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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Prison Legal News, a project of the Human
9 Rights Defense Center,

NO. CV 11-01761-PHX-GMS

10 **Plaintiff,**

ORDER

11 **v.**

12 Paul Babeu, individual and in his official
13 capacity as Sheriff of Pinal County, Arizona;
14 et al.,

Defendants.

15 The Court has before it the supplemental briefing (Docs. 144, 148) it requested on
16 the publisher-only rule in a previous Order. (Doc. 143 at 10–13.) Defendants have moved
17 to strike most of the Response filed by Plaintiff Prison Legal News (“PLN”). (Doc. 149.)
18 After reviewing the Parties’ submissions, the Court grants in part and denies in part
19 Defendants’ Motion to Strike and denies PLN’s outstanding Motion for Permanent
20 Injunction (Doc. 85). PLN has also filed a Motion for Reconsideration. (Doc. 145.)
21 Defendants responded in accordance with this Court’s Order, and the Court now denies
22 the Motion for Reconsideration.

23 **I. PUBLISHER-ONLY RULE AND NECESSITY FOR A PERMANENT
INJUNCTION**

24 On March 19, 2013, this Court issued an Order in response to the Cross-Motions
25 for Summary Judgment that the Parties filed. (Doc. 143.) In that Order, the Court resolved
26 several of the claims, but ordered supplemental briefing on one issue and the effect of that
27 issue on PLN’s request for injunctive relief. Specifically, PLN requested a permanent
28 injunction that would prevent Defendants from rejecting PLN materials under the

1 mailroom policy in effect at Pinal County Jail. (Doc. 86 at 13–17.) One of PLN’s
2 arguments for the necessity of injunctive relief was that the policy’s current provisions
3 governing admission of publications were “vague and contradictory.” Before resolving
4 PLN’s Motion for Permanent Injunction, the Court sought clarification on the “basis the
5 jail has determined to presently accept all the materials that PLN sends into it.” (Doc. 143
6 at 13.) That information, in turn, would illuminate the inquiry into whether injunctive
7 relief is necessary.

8 **A. Background and Current Application of the Publisher-only Rule**

9 The official mailroom policy in effect when PLN’s materials were rejected allowed
10 “publications” as long as they “c[a]me directly from a recognized publisher, distributor, or
11 authorized retailer.” (Doc. 88-5, Ex. Q at PCSO 000052; *id.* at PCSO 000066.) Nowhere
12 did the policy define the term “publication” or describe how jail staff determined a given
13 publisher, distributor, or retailer became “recognized” or “authorized.” The Parties
14 referred to this rule as the “publisher-only” rule. At the time PLN was sending materials,
15 mailroom staff applied the publisher-only rule for books in a very limited fashion. Only
16 four vendors, who were in fact not generally publishers, were considered “recognized”:
17 Amazon, Borders, Barnes & Noble, and Waldenbooks. (Doc. 87 ¶ 25; Doc. 99 ¶ 25.) And
18 so only books coming from these book sellers were allowed. (*Id.*)

19 Defendants conceded the unconstitutionality of the way mailroom staff applied the
20 publisher-only rule. (Doc. 98 at 7.) The Court then determined the liability of various
21 Defendants under 42 U.S.C. § 1983 for those unconstitutional actions and the availability
22 of certain categories of damages to PLN at trial that stemmed from the First Amendment
23 violations, among others. (Doc. 143 at 18–25; 28–32.)

24 PLN also requested injunctive relief and cited the fact that the publisher-only rule
25 under the new policy was substantially similar to the previous policy, which mailroom
26 staff had implemented in an unconstitutional manner. The Court made the following
27 observations:

28 PLN asks the Court to enter a permanent injunction that it may send
materials into the jail and have them received by the addressees.

