years, without incident,  
16 without there being complaints or issues or any check on that  
17 practice. It seemed to be working. It was going along fine.  
18 No problem.

19 The lawsuit comes in, and they kept the status quo to  
20 continue the way that they were practicing at that time as to  
21 not change because of the lawsuit. The parties have done  
22 discovery which the defendants finished -- or provided  
23 documents at the end of December stating that there were  
24 certain documents it was going to have to somewhat reinvent  
25 the wheel to go find. It notified the plaintiff of that. It

1 went through that process. Come the middle of January, end  
2 of January, it was able to uncover all of those incident  
3 reports. It starts looking through what's going on at the  
4 jail, even with this practice in place, and actually starts  
5 evaluating the numbers of publications coming in and kind of  
6 does a review of the practice and what's coming in and the  
7 numbers and what is the burden and makes a decision to say,  
8 you know, we're getting 3 to 4 publications a day, 15 to 20 a  
9 week, let's try to just take them out. We're still going to  
10 keep the staples out of the hands of the prisoners, but let's  
11 go back to the way the written policy is, because even though  
12 at the time in 2009 that this practice was put into place,  
13 this seemed like the best way to do it, maybe this really  
14 isn't going to be as big of a deal to take out these staples,  
15 let's do this, as a constant reevaluation.

16 THE COURT: So in the reply brief, the plaintiffs  
17 argue that, and actually use your declarations, your clients'  
18 declarations, that the Main Jail is receiving 3 to 4  
19 publications per day, and at RCCC, it's about 15 to 20  
20 publications per day.

21 You're not disagreeing with that since it's your  
22 declarations?

23 MS. BUTTS: Correct. I don't think it says 3 to 4  
24 publications per day. I think it does it in a week, and they  
25 divided it out. I think on average, that's probably true.

1 THE COURT: Okay.

2 MS. BUTTS: I think it varies. I think publications  
3 tend to come in probably more at the beginning of the month  
4 or at the end of the month, but yeah, let's go with that.  
5 Three to four is fine.

6 THE COURT: Okay. I want to focus on RCCC just for a  
7 second. My impression is that RCCC -- actually, Mr. Galvan,  
8 I'll ask you, did you have any evidence that RCCC was  
9 returning the Prison Legal News or publications related to  
10 Prison Legal News or was it only the Main Jail?

11 MR. GALVAN: Your Honor, actually I thought of it all  
12 in aggregate. I would have to go back. But my sense is that  
13 both -- it is that we have returns from both facilities.

14 THE COURT: Because the declarations seemed to dispute  
15 that, particularly a declaration from Lieutenant Griem, who  
16 was the watch commander at RCCC from April 2011 to October.  
17 And according to him, that night shift officers have always  
18 simply just removed the staples and mailing labels, but they  
19 haven't simply returned your client's publications to the  
20 sender.

21 MR. GALVAN: Although he also says in paragraph 4:  
22 "On a small number of occasions, I've been made aware that an  
23 officer has returned a publication to the publisher because  
24 the publication contained staples."

25 THE COURT: Okay. Ms. Butts, the other question I had

1 raised by the plaintiffs is did you, in the course of now  
2 discovery and through this lawsuit, did you find any reported  
3 security incidents involving an inmate or a prisoner where a  
4 staple from a Prison Legal News publication, this type of  
5 staple, was used to cause harm or create a danger?

6 MS. BUTTS: The jail doesn't keep records that would  
7 indicate what type of magazine a staple would come from.  
8 More often than not, the staple is discovered separated from  
9 wherever it came from. The jail just doesn't keep those kind  
10 of records.

11 So no, I cannot dispute that statement. I don't have  
12 any piece of evidence that says Prison Legal News magazine  
13 staple caused a security incident or injury. We just don't  
14 have that kind of information.

15 THE COURT: Okay. And then could the jails, Main Jail  
16 and RCCC, live with an injunction that, in effect, committed  
17 this February 13, 2012, policy and procedure that's being  
18 followed to writing? Could you live with that type of  
19 injunction?

20 MS. BUTTS: Well, I mean it's already happening, so  
21 I'm not sure what there is to enjoin. But that is the  
22 current practice. It's the intended continued practice.  
23 There is nothing to suggest that the intention is anything  
24 else. It was a short-lived practice. The policy as written  
25 has always been the same. It's been that way for five years

1 now. I'm not sure what there is to enjoin. But it is the  
2 practice as it is now. It's the intended practice for the  
3 future. So it kind of is what it is.

4 THE COURT: So here's the argument. And because you  
5 don't get a chance to respond in writing to the reply briefs,  
6 it's sort of the \$64,000 question, which is what you just  
7 argued. The defendants assert that their jails now deliver  
8 publications with the staples removed. However, defendants  
9 maintain their policy of returning to sender all  
10 correspondence sent to the Main Jail with mailing labels.

11 Is that true?

12 MS. BUTTS: Yes.

13 THE COURT: Okay. Despite this recent and partial  
14 voluntary cessation of allegedly illegal conduct, without an  
15 injunction, defendants are free to return to their old  
16 ways -- that's in quote -- and exclude PLN's publication  
17 altogether, citing Friends of the Earth vs. Laidlaw  
18 Environmental Services and United States vs. W.T. Grant.  
19 Injunctive relief is appropriate unless "it is absolutely  
20 clear the allegedly wrongful behavior could not reasonably be  
21 expected to recur, citing Friends of the Earth and then some  
22 other cases. And then, finally, they talk about a Ninth  
23 Circuit case, Demery vs. Arpaio, which involved pretrial  
24 detainees who filed suit under the First and Fourteenth  
25 Amendments to enjoin web posting of jail videos. The

1 district court granted the injunction in that case. On  
2 appeal, the defendants argued that termination of web posting  
3 rendered moot the claim for injunctive relief. The Ninth  
4 Circuit disagreed and upheld the injunction.

5 So why shouldn't I apply those cases to this  
6 situation?

7 MS. BUTTS: Well, right now, we're at the preliminary  
8 injunction phase. We haven't had a trial on the merits. We  
9 haven't had a jury decide whether or not the implemented  
10 practice was reasonable. At this stage right now, to put in  
11 place that kind of order, it's not necessary. If at the end  
12 of the day when we get past this and we go to the merits and  
13 a jury says we're unreasonable, then clearly an injunction  
14 implemented at that stage may be the necessary course of  
15 action.

16 But for right now, the practice is what it is. Their  
17 magazine is coming in. The staples are being taken out. The  
18 jail doesn't have an intention of tomorrow turning around and  
19 saying no, it's going to continue with that practice of  
20 taking the staples out. There's no evidence to suggest it's  
21 going to change.

22 The purpose of a preliminary injunction is to prevent  
23 great harm like --

24 THE COURT: Irreparable.

25 MS. BUTTS: Irreparable harm right now because it's

1 happening and we have to do something right away to stop it  
2 or, you know, catastrophe ensues. And that's just really not  
3 where we're at right now. If this was a motion on the  
4 merits, if this was a motion for summary judgment, I think  
5 maybe there would be a different argument to be made.

6 THE COURT: The other thing Mr. Galvan argues in the  
7 reply is that in the opposition, you didn't address the other  
8 two requirements of a preliminary injunction, the third and  
9 fourth; that is, that the balance of equities tips, in your  
10 case, in your client's favor, and that injunction would not  
11 be in the public interest. I didn't really see those  
12 addressed.

13 MS. BUTTS: I think we addressed the balance of harm.  
14 I think we state -- actually, I'm pretty sure we state in  
15 there that we've shown that the time consumption and the  
16 resources tip in our favor, whereas they've failed to show  
17 that in regard to the mailing labels or really as to the  
18 staples.

19 THE COURT: Except you undermine that argument by now  
20 telling me that it's really not a big deal.

21 MS. BUTTS: Right. I understand. We're supposed to  
22 look at the time that it was implemented. Not right now.  
23 Not the effect of it and not whether it actually worked.  
24 That's not what Turner requires. Turner requires to look at  
25 when the choice was made whether it was reasonable, not

1 whether it actually worked.

2 THE COURT: Yeah, but whether I'm going to issue an  
3 injunction or not, I have to look at what's going on right  
4 now.

5 MS. BUTTS: I understand. But right now, there's  
6 nothing to enjoin when it comes to the staples. So we're  
7 going to enjoin a possibility, which there's always a  
8 possibility that policies and practices will change based on  
9 occurrences in the jail. Title 15 requires a jail to  
10 constantly be analyzing what's going on in its facility to be  
11 making the proper regulations and procedures. To enjoin the  
12 possibility the action will occur at this stage of the game,  
13 it's not reasonable. It's not necessary.

14 THE COURT: Tell me about this mailing label issue  
15 that seems to still exist, Mr. Galvan. How many pieces of  
16 correspondence does it involve? Obviously you don't use  
17 mailing labels anymore on the Prison Legal News, so that's a  
18 nonissue. But are you still trying to send in mailings with  
19 mailing labels on them?

20 MR. GALVAN: Yes, your Honor. In addition to  
21 publishing -- for the Legal News, we're also a distributor  
22 and publisher of books. And when we get an order for a book,  
23 that's a special event, not like the subscriber getting his  
24 magazine from the printer. That's fulfilled from the office.  
25 And the practical way to do that is to put the book in an

1 envelope, and then there's a label that's printed from a  
2 database from that customer's information, and the label --  
3 there's a picture of it. It's Exhibit F to the Wright  
4 declaration.

5 THE COURT: Okay.

6 MR. GALVAN: One clarification for the record, the  
7 substantive evidence is from Paul Wright, the publisher of  
8 Prison Legal News. Walczak did put in a declaration, but he  
9 sponsored attorney kind of stuff that attorneys could  
10 sponsor. But Wright, the client, sponsored the substantive  
11 stuff. And in that picture, Exhibit F, you can see it's a  
12 tiny little label, just like the little tiny label, you'd get  
13 a sheet of them and you'd put them in a printer. And, you  
14 know, there's something even bigger, that if this were a  
15 legitimate concern, I'd be more worried about the stamp that  
16 you see up in the upper left-hand corner.

17 THE COURT: It's actually a postage stamp?

18 MR. GALVAN: That's the postage stamp.

19 THE COURT: Okay.

20 MR. GALVAN: And that was put on by Prison Legal News  
21 in order to get the post office to deliver it. Now, if I  
22 wanted to hide something, I'm not sure I'd pick this little  
23 paper label. I think I'd pick this thickly gummed stamp.  
24 But there's no issue about the stamps. The sine qua non  
25 under Turner, the first prong, is this an arbitrary and

1 irrational policy. And to attack those little labels and let  
2 all those big -- you saw that big commemorative stamp, let  
3 all those things through, it's just arbitrary and irrational.

4 THE COURT: Do they rip off the stamps too?

5 MS. BUTTS: Yes.

6 THE COURT: That's what I thought. I guess my  
7 original question was I know the numbers on Prison Legal  
8 News, but how much volume are you talking about?

9 MR. GALVAN: It's smaller than Prison Legal News for  
10 this particular jail. I don't have exact figures. But if it  
11 were more than a couple of dozen per year, I'd be surprised.

12 THE COURT: So why couldn't your client just handwrite  
13 on an envelope and use a postage meter type stamp? Where is  
14 that a problem?

15 MR. GALVAN: Because in the operation, he's fulfilling  
16 orders from the whole country, from 2,200 correctional  
17 institutions.

18 THE COURT: But you're not worried about the whole  
19 country. You're only worried in this lawsuit about the Main  
20 Jail.

21 MR. GALVAN: Well, we are worried about the whole  
22 country. That's why we litigate. I mean the history of  
23 Prison Legal News --

24 THE COURT: Well, let me put it this way. I'm not  
25 worried about the whole country. I'm only worried about this

1 lawsuit.

2 MR. GALVAN: There are steps of the analysis before we  
3 get to my client's alternatives. And they haven't shown that  
4 there's any rational relationship between this label ban for  
5 these little tiny labels and their interest in keeping drugs  
6 and razor blades out of the prison.

7 In the one picture that they submitted, Exhibit 4 to  
8 Ms. Butts' declaration, the sealed exhibit, the only thing  
9 that they've said could come into under mailing labels is a  
10 huge mound of some sort of drug. I don't know what it is,  
11 but it looks like two fistfuls of yellow insulation. Now,  
12 how that gets in under that tiny label makes no sense at all.

13 We've submitted an expert declaration from someone who  
14 was the warden of a pretrial facility and the warden of a  
15 supermax federal prison.

16 THE COURT: A federal prison, not the Main Jail.

17 MR. GALVAN: Well, he was the warden of the Miami  
18 pretrial federal facility. So that's an important jail.  
19 That's a jail. People are coming in and out, just like  
20 Sacramento jail.

21 THE COURT: I don't know if I'd agree with that.

22 MR. GALVAN: He said in his experience, no sensible  
23 correctional administrator is worried about these little  
24 labels. And they haven't rebutted that. Also, he pointed  
25 out, and it's patent in their policies, they allow things to

1 come in from Amazon.com and Barnesandnoble.com with labels on  
2 them.

3 THE COURT: Thank you for reminding me of that. That  
4 was my other question. Is that true? It wasn't disputed in  
5 the declarations, and that would seem to me -- I did have  
6 that written down. I was going to ask you about that,  
7 Ms. Butts. But if you're going to let Amazon and Borders  
8 deliver publications with mailing labels, then that does seem  
9 to me to be a little inconsistent.

10 MS. BUTTS: We're not talking about a publication.  
11 We're talking about correspondence. Amazon and Barnes &  
12 Noble aren't sending correspondence with mailing labels that  
13 are coming in. So he's talking about a publication when he's  
14 talking about Amazon and Barnes & Noble. But when they're  
15 talking about their mailing labels, they're talking about  
16 correspondence from their facilities back East. The two  
17 things are different.

18 THE COURT: Why?

19 MS. BUTTS: Because while it's coming from a  
20 publisher --

21 THE COURT: A mailing label is a mailing label.

22 MS. BUTTS: No mailing labels are going into the jail.  
23 They're being taken off. No inmate is getting access to a  
24 stamp or a mailing label or anything with a gummed -- that's  
25 not the way it works. And that applies to Amazon. That

1 applies to Prison Legal News. It applies across the board.

2 THE COURT: So what are we arguing over?

3 MS. BUTTS: The procedures are the same.

4 THE COURT: They're not being returned.

5 MR. GALVAN: I have a table. My client back in  
6 Vermont has a table full of envelopes where it's written  
7 "return to sender" mailing label.

8 THE COURT: Okay. Why?

9 MS. BUTTS: Because when where talking about -- when  
10 Amazon and Barnes & Noble are sending something in, they're  
11 sending in a package from a verified publisher. When Prison  
12 Legal News is sending in its correspondence from its location  
13 back East, there's no way to know it's a publisher. Their  
14 envelopes have a stamp on the corner that say Prison Legal  
15 News. It's a stamp. I could go make a stamp right now that  
16 says Amanda Butts Publishing Company. That doesn't make me a  
17 verified publisher. Whereas Amazon and Barnes & Noble, these  
18 are documents coming from their facilities. It's clear the  
19 location. There's not as much of a concern with those items.  
20 There's less of those items coming in because we're talking  
21 about packages, not correspondence.

22 THE COURT: Why would your client have a concern about  
23 Prison Legal News?

24 MS. BUTTS: It's not Prison Legal News in particular.  
25 It's just no way of knowing that that envelope is really

1 Prison Legal News. It's not clear to the person checking the  
2 mail.

3 And really the issue with the mailing labels, it's not  
4 the label getting in. They're going to take them off. It's  
5 cutting down the amount of taking off and writing and finding  
6 the information to put on the label to then process the mail.  
7 If we do it for Prison Legal News correspondence, then we're  
8 going to do it for all correspondence, we have to, because  
9 they're just a citizen corresponding with an inmate.

10 So we can't really create a special rule for a  
11 publisher to send correspondence unless we're going to do the  
12 same thing for every citizen. Then we would be violating the  
13 equal protection rights of citizens. And so then every  
14 single piece of correspondence that comes in with a mailing  
15 label will now need to be taken off by the one mailroom  
16 officer, written on there, and then processed, for  
17 everything. Not just packages from a verified publisher that  
18 are coming in here and there with books in them. And you  
19 can't give the box anyway, so you have to take it out of the  
20 box. We're talking about just envelopes, just standard  
21 correspondence when we're talking about Prison Legal News.

22 THE COURT: Well, Amazon delivers in those cardboard  
23 boxes.

24 MS. BUTTS: Right. But you can't take a box to a  
25 prisoner. So you naturally have to take it out of the box

1       anyway.  It's the process that has to happen with the  
2       package.  There's nothing that Amazon or Barnes & Noble could  
3       do to send their packages in a way that wouldn't require the  
4       mailroom officer to have to take it out of a box and have to  
5       put something with it to send it to the inmate.  Whereas  
6       Prison Legal News in their office, according to the  
7       deposition of their publisher, Paul Wright, the other day  
8       indicated that all of this is sent from their office, it's  
9       not a printer, its all done by putting into the machine the  
10      mailing label, printing it out, taking it off, putting it on  
11      the envelope by seven employees who are sending out thousands  
12      of these things all the time.

13                I don't understand why they can't write the name and  
14      the housing information on the envelope and send it so that  
15      when it comes to the Main Jail, they just have to rip off the  
16      stamp and pass it along to the inmate.

17                MR. GALVAN:  Your Honor, we're as much a publisher as  
18      Amazon.com, so I don't know why this demand isn't being made  
19      of Amazon.com.  They could also hire some special people to  
20      write in Magic Marker on their boxes.

21                This is what we face all over the country, hostility  
22      to Prison Legal News, based on content really.  But there's  
23      always a shifting set of rationales for why we're different.  
24      It's always one thing after another.  That's why a  
25      preliminary injunction is important in this case, frankly,

1 your Honor, as you see the shifting sands. One minute it's  
2 the staples. One minute it's the labels. One minute we're a  
3 publisher. One minute we're just two guys in an office. I  
4 think that gets to the heart of why an injunction is needed  
5 at this stage, your Honor.

6 MS. BUTTS: They're blurring the line between what  
7 they're sending in. That would be true if Amazon and Barnes  
8 & Noble were sending in envelopes. Then we could say Barnes  
9 & Noble and Amazon, you need to find a way to write the name  
10 on it instead of just sending it in with a mailing label  
11 because we can hand the inmate the envelope. You can't give  
12 an inmate a box. And the items coming in from Amazon and  
13 Barnes & Noble are coming in in boxes.

14 THE COURT: Right.

15 MS. BUTTS: So you're naturally, no matter where it  
16 comes from, going to have to take it out of the  
17 instrumentality it's coming in. That's not the case for the  
18 items coming from Prison Legal News.