1 Nevertheless, in light of the deference to which prison officials are entitled,
2 the Court is disinclined to enter such a broad and undefined injunction on a
3 permanent basis, when it is not sure on what basis the jail has determined to
4 presently accept all the materials that PLN sends into it. PLN might change
5 the nature of materials it seeks to send into the jail that could conceivably
6 cause security or management concerns. Nor, in light of the jail's
7 undisputed representation that all of PLN's materials are now being
8 received, is it necessarily clear that such an injunction is necessary.

9 On the other hand, when Defendants have not explained what
10 determinations were made under the current policies to allow the receipt of
11 PLN's materials, nor the criteria on which such determinations were made,
12 if any, it is possible that the jail's current decision to allow such materials
13 may be ephemeral. This is underlined by the jail's refusal to permit mailing
14 privileges to other organizations that PLN asserts are similar to it. Further,
15 to the extent there are no such criteria there is the possibility if not
16 likelihood that the jail is resolving such matters "on an ad hoc and
17 subjective basis, with the attendant dangers of arbitrary and discriminatory
18 application."

19 (*Id.* at 12–13 (quoting *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir.
20 1996)).)

21 Deputy Chief James Kimble, who has final policymaking authority for the prisons
22 in Pinal County, (Doc. 87 ¶ 35; Doc. 99 ¶ 35), filed a Declaration in response to the
23 Court's Order for supplemental briefing. (Doc. 144-1, Ex. 1.) Deputy Chief Kimble
24 clarified how the jail is currently implementing the "publisher-only" rule.

25 The current policy permits "publications" so long as they come from a "recognized
26 publisher, distributor, or authorized retailer." (Doc. 88-6, Ex. S at PCSO 000082.)
27 "Publications" are defined as "books, magazines, periodicals, and catalogs." (*Id.* at PCSO
28 000075.) Upon arrival, all publications are screened for contraband. (Doc. 144-1, Ex. 1 ¶
3.)¹ The policy, however, does not specify what criteria the jail employs to classify an
entity as a "recognized publisher, distributor, or authorized retailer."

Nevertheless, Deputy Chief Kimble has "interpreted the terms 'recognized
publisher,' 'recognized distributor,' and 'authorized retailer' to mean that the identity and
address of the purported publisher, distributor, and/or retailer have been verified through

¹ At no point has PLN ever challenged this procedure.

1 internet searches, thus eliminating any danger that it is an individual attempting to contact
2 inmates by simply using a name that sounds like a book publisher or distributor.” (*Id.* ¶ 4.)
3 The reason the jail allows publications only from entities—not individuals—is “[t]o
4 eliminate contraband.” (*Id.* ¶ 3.)

5 PLN mails (1) its own newsletter, (2) its own brochures and pamphlets, (3) books
6 that it has published, and (4) books that are published by other entities. (Doc. 89 ¶¶ 4–6,
7 12.) According to Deputy Chief Kimble, “PLN is a recognized publisher and distributor
8 because its identity is able to be independently verified.” (Doc. 144-1, Ex. 1 ¶ 5.)
9 Consequently, PLN’s own newsletter, brochures, and pamphlets and self-published books
10 are allowed because “they come directly from PLN, a recognized publisher, and not from
11 an individual.” (*Id.* ¶ 6.) For books that PLN does not publish but still distributes, PLN is
12 considered a “recognized distributor.” (*Id.*)

13 **B. Analysis**

14 PLN seeks a permanent injunction against Defendants. PLN, however, has not had
15 any materials rejected by the jail since this lawsuit was filed. (Doc. 99 ¶ 94; Doc. 119 ¶
16 94.) Injunctive relief is for unusual cases, where a plaintiff “(1) has suffered an irreparable
17 injury; (2) [where] remedies available at law, such as monetary damages, are inadequate
18 to compensate for that injury; (3) [where], considering the balance of the hardships
19 between the plaintiff and defendant, a remedy in equity is warranted; and (4) [where] the
20 public interest would not be disserved by a permanent injunction.” *eBay, Inc. v.*
21 *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In case like this, where the injury to the
22 plaintiff has ceased, the plaintiff carries a weighty burden to show that future injury is
23 likely. *See Nelsen v. King Co.*, 895 F.2d 1248, 1251 (9th Cir. 1990). Notably, “[p]ast
24 exposure to illegal conduct does not in itself show a present case or controversy regarding
25 injunctive relief . . . if unaccompanied by any continuing, present adverse effects.” *O’Shea*
v. Littleton, 414 U.S. 488, 495–96 (1974).