19 THE COURT: What's coming in? Mr. Galvan.

20 MS. BUTTS: Envelopes.

21 THE COURT: Yeah, but what's in the envelopes?

22 MR. GALVAN: What's in the envelope would be typically  
23 what's illustrated in Mr. Wright's declaration where he  
24 provides some samples of the non-Prison Legal News  
25 publications. For example, his Exhibit B, this is a small

1 book. These are the first few pages of a small book called  
2 "Protecting your Health & Safety, a Litigation Guide for  
3 Inmates," published by the Southern Poverty Law Center,  
4 distributed by Prison Legal News.

5 THE COURT: So that would be stuck in a brown envelope  
6 with a stamp and a mailing label?

7 MR. GALVAN: Almost exactly like an Amazon  
8 distribution except --

9 THE COURT: You're using an envelope. So when it gets  
10 to the jail, they're going to rip off the mailing label,  
11 right, they're going to rip off the stamp, then they're going  
12 to open the envelope and then deliver what's inside; right?

13 MS. BUTTS: Uh-huh.

14 THE COURT: Yes? Is that a yes?

15 MS. BUTTS: No. I'm sorry. What are we talking  
16 about? Are we talking about the envelopes coming with this  
17 book in it?

18 THE COURT: Right.

19 MS. BUTTS: Okay.

20 THE COURT: You're not going to deliver -- it's going  
21 to go through an x-ray machine now, but --

22 MS. BUTTS: Well, I think the problem with Prison  
23 Legal News is if their envelopes, for instance, were printed  
24 with this in the corner of it where it says Prison Legal News  
25 and it's an official business envelope, right, where you can

1 tell someone made mass amounts of these for a business  
2 purpose, I think that would be different. If you look at the  
3 envelopes that they're talking about, it's literally a stamp  
4 that you would dip in an ink pad and stamp on that that says  
5 Prison Legal News.

6 THE COURT: Maybe I'm missing something. So if that  
7 envelope came today to the Main Jail, the person in the mail  
8 room is going to open the envelope; right?

9 MS. BUTTS: No.

10 THE COURT: Well, it's going to be run through an  
11 x-ray machine.

12 MS. BUTTS: If it had a mailing label on it, it's the  
13 same as personal correspondence because there's no way to  
14 verify that this is --

15 THE COURT: It's returned to the sender.

16 MS. BUTTS: It's returned to sender.

17 THE COURT: Wow.

18 MR. GALVAN: That's why we need an injunction, your  
19 Honor. We're a publisher whose material is being returned to  
20 sender. It couldn't be plainer.

21 MS. BUTTS: There's no way to know it's a publisher.

22 MR. GALVAN: It says Prison Legal News. Everyone  
23 knows we're a publisher. We're a verified publisher in 2,200  
24 institutions. We're a verified publisher in the California  
25 Department of Corrections, 33 state prisons, including

1 Pelican Bay, the worst of the worst.

2 THE COURT: Does RCCC do the same thing?

3 MS. BUTTS: No. They have between 9 to 12 officers  
4 doing the mail, so they take off the mailing labels.

5 THE COURT: Doesn't that seem inconsistent, that it's  
6 really just because --

7 MS. BUTTS: We don't have the staffing to do it at the  
8 Main Jail?

9 THE COURT: Yeah.

10 MS. BUTTS: I mean that's just sort of what it is.

11 THE COURT: So you're using an economic reason to,  
12 according to the plaintiffs, violate the First Amendment of  
13 the Constitution? It's a First Amendment issue. You're not  
14 allowing a publisher to get in their material to someone who  
15 is entitled to read that material.

16 MS. BUTTS: Right. But there's a rational, reasonable  
17 basis for the policy that requires them to do it a different  
18 way. We're not banning their content. We're not saying  
19 Prison Legal News, you, for instance, are not allowed to talk  
20 to inmates, you are not allowed to correspond with inmates.  
21 No matter what you send in here, we're sending it back  
22 because we don't like you, and we don't like what you're  
23 saying. That's what they want to argue. That's not the  
24 case. This is the way the mail is processed no matter what.

25 We recognize that they're a publisher. We know

1 they're a publisher. I get that. And I know that Prison  
2 Legal News is a publication that's been around for a long  
3 time. The problem is I can go down and make a stamp that  
4 says Prison Legal News with their address on it and stamp it  
5 on any envelope I want. Now, it would be illegal, but I  
6 could still do it and try and send something into the jail  
7 disguised as Prison Legal News.

8 THE COURT: Turner factor number 4 is whether the  
9 existence of easy and obvious alternatives indicates that the  
10 regulation is an exaggerated response by prison officials,  
11 which brings me back to numbers.

12 Just so both of you know, and I said this, I'm not  
13 concerned about any other publisher than Prison Legal News in  
14 this lawsuit. And the volume of these materials going into  
15 the Main Jail, at least the facts as I understand them, is  
16 relatively small.

17 MS. BUTTS: Not when we're talking about  
18 correspondence though.

19 THE COURT: From Prison Legal News?

20 MS. BUTTS: I don't know. They haven't said how many  
21 they send in.

22 THE COURT: You answered my question, didn't you?

23 MR. GALVAN: Publications, my estimate, a couple dozen  
24 a year.

25 THE COURT: A couple dozen a year.

1 MR. GALVAN: That's my --

2 THE COURT: Okay. And then correspondence.

3 MR. GALVAN: Well, we certainly correspond. And  
4 that's how we developed the evidence for this case. We will  
5 write to people in the jail who are subscribers and say we  
6 haven't heard from you for a while, have you gotten our  
7 magazine, and they'll write back saying no, we haven't.

8 THE COURT: So a letter in an envelope?

9 MR. GALVAN: That's a letter in an envelope, yes.

10 THE COURT: And how many pieces of correspondence are  
11 you talking about there?

12 MR. GALVAN: I haven't kept a record, but that could  
13 be in the dozens, the scores, maybe hundreds. I would doubt  
14 hundreds. Hundreds would be another case with the system  
15 where you've got, you know, like CDCR, 33 prisons.

16 THE COURT: Does your client keep records as to which  
17 correctional facilities the correspondence is going to?

18 MR. GALVAN: Oh, sure, we certainly do.

19 THE COURT: Okay. So you could tell me easily over  
20 the past year how many pieces of correspondence went into the  
21 Sacramento Main Jail?

22 MR. GALVAN: I don't have it here, but I could  
23 certainly find out.

24 THE COURT: Okay.

25 MS. BUTTS: But there is evidence to show that the

1 Main Jail is getting roughly 1,200 pieces of correspondence a  
2 day. So if we're going to have to start taking the mailing  
3 label off when it looks like Prison Legal News, don't we then  
4 have to do the same for every piece of correspondence that  
5 comes in with a mailing label?

6 How can we differentiate that from Prison Legal News  
7 envelopes with a stamp on it? A stamp as in -- I don't mean  
8 a postage stamp. I'm talking about an ink writing stamp from  
9 me having my address as a stamp that I put in the return  
10 address corner.

11 THE COURT: Do you want to answer that?

12 MR. GALVAN: Yes, your Honor.

13 THE COURT: Go ahead.

14 MR. GALVAN: I want to answer how do you distinguish  
15 between the Prison Legal News envelope and some other  
16 publisher that counsel thinks is more established. We've  
17 been around since 1990. Amazon, I don't know, since 1998.

18 Also, my kids get a lot of presents from Amazon. I've  
19 got a garage full of Amazon boxes that I could easily use to  
20 repack things and send contraband into the jail. The  
21 notion that there's something about an officially printed box  
22 in counsel's view that makes it safer than a stamped envelope  
23 is, frankly, absurd.

24 We all have Amazon boxes all over our houses. We  
25 could be mailing stuff in Amazon boxes all the time. I don't

1 see how it makes any sense. Under Turner, it's a classic,  
2 irrational, and arbitrary distinction.

3 MS. BUTTS: Again, we're not talking about boxes.  
4 We're talking about envelopes that would be able to be  
5 delivered to an inmate if it was not with a mailing label,  
6 whereas a box would never be delivered to an inmate. So the  
7 procedure already has to be different when we're talking  
8 about a box. Not to mention I'm pretty sure there are ways  
9 to determine when an item has been resealed in the way that  
10 Mr. Galvan is talking about, as opposed to coming directly in  
11 from the distributor or publisher.

12 THE COURT: Here's what the defendants argue,  
13 Mr. Galvan, which I want you to respond to. "Under the  
14 Turner test, defendants need not show specific instances of  
15 incidents that occurred as a result of the challenged  
16 policy." And again, we're only talking about mailing labels  
17 here. "It is sufficient that a prison regulation is  
18 justified on the basis of anticipated security problems,"  
19 citing Casey vs. Lewis, a Ninth Circuit case. "Corrections  
20 facilities across the country have had problems with staples  
21 being used as tattoo needles." Again, we're talking about  
22 staples. I don't want to get into staples.

23 But in terms of mailing labels -- here we go. The  
24 defendants argue: "Jail inmates are notorious for finding  
25 unique methods to smuggle drugs into their jail cells, and

1 the U.S. mail has always been a favored route. Illicit drugs  
2 can be liquefied and applied to paper through drops, in ink,  
3 behind postage stamps, on the glue that seals the envelopes,  
4 and under stickers. Inmates ingest the drugs by licking or  
5 eating the paper. Mailing labels pose a threat in  
6 correctional facilities because they can be used to conceal  
7 heroin, LSD, and other drugs, as well as metal objects."

8 Now, your expert doesn't necessarily disagree with  
9 that, but he argues, at least with respect to your  
10 publications or your envelopes, that's irrational under the  
11 Turner standards.

12 And the defendants argue, again, "To show a rational  
13 relationship between a regulation and a legitimate  
14 penological interest, prison officials need not prove that  
15 the banned material actually caused problems in the past, or  
16 that the materials are 'likely' to cause problems in the  
17 future. It does not matter whether plaintiff or even this  
18 court agree with defendants or whether defendants' policies  
19 and practices actually advance their facilities'  
20 legitimate interests.

21 "This court is only required to find that the  
22 defendants' judgment was 'rational,' that is, whether the  
23 defendants might reasonably have thought that the policy  
24 would advance its interests."

25 Now, obviously the burden is on you to convince the

1 Court that you're likely to succeed on the merits of your  
2 argument under the First Amendment with respect to mailing  
3 labels. So why haven't they at least raised enough in this  
4 opposition for the Court to find that, at least on the state  
5 of the record as it is now, that I'm not convinced that  
6 you've satisfied your burden?

7 MR. GALVAN: First on the law and then on the facts.  
8 What your Honor quoted from the brief was their assembly of  
9 quotes that basically try to make the Turner analysis seem  
10 toothless on the first level, but it's not toothless. Turner  
11 itself says the logical connection has to be not so remote as  
12 to render the policy arbitrary or irrational, which means  
13 there's something for the Court to do here. I mean that  
14 quote from the en banc Arpaio opinion that says the Court  
15 need not even agree doesn't mean that the Court simply turns  
16 off on all examination.

17 So let's look at mailing labels. Defendants scoured  
18 their files to try to find a picture that made mailing labels  
19 look dangerous, and Exhibit 4, sealed, is what they found.

20 THE COURT: You keep coming back to Exhibit 4, which I  
21 granted your objection, but go ahead, now that you've opened  
22 the door.

23 MR. GALVAN: Assuming that Exhibit 4 were admissible,  
24 which it's not, this is the best they have for mailing  
25 labels.

1 MS. BUTTS: That's not a mailing label.

2 THE COURT: What is it?

3 MS. BUTTS: It's a Post-it. And that's not even part  
4 of our argument. We didn't assert that that mailing label  
5 was dangerous.

6 THE COURT: Did you submit anything with respect to  
7 mailing labels, any exhibits?

8 MS. BUTTS: We don't have mailing labels that come  
9 into the jails, so we don't have pictures of them causing  
10 destruction.

11 THE COURT: That's right. Everything gets returned or  
12 ripped off.

13 MR. GALVAN: So they don't have any evidence of  
14 mailing labels. But they say we just have to point to a  
15 reason that a rational person would agree with. And the law  
16 does say that. They just have to point, like summary  
17 judgment, you just have to point at your opposition's  
18 evidence. Okay. But what they point at doesn't make any  
19 sense. What they point at is the assertion that, well, it's  
20 easy to liquify a drug and then soak a mailing label in the  
21 drug and then people could eat the drug.

22 Okay. Well, if you can liquify the drug and permeate  
23 a mailing label with it, you'd be better off permeating a  
24 piece of paper. Back in the '60s, people had a lot of paper  
25 acid. Right? So if that's the real concern, then why are

1 they letting any paper into the prison at all? I mean  
2 they're all focused on the mailing label, they're going to  
3 tear off the mailing label, but the permeated with drug paper  
4 is probably inside the envelope. It's the letter.

5 So if that satisfied Turner, then the rule that we'd  
6 be here talking about is no paper comes into the prison at  
7 all. You have to use their email system. They have this new  
8 email system that people can use to send in messages.

9 THE COURT: Here's what your evidence is from  
10 Mr. Clark. He says, "While it is theoretically possible to  
11 do so," to use mailing labels as an avenue for smuggling or  
12 concealing drugs, so while it's theoretically possible to do  
13 so with certain soluble drugs in extremely small amounts, he  
14 says, "I have never heard of this practice causing a problem  
15 in the correctional settings with which I'm familiar." And  
16 then he cites all the experience he's had. "I am certain  
17 I've never heard mailing labels raised in those reports.  
18 Likewise, I have attended many national correctional  
19 conferences of practitioners and leaders in the field and met  
20 with the administrators of state, local, and private  
21 corrections systems. I maintain contact with many of these  
22 professionals. I do not recall mailing labels, especially  
23 from publications, ever being raised by any of these  
24 individuals as an issue of concern. I have never been aware  
25 of metal objects of contraband being hidden under mailing

1 labels.

2 "Defendants declare on page 15 of their opposition  
3 that the use of labels is not the only manner of delivering  
4 liquefied drugs. They mention drops applied to paper, in  
5 ink, or on the glue that seals envelopes. A ban on mailing  
6 labels would do nothing to deter these other methods, but  
7 would only address the unlikely prospect of smugglers taking  
8 the extensive trouble to set up delivery of drugs through a  
9 publisher or a publication that uses labels for delivery to a  
10 prison."

11 So how do you respond to that?

12 MS. BUTTS: Well, it seems from what we've seen, the  
13 majority of facilities don't allow the mailing label in,  
14 which is probably why you don't have issues with mailing  
15 labels. I believe the reason why they don't allow them in is  
16 because it's fairly common knowledge that you can smuggle  
17 drugs into a facility through a mailing label, which is why  
18 stamps and mailing labels are often removed.

19 As for the paper issue, once you get past the mailing  
20 label and you open the envelope and read through the mail, as  
21 you would do with every piece of correspondence that comes  
22 in, an item that had been soaked in water would probably be  
23 noticeable and would be denied for that reason and kept in  
24 evidence for being some of kind of illegal object.

25 It's not as if the buck stops at the mailing label and

1 there's no other analysis of mail. There are multiple  
2 procedures for evaluating mail and other things coming into  
3 the jail to make sure contraband comes out.

4 Here we're talking about the mailing label. And the  
5 label can be an issue. That's why it's removed. And when it  
6 comes to the Main Jail, we have one officer processing  
7 potentially thousands of pieces of correspondence a day.  
8 This correspondence that they're talking about with the  
9 mailing label is correspondence, not a publication, not a  
10 package. It's a letter coming in like any letter that I  
11 would want to send to an inmate in there or from someone's  
12 mom or grandmother. So you have to evaluate it the same way  
13 you would an everyday citizen who would be sending something  
14 in.

15 So for every piece of correspondence that comes in in  
16 an envelope that has a mailing label, by the plaintiff's  
17 requirement, the one officer processing these thousands of  
18 letters would have to take off that mailing label and write  
19 by hand the name, location, and all the information required  
20 for every single letter coming in.

21 So the jail opted to preserve its resources in that  
22 sense due to the dangers of mailing labels, continue to keep  
23 mailing labels out, and send them back so that they don't  
24 have to go through that process. And plaintiff hasn't  
25 produced any evidence as to why it can't itself write the

1 name on the maybe 12 -- he's not even sure how many pieces of  
2 correspondence it sends in, whereas the jail has put forth  
3 valid evidence showing the amount of correspondence coming  
4 into the jail.

5 THE COURT: It's actually hundreds. But on page 11 of  
6 the motion for preliminary injunction, the plaintiff argues,  
7 "Sending correspondence and publications to prisoners using  
8 mailing labels is a common practice. Magazine subscriptions  
9 are often sent using mailing labels for prisoners and  
10 non-prisoners alike," citing Mr. Wright's declaration. "In  
11 fact, until recently, the California Department of  
12 Corrections and Rehabilitation actually required publishers  
13 to send materials with an approved vendor label affixed to  
14 each publication. The CDCR policy at issue there provided  
15 that 'any packages from a book vendor or publisher must have  
16 a book label with a vendor stamp attached. Packages without  
17 the vendor stamp, label, or the required signatures will be  
18 returned to sender.' If labels from publishers constituted a  
19 security threat, it seems unlikely that a state prison system  
20 would dramatically increase the amount of correspondence sent  
21 with labels by requiring their use."

22 MS. BUTTS: If this came in with a mailing label on  
23 it, it would be taken off. Or it probably wouldn't even be  
24 taken off, because it's not an issue with a publisher. We're  
25 not concerned about publishers sending drugs to inmates. I

1 think that we're pretty sure no one's trying to commit  
2 illegal acts as publishers in the same sense of books and  
3 packages. The problem with the letters that they're sending  
4 in is you cannot verify that it's a publisher. It just looks  
5 like a letter that you and I could put together and send into  
6 the jail.

7 It makes sense to require the label. And if this  
8 magazine was coming in with a label, there wouldn't be an  
9 issue. We're not talking about the magazine. We're talking  
10 about letters. That's different.

11 THE COURT: Okay. Do you want to respond?

12 MR. GALVAN: Just a few points.

13 There is no evidence that other facilities ban mailing  
14 labels. I think what counsel may be referring to are the  
15 collection of web pages that your Honor has already excluded.  
16 And even if that were evidence, when you read that  
17 collection, it's clear that they're talking about people who  
18 send in like a little package of labels and stickers like  
19 you'd use for scrap booking or something, where you've got  
20 the backing and then the label. That's clearly a problem,  
21 right, because you could sort of peel that up and put  
22 something in there. Not a used label. But that's not  
23 evidence anyway.

24 Our evidence, which your Honor read, the only thing to  
25 add to that is Mr. Wright also said that we're sending

1 mailing labels to 2,200 correctional facilities, and no one  
2 is banning us because of mailing labels.