26 As discussed in the prior Order, several Defendants violated PLN’s constitutional
27 rights, and PLN can proceed to trial to determine what damages should be awarded. But
28 any injury due to application of the publisher-only rule appears to be over, and injunctive

1 relief is appropriate only when injuries are ongoing or imminent. *See Demery v. Arpaio*,
2 278 F.3d 1020, 1025–26 (9th Cir. 2004) (“[A] suit for injunctive relief is normally moot
3 upon the termination of the conduct at issue” unless there is evidence that the conduct is
4 likely to recur).

5 PLN’s primary argument for why the jail is likely to deny its materials in the future
6 pursuant to the publisher-only rule is that the jail currently allows PLN materials only on
7 the whim of Deputy Chief Kimble. PLN is a “recognized publisher and distributor”
8 because Deputy Chief Kimble interpreted the terms “approved” and “recognized” to mean
9 “verifiable by internet search.” An internet search confirmed the existence of PLN. Yet
10 the policy itself does not prescribe that procedure. Its opacity leaves open the possibility
11 that a subsequent Deputy might ascribe a different meaning to those terms that would
12 move PLN back to the blacklist. The written policy’s failure to specify the procedure for
13 approval may leave open the possibility that, despite the efforts of Deputy Chief Kimble,
14 jail officers might resolve questions of approval “on an ad hoc and subjective basis, with
15 the attendant dangers of arbitrary and discriminatory application.” *Cohen*, 92 F.3d at 972.
16 This is the vagueness that the First Amendment condemns. *Id.*

17 To support its theory that the policy—even with Deputy Chief Kimble’s
18 interpretation—will result in arbitrary application and that an injunction is necessary, PLN
19 cites the jail’s refusal to permit mailing privileges to other similarly-situated non-profit
20 entities, such as Prison Library Project and Read Between the Bars. (Doc. 88-8, Ex. AA at
21 PCSO 000224-26; *id.*, Ex. CC at PCSO 005292, 005241-44, 005424.) While those entities
22 are not parties to this case and PLN cannot assert their rights, the jail’s treatment of those
23 materials serves as a yardstick for measuring how jail staff are implementing the
24 publisher-only rule and whether the danger is real that they might refuse PLN materials in
25 the future. At one point, PLN materials were getting through, but materials from other
26 non-profits were not, raising the possibility that the only reason PLN materials were
27 allowed was because PLN had filed suit.

28 Defendants counter by asserting that Deputy Chief Kimble has personally
institutionalized his interpretation of the policy by conducting training for all jail staff.

1 (Doc. 144-1, Ex. 1 ¶¶ 8–9.) Under Deputy Chief Kimble’s interpretation of the policy,
2 books from non-profits like Read Between the Bars and Prison Library Project are
3 allowed—those entities qualify as “recognized distributors because their identity can be
4 independently verified.” (*Id.* ¶ 7.) Consequently, jail staff should allow materials from
5 those organizations. (*Id.*)

6 Deputy Chief Kimble acknowledged, however, that “[u]nfortunately, during and
7 shortly after the implementation and training phase of the jail policy on incoming mail,
8 several publications were [incorrectly] rejected. . . . Apparently front line mail staff did
9 not independently verify the identity of these organizations.” (*Id.* ¶ 8.) This lapse would
10 explain why the jail was rejecting materials from other non-profit organizations while
11 allowing PLN material in. Jail staff were unaware of Deputy Chief Kimble’s
12 interpretation of the policy, and, as discussed in the prior order, appeared to adhere to the
13 idea that the only approved suppliers were Amazon, Borders, Barnes & Noble, and
14 Waldenbooks. (Doc. 143 at 5, 10–13.)