3 THE COURT: This is the only one, Sacramento County  
4 Main Jail?

5 MR. GALVAN: This is the only one at the moment where  
6 we're fighting mailing labels.

7 THE COURT: Out of 2,200 facilities.

8 MR. GALVAN: This is the one.

9 THE COURT: That makes your client unique if that's  
10 true.

11 MS. BUTTS: Well, I don't know how the other mail's  
12 processed, but we have one person processing our mail in  
13 order to keep the utmost amount of contraband out. I don't  
14 know how those other jails are doing it. I don't know if  
15 they have the 16 people processing the way that we used to  
16 when we used to take off the mailing label and write it on  
17 there. But because of problems we had in our jail, we  
18 decided to choose a different way of doing it and consolidate  
19 it to one person to keep out as much as possible. By having  
20 one person, you have to look at your resources more  
21 carefully.

22 So I can't speak to other jails and why they would  
23 choose to take the mailing label off and write on it or if  
24 they choose the allow the mailing label in. I just know in  
25 our facility, we've determined that mailing labels are

1 dangerous, and they're not coming in. And so either we're  
2 taking them off and writing it on there or we're returning it  
3 to sender. RCCC has --

4 THE COURT: The First Amendment be damned.

5 MS. BUTTS: No, I don't think that's -- Why? You can  
6 send in an envelope --

7 THE COURT: It just seems inconsistent to me that you  
8 do it at RCCC -- not you, your client, does it at RCCC, yet  
9 for economic reasons, you don't do it at the Main Jail. And  
10 again, RCCC has a lot fewer inmates than the Main Jail. The  
11 allocation of resources and using that as the reason to run  
12 the risk of violating the First Amendment, even though you  
13 say it's just correspondence, a lot of this correspondence  
14 contains publications.

15 That seems to be a dangerous and risky policy to take.  
16 That's the part I'm having a hard time wrapping my head  
17 around, that at RCCC, all we do is rip off the label, and we  
18 let it in.

19 MS. BUTTS: At RCCC, they take off the label and take  
20 the time with the 9 to 12 people they have processing with  
21 the less amount of mail.

22 THE COURT: Move four people to the Main Jail. Right?

23 MS. BUTTS: I mean I don't think that's how staffing  
24 works. I'm pretty sure we can't decide how to move around  
25 deputies in that sense. But that's not really the way it

1 works, and that's not the budget that is in place right now.  
2 So I can't really speak to how the jail decides where to put  
3 people in that sense.

4 THE COURT: Okay. So let's move forward. You're the  
5 trial lawyer in this case, and the plaintiff puts on evidence  
6 that every jail in the State of California main jail allows  
7 mailing labels in other than the Sacramento County Main Jail.  
8 57 out of 58 counties. And, by the way, ladies and  
9 gentlemen, at their facility, RCCC, they also let in mailing  
10 labels, or they take the time to rip them off.

11 How do you defend against that?

12 MS. BUTTS: I mean I understand the problem. I  
13 understand what they're saying. I get it.

14 THE COURT: Okay.

15 MS. BUTTS: But I think the law isn't designed to  
16 allow us to say I think there's a better way to do it, and  
17 that's just not really what the Supreme Court has required us  
18 to do. It's to look at was it a rational decision. Mailing  
19 labels, a problem. How can we fix this problem? Well, we're  
20 going to need to take them off, or we're going to need to  
21 send them back. What resources do we have to do this? We  
22 have one mail room officer. We have 1,200 or some odd pieces  
23 of correspondence, letters, coming in every day which  
24 potentially have mailing labels on them.

25 THE COURT: Whether the existence of easy and obvious

1 alternatives indicates that the regulation is an exaggerated  
2 response.

3 MS. BUTTS: It's not easy for the Main Jail though.  
4 You're talking about 1,200 pieces of correspondence.

5 THE COURT: Move people over.

6 MS. BUTTS: So we've decided that there's a better way  
7 to do it, so that makes it not rational.

8 THE COURT: I'm moving away from prong number 1. I'm  
9 looking at prong number 4. Existence of an easy and obvious  
10 alternative. And again, if you want to tie that to is it  
11 rational, I guess it would be more rational to me if it was  
12 applied as to all facilities. It just would seem difficult  
13 for me for the sheriff to justify, other than I've only got  
14 one guy at the Main Jail and I've got eight guys at RCCC.  
15 So, you know, in that case, the First Amendment at the Main  
16 Jail has to suffer, whereas the First Amendment at RCCC  
17 doesn't have to be impacted in any way.

18 MS. BUTTS: You keep saying the First Amendment as if  
19 we don't allow mail. I mean it's not as if there aren't  
20 other ways to send in the mail. I just don't -- by saying  
21 please do it another way so that our resources aren't taken  
22 to write the name on it, I just think that we're pushing the  
23 First Amendment button a little far. We're not banning  
24 information from coming in to inmates. We're not banning  
25 their letters from coming in.

1           We're asking you have resources to do it. You haven't  
2 shown that you don't have the resources to do it. We're  
3 showing we don't have the resources to do it. But now you're  
4 saying well, move your resources around and find some. We  
5 haven't shown that we can't do it, but we just think you  
6 should do it differently.

7           THE COURT: We haven't gotten to the due process  
8 argument yet either. But the fact that both written policies  
9 don't at least provide for notification to the prisoners  
10 that, by the way, we sent back all these letters --

11          MS. BUTTS: We don't have a prisoner in our case.

12          THE COURT: Right. You have the sender, the  
13 publisher, which doesn't seem to make a difference under some  
14 of these cases that it's the publisher who's bringing the  
15 lawsuit. In fact, it was Judge Burrell and Judge Damrell's  
16 case I think that involved just the publisher, not the  
17 prisoners, in which the Ninth Circuit then overturned their  
18 grant of summary judgment saying just because it's a  
19 publication, not a prisoner, that that argument isn't going  
20 to fly.

21          MS. BUTTS: As to what?

22          THE COURT: As to --

23          MS. BUTTS: There was no notification or due process  
24 issue in that case.

25          THE COURT: The sheriff's policies don't provide for

1 notification to the inmate or the prisoner that his mail has  
2 been returned.

3 MS. BUTTS: They do. Part of the policies state that  
4 notice should be given to the inmate.

5 THE COURT: Well, "should be" I don't think satisfies  
6 the due process standard.

7 MS. BUTTS: We don't have an inmate in our case. We  
8 only have a publisher. And those cases, and the one that you  
9 just cited from the Eastern District and from the Ninth  
10 Circuit, did not have a due process claim in it. So the  
11 holding regarding summary judgment in Hrdlicka isn't  
12 applicable here.

13 THE COURT: Do you want to respond to that?

14 MR. GALVAN: I don't think your Honor was talking  
15 about Hrdlicka, but I'm not sure, because I have to admit I  
16 don't know which Judge Damrell and Judge Burrell case your  
17 Honor was referring to. But I can respond to the due process  
18 point more generally.

19 THE COURT: Go ahead. And I'll tell you the name of  
20 the case.

21 MR. GALVAN: Two problems with the policy.

22 One, it doesn't provide due process directly to us.  
23 We don't get notice and an opportunity to respond and to have  
24 our response be addressed by someone other than the person  
25 who rejected our material. And that's the basic Ninth

1 Circuit standard.

2 And two, we do have an interest in having our readers  
3 get notice of when our material is held back, because that's  
4 part of how we find out, because then the readers can write  
5 to us and say I got notice that your material's not getting  
6 in, you should do something about it.

7 And I think your Honor is correct that the cases,  
8 whether they're brought by a publisher or not, recognize that  
9 the notice has to run both to the sender and to the reader,  
10 and it's the publisher's interest in both those notices  
11 running.

12 THE COURT: It's the Hrdlicka case which involved  
13 then-Sheriff McGinness.

14 MR. GALVAN: If I could say one other thing about  
15 Hrdlicka. A point before we shifted to due process, counsel  
16 said, well, we haven't shown that we couldn't use our  
17 resources to accommodate their label policy. Well, the  
18 Supreme Court of the United States denied cert in Hrdlicka  
19 two weeks ago. And Hrdlicka squarely says that, in fact,  
20 this particular jail, does not have the right under the First  
21 Amendment to shift the cost to the publisher of its mail room  
22 policies that aren't justified by Turner. And so it's no  
23 answer, after Hrdlicka, to say we can run through all sorts  
24 of hoops to comply with their policy. That's not the law.

25 MS. BUTTS: I would say that's not what that case

1 held. That case held that the jail hadn't done enough on  
2 summary judgment to establish that it hadn't violated the  
3 publisher's rights and that it needed to go further to a  
4 trial. And anything about the cost shifting is really truly  
5 just dicta and not really to the arguments in that case.

6 MR. GALVAN: Your Honor, it was holding, in the Ninth  
7 Circuit in Hrdlicka, the sheriff said we don't have to let in  
8 all this bulk mail because -- one of the reasons we shouldn't  
9 have to let it in is because the publisher of that, of the  
10 CJA, that publication, could have a whole different way of  
11 doing it, could figure out who the readers are and address  
12 things to them, and the Ninth Circuit clearly said that the  
13 publisher had met its burden there to show that that would be  
14 economically infeasible.

15 And the First Amendment doesn't allow the jail to  
16 impose, I think it used the word economically impracticable,  
17 requirements on a publisher that aren't satisfied by Turner.  
18 I think it's squarely held in the case. What the procedural  
19 posture was, I think, is not material. I think it's the law  
20 in the Ninth Circuit.

21 MS. BUTTS: Well, there is a difference here. That  
22 publisher had shown that it would be infeasible. This  
23 publisher hasn't put on any evidence about the feasibility of  
24 writing names on a mailing label. They've only put forward  
25 evidence regarding sending their publication through a

1 printer regarding staples.

2 MR. GALVAN: If I may, your Honor, the Wright  
3 declaration at paragraph 28 addresses the cost prohibitive  
4 nature of individual labeling of envelopes.

5 THE COURT: But the Hrdlicka case, the language I  
6 think we're all talking about, is as follows, talking  
7 actually about the second Turner factor, alternative avenues  
8 to exercise the right. Defendants argued in that case that  
9 the publisher has alternative avenues to communicate with  
10 inmates. The jail will distribute materials to inmates who  
11 request it. There was a material question of fact whether as  
12 a practical matter the plaintiffs could effectively reach  
13 county jail inmates if they deliver only upon request, citing  
14 the Morrison case. The court writes, "In Morrison, we held  
15 that the second Turner factor weighed against the legitimacy  
16 of a mail policy when restricted publications would be  
17 delivered only if they were sent at a higher rate. Paying a  
18 higher rate is not an alternative because the prisoner cannot  
19 force a publisher who needs to use, and is entitled to use,  
20 the standard rate to take additional costly steps to mail his  
21 individual newsletter. Here, unlike our earlier cases, the  
22 jails' policies do not require inmates to pay for, or for the  
23 publisher to mail its issues at a higher postage rate.

24 "It is difficult to create a broad awareness among  
25 inmates in jails where, unlike in prisons, populations turn

1 over quickly. It is true the publisher can advertise its  
2 publication to inmates through the yellow pages or  
3 television. But many inmates will have left the jail before  
4 they can learn about the existence of," in this case it was  
5 CJA, "request that it be sent to them, and then receive it.  
6 Inmates typically want information about bail bonds and  
7 attorneys as soon as they arrive at the jail. For those who  
8 receive CJA only after a significant wait, the advertising in  
9 CJA is of little or no use."

10 I think that's what you were referring to.

11 MR. GALVAN: Yes, your Honor.

12 THE COURT: Okay.

13 MS. BUTTS: That case didn't have anything to do with  
14 bulk rate mail. It had to do with delivery drop-off and  
15 unsolicited publications. It's a different issue than the  
16 one we're dealing with right now.

17 THE COURT: It's interesting in this Hrdlicka case,  
18 too, the court found that "The undisputed fact that CJA is  
19 currently distributed in more than 60 counties throughout 13  
20 states, including in 32 California County jails, suggests  
21 that the response of the two jails in this case may be  
22 exaggerated."

23 Okay. What did you want to say, Mr. Galvan, about the  
24 due process argument?

25 MR. GALVAN: I believe I addressed it, your Honor.

1 It's that the due process concern does run to both, and in  
2 this case, runs both to the notice provided to the reader,  
3 the inmate, and the notice provided to the sender, PLN. That  
4 it is proper for this Court to require notice running both  
5 ways regardless of the absence of an inmate plaintiff in this  
6 case because PLN has an interest in its readers getting  
7 notice as well. It's part of the way in which -- it's part  
8 of the due process right recognized, from Proconier and  
9 Thornburgh, and all way up to the Ninth Circuit cases.

10 That's all, your Honor.

11 THE COURT: Okay. Ms. Butts, anything further you  
12 want to add that I haven't already asked of you?

13 MS. BUTTS: The cases state that notice should be  
14 provided and an opportunity to be heard. Those things are  
15 provided here to Prison Legal News. They've opted not to  
16 take advantage of them except for filing a lawsuit. I think  
17 they're being heard right now.

18 But as far as the pre-litigation aspects, those things  
19 are in place for the publisher. They're the publisher.  
20 That's the right they're asserting. It exists. I don't  
21 think there's anything to enjoin as far as the publisher is  
22 concerned here.

23 THE COURT: Again, your argument is that if I did  
24 issue an injunction, the injunction shouldn't cover any  
25 requirement that adequate written notice in an administrative

1 appeal process, that that also be given to prisoners since  
2 your argument is there's no prisoner in this case, and they  
3 have no standing to argue for injunctive relief on behalf of  
4 a prisoner.

5 MS. BUTTS: Correct.

6 THE COURT: Mr. Galvan, your response to that again is  
7 what? I mean I understand the due process argument as to  
8 your client. But why does your client have standing and a  
9 basis to argue for injunctive relief on a prisoner when I  
10 don't have a complaint from a prisoner?

11 MR. GALVAN: We are not seeking any form of  
12 third-party standing. We are not claiming to represent the  
13 prisoners or enforce their rights.

14 THE COURT: Yeah, you are. Because in your proposed  
15 order, you say you want me to order that defendants provide  
16 adequate written notice and an administrative appeal process  
17 to both prisoners and senders. You only represent the  
18 sender.

19 MR. GALVAN: Because it's our right. It's our right  
20 to have the notice run both ways. We're trying to reach the  
21 sender. And when our material is blocked to the sender --

22 THE COURT: No, you're the sender.

23 MR. GALVAN: Right. I'm sorry, your Honor. We're the  
24 sender trying to reach the reader.

25 THE COURT: Right.

1 MR. GALVAN: And when our material is blocked to the  
2 reader without due process, that violates our due process  
3 rights as well as the reader's. In other words, there are  
4 two primary rights violated, and they're held by different  
5 parties.

6 THE COURT: But my concern is this language in your  
7 proposed order to both prisoners and senders.

8 MR. GALVAN: Yes, your Honor.

9 THE COURT: You don't represent the prisoners.

10 MR. GALVAN: We don't, but we represent the sender.  
11 And the sender's right is violated when notice is not  
12 provided to the prisoner.

13 THE COURT: So I can require notice and an  
14 administrative appeal process to the sender and strike the  
15 language to prisoners. I don't have a basis for granting  
16 injunctive relief for a prisoner when I don't have a prisoner  
17 before me; right?

18 MR. GALVAN: But the injunctive relief is to benefit  
19 PLN. If PLN benefits when its reader gets notice that its  
20 material has been blocked.

21 THE COURT: It gets notice when it says returned to  
22 sender and the sender gets it back; right?

23 MR. GALVAN: Yes, when we get the notice directly.  
24 But then when our reader, when our customer gets the notice,  
25 that's an interest of ours that's been recognized by the case

1 law as well.

2 When the person who we want to listen to our message  
3 gets the notice that our message has been blocked, that  
4 vindicates our First Amendment rights. It also vindicates  
5 theirs, but we don't care about that here because they're not  
6 a party here. But it vindicates our First Amendment rights.

7 THE COURT: How does providing an administrative  
8 appeal process to the prisoner benefit your rights?

9 MR. GALVAN: When the prisoner gets notice, now the  
10 prisoner is an advocate for the receipt of our message. And  
11 that's part of I think the interest that's recognized in  
12 Procunier and Thornburgh when it talks about --

13 THE COURT: I feel like we're going in circles,  
14 though, because I don't have a prisoner in front of me who is  
15 complaining. I only have you.

16 MR. GALVAN: I don't think you need one, because I'm  
17 complaining about my reader not having gotten notice that my  
18 paper was blocked. I'm complaining because it violates my  
19 First Amendment rights.

20 THE COURT: Your client's First Amendment rights. I  
21 get that. Hypothetically though. It's only hypothetical as  
22 to a prisoner who is not before me.

23 MR. GALVAN: The prisoner is not before you, but I'm  
24 before you, and I have a right for that reader to get notice.

25 So I'm not trying to --

1           THE COURT: But you can protect that right by  
2 requiring the jail to -- I mean one of your arguments is the  
3 notice already is inadequate.

4           MR. GALVAN: Certainly if I get notice and due  
5 process, it certainly diminishes the injury of failing to  
6 provide my reader notice, because now I can come in and  
7 advocate. But I'm saying it doesn't eliminate that injury  
8 entirely.

9           THE COURT: All right. Let me tell you where I'm at  
10 on this. With the staples, I think it's almost been  
11 conceded. And the argument really with respect to staples is  
12 that really it's just moot; that I don't need to issue an  
13 injunction. I disagree because of the cases that were cited  
14 in the reply brief with respect to the staples, although it  
15 appears to be a nonissue at this point. I think the  
16 plaintiffs would be entitled to have injunctive relief; that  
17 they have satisfied injunctive relief with respect to the  
18 staples.

19           And I'm really just going to focus on the First  
20 Amendment claim. I'm not going to get into the due process  
21 or equal protection claims, and I don't have to in granting  
22 injunctive relief. I just have to find that there's been a  
23 likelihood of success on the merits, that the plaintiff would  
24 suffer irreparable harm in the absence of the preliminary  
25 injunction, the balance of equities would tip in the

1 plaintiff's favor, and that the injunction is in the public  
2 interest.

3 With respect to the staples and applying the Turner  
4 factors, I think it's clear that, and, again, focusing only  
5 on the PLN publication, I don't think that the regulation  
6 with respect to this publication is rationally related to the  
7 government objective.

8 And obviously safety in jails and prisons is of utmost  
9 importance. I recognize that. I have always said, both in  
10 civil and criminal cases, judges should not be running  
11 prisons or jails and that we should intervene only in the  
12 most obvious cases. We're not correctional experts, I never  
13 have claimed to be, and certainly a robe doesn't make me an  
14 expert. And I've seen enough go on in jails and prisons to  
15 recognize your clients' rights, Ms. Butts, to run the jails  
16 as they see fit. But there's always some type of balance,  
17 it's not black and white, when it comes to constitutional  
18 rights.

19 Are there alternative avenues that remain open to  
20 inmates to exercise the right? It's a factor that there's  
21 some argument over, but it's not really the critical factor  
22 in analyzing at least with respect to the staples. And  
23 again, they're being removed now, and the inmates are getting  
24 the publication.

25 The impact that accommodating the asserted right will

1 have on the other guards and prisoners and on the allocation  
2 of prison resources. Again, that favors, based on the  
3 evidence, the plaintiff.

4 And whether the existence of easy and obvious  
5 alternatives indicates that the regulation is an exaggerated  
6 response. With respect to these staples, I think, and this  
7 publication only, I think it again favors the plaintiff.

8 And I keep saying "this publication" and "this  
9 plaintiff" because I think the way you've drafted,  
10 Mr. Galvan, this proposed order, it's overbroad. And I would  
11 reword it to focus only on this publication and this issue.  
12 I don't want to, and I will not, issue an injunction that  
13 prohibits that jail from prohibiting into the jail or RCCC  
14 publications that do contain larger staples, more dangerous  
15 staples, staples that clearly would pose a danger. You've  
16 got to give the sheriff, at least in my view, that  
17 discretion. And I think the cases are clear. And under  
18 different facts and different circumstances, I don't think  
19 the sheriff would have a difficult time showing that there  
20 was some rational relationship.

21 Your injunction, in effect, as written, would cover  
22 all staples, and I'm certainly not going to issue an  
23 injunction that covers and prohibits the sheriff from simply  
24 returning a publication that has a staple or staples that  
25 clearly would pose a danger. I'm only concerned and will

1       only remain concerned about PLN's publication.

2               So I'm going to grant the preliminary injunction,  
3       finding that you've satisfied the requirements for a  
4       preliminary injunction and finding that it's not moot. That  
5       the case law does instruct the Court that, despite the change  
6       in policy, there still has to be some type of written order  
7       that that policy should continue. And obviously if then the  
8       policy is violated, you've got a basis to come back into  
9       court, and I can easily intervene.

10              So I would change the language of the proposed order  
11       and simply limit it to PLN staples.

12              Go ahead, Ms. Butts.

13              MS. BUTTS: I feel like we maybe skipped past a little  
14       bit of the reason for keeping staples out. We talked a lot  
15       about the change in the practice and allowing them in now.  
16       But to succeed on the merits of their case, they have to  
17       prove that the decision to ban staples in the jail or to  
18       change the practice to send them back was not rationally  
19       related to a legitimate penological objective. And we didn't  
20       really get into the staples used in their magazine are a  
21       problem in jails and are dangerous in the sense -- I know  
22       there's some --

23              THE COURT: That's where we would disagree. I don't  
24       find their staples -- and I'm limiting it to PLN. I don't  
25       find their staples to be --

1 MS. BUTTS: Well, what type of staples are those? I'm  
2 just not sure what gauge of metal we're discussing. I want  
3 to know --

4 THE COURT: That would be up to the sheriff to  
5 convince me. I'm not convinced based on this evidence,  
6 because none of the evidence that you submitted focused on  
7 their publication and their staples, which is all I'm  
8 concerned about. I have in front of me now the publication.  
9 I have in front of me their staples. They are flimsy. They  
10 are small. I don't have any evidence from the sheriff that  
11 their staples pose the danger that the policy, this broad  
12 policy involving staples in general, is rationally related to  
13 a legitimate concern about PLN staples. And when I have to  
14 balance that against their right under the First Amendment,  
15 the sheriff can't win this one.

16 MS. BUTTS: But aren't they just paper staples we're  
17 talking about, which have been shown to be used in tattoo  
18 rigs, and tattoos are a problem in jails? I mean they're  
19 paper staples. They're not specially made staples for Prison  
20 Legal News magazine, unless there's something that I missed  
21 in the evidence.

22 They're paper staples; correct? Paper staples are a  
23 problem. And I just want to know when I go back to my client  
24 do I need to tell them from here on out, we're going to need  
25 to start specifying the gauge of metal when you find it in a

1 cell.

2 THE COURT: You might have to. To convince me that  
3 the infringement on the First Amendment right is rationally  
4 related to a legitimate and neutral government objective and  
5 that there's no easy and obvious alternative, your client  
6 might have to.

7 But under the facts of this case as presently before  
8 the Court, I'm not convinced. And given the burden of proof  
9 in issuing this injunction, I am convinced that they've met  
10 their burden and that, at least at this stage, your client  
11 hasn't satisfied the Turner standards such that the  
12 injunction should be denied.

13 So the simple answer is yes, he's going to have to do  
14 more, especially when it deals with a publication.

15 Now, obviously he knows the response because he's  
16 responded by saying let's just remove the staples. Let's not  
17 make a big deal out of this. I'm just going to remove the  
18 staples. Sure. If the next publication comes in and it's a  
19 different staple and he wants to take a stand and draw a line  
20 in the sand, I understand that. That's why he's got to have  
21 some discretion.

22 But I didn't see any evidence at all that these  
23 staples, because I have an expert declaration from someone  
24 else who says it's absolutely irrational, it's absolutely not  
25 legitimate based on my 25-plus years of experience in running

1 high-security federal prisons and other prisons. And that  
2 combined with this other evidence that no other -- at least I  
3 didn't see any other jail or correctional facility that does  
4 what you do. I mean it's being delivered to prisons, CDCR  
5 prisons.

6 Now, maybe this sheriff thinks that he knows better,  
7 but, you know, is that an exaggerated response? Well, based  
8 on the evidence I have, the only conclusion I can reach is  
9 yes. If you're going to let -- I mean, I don't know, does it  
10 go into San Quentin?

11 MR. GALVAN: Yes, your Honor, and death row.

12 THE COURT: I don't know how you can defend that. And  
13 it wasn't specifically addressed. You know, that's the  
14 difficult question for your client to have to answer. Why  
15 does the County of Sacramento Main Jail know better or want  
16 to impose this exaggerated response to this specific  
17 publication? That's where the argument fails in my mind,  
18 particularly when you're dealing with a First Amendment  
19 right. If your client was sitting there, that's what I would  
20 tell him.

21 And I understand. I mean the response is well, what  
22 do you want me to do when the next one comes along? Well, if  
23 you want to draw a line in the sand, you know what you've got  
24 to show. Show me that other jails are doing the same thing  
25 as you. Show me that CDCR is doing the same thing as you.

1 Those are types of facts and types of evidence that obviously  
2 I would seriously consider. I agree you don't have to show a  
3 specific incident. It would be helpful if you had a specific  
4 incident where someone used a PLN staple and someone used it  
5 to tattoo themselves or stab someone.

6 MS. BUTTS: Their expert says you can make a tattoo  
7 rig with the type of staple in there. He says our evidence  
8 didn't show it. He says I didn't see it in those pictures,  
9 but he says you could make it that way.

10 THE COURT: I mean this case is going to continue.  
11 They're going to probably want a permanent injunction.  
12 That's the type of evidence your client is going to have to  
13 consider presenting to the Court. This is only a preliminary  
14 injunction. It can be dissolved.

15 But look, it's going to be difficult given the issues  
16 involved in this case, particularly when you're dealing with  
17 constitutional rights, to overcome the law which favors, at  
18 least in this case and this type of specific fact situation,  
19 favors the plaintiff. I mean that's the reality of this case  
20 at this point. It's not going to be easy.

21 And again, you know, I keep coming back to it, I don't  
22 want to call it a concession, but, you know, he just does it.  
23 It's, what, a couple newspapers a week. I know he wants to  
24 draw a line in the sand, and it's really hard to figure out  
25 where that line should be drawn. But in this case and under

1 these specific facts, he obviously has figured out let's just  
2 remove the staples. Let's just make it easier. And who  
3 knows. If this case goes on and two years from now, that  
4 policy continues to be followed, one of your arguments may be  
5 why do I need a permanent injunction at this point? We're  
6 not going to change our policy. Now, I know Mr. Galvan will  
7 argue against that. But that, again, is some evidence that  
8 maybe there isn't a need for a permanent injunction in this  
9 case. But that's all down the road. So I would limit the  
10 injunctive relief.

11 As to the mailing labels, I think that's a closer  
12 question, Ms. Butts. I think your arguments on the mailing  
13 labels are tougher for me. And you can tell from my  
14 questions that it's a different type of animal. I'm not sure  
15 that it's necessarily as exaggerated or I could make a  
16 finding that it's as exaggerated of a response with respect  
17 to the mailing labels. And this is, I think, a much closer  
18 issue.

19 I'm having a hard time, as you could tell from my  
20 questions, figuring out how it's rational when one facility  
21 in the same county just removes mailing labels and the other  
22 facility, the Main Jail, doesn't. I know it comes down to  
23 allocation of resources and the like.

24 And then also, again, looking at what other facilities  
25 do, including CDCR facilities, I think the plaintiffs with

1       respect to mailing labels have again presented enough  
2       evidence to convince me with regard to the mailing label ban  
3       and the policy as presently implemented at the Main Jail.  
4       Because again, RCCC doesn't seem to have a problem with it.  
5       And I don't know if you'd want RCCC included, but I don't  
6       think, Mr. Galvan, that I'm convinced that RCCC is a problem,  
7       that the policy still would violate the First Amendment  
8       rights of the plaintiffs, that the regulation as currently  
9       and policies as currently implemented. And, in particular,  
10      the declaration of the plaintiff's expert that it's at least  
11      rationally related to a legitimate penological interest or  
12      that it's not an exaggerated response, applying the Turner  
13      factors.

14               I'm not convinced, at least at the Main Jail, that  
15      requiring jail staff to remove the mailing labels or the  
16      stamps that are currently being used would be a burden on the  
17      Main Jail. That, you know, this fourth factor, do easy and  
18      obvious alternatives exist indicating that the regulation is  
19      an exaggerated response, again, that factor, in particular, I  
20      find in favor of the plaintiffs.

21               As argued in the papers, the additional time the jail  
22      staff would be required to remove the mailing labels, at  
23      least in the Court's view, is likely to be a minimal burden  
24      based on the evidence before me rather than just writing  
25      "return to sender" and sending it back. The limited effect

1 on staff does not justify restrictions on access to the  
2 publications or the correspondence that are in these  
3 envelopes.

4 I'm not disregarding completely your clients' views  
5 with respect to envelopes. It seems somewhat inconsistent  
6 again that RCCC doesn't have a problem with Prison Legal News  
7 correspondence and mailing labels but the Main Jail does.  
8 And that, again, that may be due to simply volume. But when  
9 you're dealing with First Amendment rights, the First  
10 Amendment is obviously an important right that overcomes the  
11 arguments in this specific case.

12 I'd also note we talked about specific instances or  
13 having to show specific instances of incidents. And while,  
14 as the defendants have argued, it's not required as a matter  
15 of law, as Mr. Wright argues, it is somewhat persuasive that  
16 in this case the defendants have not shown specific incidents  
17 of mailing labels that caused a security risk in the 21-year  
18 history of PLN, at least 21 years of PLN sending in both  
19 publications and other types of correspondence into the  
20 correctional facilities.

21 So I do find that with respect to the mailing label  
22 policy, just like the staples, it's not rationally related to  
23 a legitimate penological interest, at least I don't think  
24 I've been convinced. I think the plaintiffs are likely to  
25 succeed. There's a likelihood of success on the merits with

1 respect to this issue.

2 The defendants have made strong general statements  
3 about the ways that the ban might serve penological purposes,  
4 but that's in contrast to weaker and, to some degree,  
5 contradictory specific evidence that they've offered to  
6 support those statements.

7 Because I have found that the regulation is not  
8 rationally related to the legitimate penological objective, I  
9 actually do not need to consider the other Turner factors.  
10 That's *Ashker vs. California Department of Corrections*. I  
11 don't need to consider the other three factors. But again, I  
12 think in considering those other three factors, those do also  
13 weigh in favor of the plaintiffs on the First Amendment  
14 claim.

15 Again, I'm not going to address or get to the due  
16 process claim or the equal protection claim. I don't need to  
17 reach that in granting the motion for preliminary injunction.

18 On the other factors with respect to the preliminary  
19 injunction, irreparable harm, balance of equities, and in the  
20 public interest, again, I think plaintiffs have met their  
21 burden to show that the injunction is appropriate at this  
22 time.

23 And then, finally, there's the issue of bond. As the  
24 plaintiffs have argued, district courts do have discretion to  
25 determine the amount of bond accompanying a preliminary

1 injunction. This would include authority to set no bond or a  
2 nominal bond. Plaintiffs have argued that the bond  
3 requirement should be waived because plaintiff is a small  
4 nonprofit organization that would be unable to post anything  
5 more than a nominal bond. Defendants did not really oppose  
6 this argument. And given those factors and the limited scope  
7 of the preliminary injunction, I am going to waive any bond  
8 requirement.

9 In terms of the form of the injunctive order, as I've  
10 said, as to whether the sheriff wants to continue to, at  
11 least at the Main Jail, simply return correspondence that has  
12 mailing labels that doesn't involve PLN, that's up to the  
13 sheriff. That may obviously invite other lawsuits. That's  
14 between you and your client.

15 This injunction is only going to apply to PLN. That's  
16 all I have before me. I'm not going to issue a broad order.  
17 I don't know if your client would prefer a broad order or if  
18 you would prefer a broad order, but at this point, I only  
19 decide what's before me.

20 In part, as I said, it comes down to I don't like to  
21 tell sheriffs, and I will not tell sheriffs, how to run their  
22 jails, unless a specific dispute is presented to me. It may  
23 seem like a funny position to take, but it comes from years  
24 of experience in dealing with these types of cases and in  
25 dealing with sheriff's departments, both as a state court

1 judge and as a federal judge.

2 Look, I mean both of you know, I was a Sacramento  
3 County Superior Court judge. I know that Main Jail, and I  
4 know RCCC. And I respect the role that the sheriff has to  
5 play in protecting both correctional officers and inmates in  
6 those facilities.

7 I'm only going to decide the dispute that's before me.  
8 So you are not going to get the preliminary injunction that  
9 you've drafted, but you are at least going to be able to get  
10 your client's publications and correspondence with mailing  
11 labels in.

12 Hopefully, this will encourage further discussions  
13 between the two of you as to -- and I think, in part, it  
14 would help to know exactly how much correspondence is going  
15 into the Main Jail. Because one of the things I don't really  
16 know, and I didn't have numbers, and may ultimately cut  
17 against you and your clients, Mr. Galvan, is if it is only a  
18 hundred or 150 pieces of correspondence, I may then consider  
19 why isn't it easier for your client, if they really want to  
20 get these publications in, why isn't it easier for you simply  
21 to have your client have someone address an envelope?

22 So I obviously would take a look at that as this case  
23 proceeds and see where we're at as to who might better bear  
24 that burden.

25 It's an interesting case to me. Legally it's

1 interesting because it does involve constitutional issues.  
2 From a practical point of view, I sometimes shake my head  
3 because we're arguing over staples and mailing labels and how  
4 much are we really talking about. It can't be more than  
5 1 percent of what attorneys are being paid in these types of  
6 cases.

7 And it's interesting to me, and I don't know whether  
8 there was any type of correspondence or discussions before  
9 your client actually decided to file a lawsuit. It obviously  
10 is not relevant and doesn't matter. But from, again, a  
11 practical point of view, litigation is so expensive that I  
12 would think you could get two people in a room and figure  
13 this out and save everybody a whole lot of money. Sometimes  
14 people don't want to do that, and they do want to know where  
15 the line should be drawn. And maybe your client and maybe  
16 the sheriff needs to know that. I can understand that.

17 But when you have somebody in a black robe trying to  
18 decide these issues as opposed to two parties that have  
19 direct interest in it, sometimes that makes very little sense  
20 to me. And, quite frankly, I wouldn't be a settlement judge  
21 anyway. I'm just going to be sitting up here as a trial  
22 judge.

23 I mean both your clients should also know, since we're  
24 the most impacted court in the country, this thing is going  
25 to drag on. You're not going to get an early trial date.

1 And as to how much money they want to spend on this is really  
2 up to your clients. You've got two very good lawyers. The  
3 briefs were terrific. It's a really interesting case. But  
4 I'm also well aware of the fact that as much as I really like  
5 this case and the issues involved, it's going to cost an  
6 awful lot for both of your clients, particularly when you're  
7 not dealing with, I don't think, a whole lot of mail getting  
8 into that Main Jail.

9 All that being said, I'm going to grant the motion.  
10 I'll draft the preliminary injunction order. It will not  
11 look exactly like the order that you proposed. It will  
12 contain some similar language, but it will be, I think, a  
13 little more limited than the language that you've proposed.

14 Okay. Any questions?

15 MR. GALVAN: Just one on the staples definition, your  
16 Honor.

17 THE COURT: Okay.

18 MR. GALVAN: You had mentioned when you were going  
19 through the staples, you've got to leave the sheriffs the  
20 ability to deal with those big industrial staples. And in  
21 our proposed order at page 2, lines 12 through 14 --

22 THE COURT: I liked your definition.

23 MR. GALVAN: Okay.

24 THE COURT: Light-duty small -- small may be difficult  
25 for the sheriff to figure out. But light-duty small wire

1 fasteners commonly used to attach a few sheets of paper and  
2 used by the plaintiff to bind the sheets of its monthly  
3 publications.

4 By the way, just as an aside, one of the things  
5 that -- and all of you know that judges have brilliant  
6 lawyers working for them behind the scenes. And one of my  
7 brilliant lawyers, Mr. Galvan, did find an advertisement for  
8 a nonbinding type of staple. So it's not a staple anymore.  
9 They've come up with something where you can staple  
10 publications -- I had it here, but I can't find it right  
11 now -- without an actual staple going into the publication.  
12 Ms. Butts smiled. But, of course, the caveat is you can only  
13 staple, at least right now with these nonmetal staplers, no  
14 more than five pages. So if you limited your publication to  
15 five pages, that would also solve this problem too. I'd be  
16 happy to send you a copy of the advertisement, but I'm sure  
17 your clients can find it. It's something to consider in your  
18 continued discussions as to how maybe to resolve this case.

19 Okay. I'll get this order out as soon as I can, and  
20 then we'll proceed down the road unless the two of you get  
21 your clients in a room and resolve this.

22 All right. Thank you, both.

23 MR. GALVAN: Thank you, your Honor.

24 MS. BUTTS: Thank you.

25 (Proceedings concluded at 11:57 a.m.)

1 I certify that the foregoing is a correct transcript  
2 from the record of proceedings in the above-entitled matter.  
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4  
5 /s/ Kelly O'Halloran

6 KELLY O'HALLORAN, CSR #6660  
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