15 Deputy Chief Kimble contends that he has disabused the jail staff of that notion.
16 “Since that time [January and February, 2012), I have reinforced the implementation of
17 the jail mail policy by personally instructing lower and upper supervisory staff on the
18 proper implementation of the policy. I have also implemented periodic jail mail policy
19 training for front line mail staff to reinforce the policy.” (Doc. 144-1, Ex. 1 ¶ 8.)
20 Accordingly, “[f]ront line mail staff now know that . . . ‘recognized publishers and
21 distributors’ and ‘authorized retailers’ are those that can be independently verified to
22 ensure that contraband is not hidden in publications that reach the jail. Publications
23 coming to the jail go through a review process.” (*Id.* ¶ 9.) Deputy Chief Kimble described
24 the now-operational review process: “Front line mail staff (1) inspect each publication for
25 contraband, sexually explicit materials, and unauthorized materials . . . and (2) must verify
26 the identity of an unknown purported publisher, distributor and/or retailer through internet
27 searches. If the internet search confirms the identity of the organization, then the
28 publication should be allowed in subject to the [contraband] review process.” (*Id.* ¶ 9.)

The training and review process that Deputy Chief Kimble outlined and that he

1 asserts is now operative appears to alleviate the concern from PLN’s perspective that
2 acceptance or rejection of its materials depends on which mailroom staffer reviews the
3 package. Deputy Chief Kimble has testified that the review process is regularized and
4 uniform.

5 In its Response, PLN attempts to raise issues as to the accuracy of Deputy Chief
6 Kimble’s affidavit. Defendants have moved to strike significant portions of PLN’s
7 Response. (Doc. 149.)² PLN filed copies of emails between jail staff that show confusion
8 relating to the policy. Those emails, however, are all dated before PLN sought to send
9 material to the jail, and are irrelevant to the very limited question the Court left for this
10 supplemental briefing. Consequently, the Court grants Defendants’ Motion to Strike the
11 emails and accompanying affidavit. (Doc. 148-1; *id.*, Exs. 1–4.)

12 PLN also submitted an Expert Report, prepared by John L. Clark, who is a former
13 corrections professional. (Doc. 148-1, Ex. 5.) The report and accompanying affidavit
14 (Doc. 148-2), contain his review and opinion on the adequacy of all of the jail’s mailroom
15 policies. Only a small portion of Clark’s report and affidavit is relevant to the question
16 here, namely his opinion that “verbal instructions to staff in correctional institutions often
17 do not lead to consistent implementation of written policies over time, as memories fade
18 or personalities change.” (*Id.* ¶ 10.) The Court has considered that observation for what it
19 is worth in arriving at its final decision. The remainder of the report and affidavit is
20 irrelevant, and the Court grants Defendants’ Motion to Strike that material. (Doc. 148-1,
21 Ex. 5; Doc. 148-2.)

22 Finally, PLN submitted an affidavit from a Jody Holmes. (Doc. 148-3 (Holmes
23 Decl.)) Holmes claims to be “a core member of Read Between the Bars (‘RBtB’), a non-
24 profit book distributor.” (*Id.* ¶ 2.) She claims that “[p]rior to reading Deputy Chief
25 Kimble’s March 29, 2013 affidavit it was my understanding that books sent by RBtB to

26 ² Defendants believe that the standards normally applicable to a Motion for
27 Reconsideration apply to any argument or evidence submitted by PLN in response to the
28 Court’s Order for supplemental briefing. While the Court is mindful of the respective
burdens attendant to summary judgment, its Order did not necessarily foreclose the
possibility of new evidence, provided that it was responsive to the issue.

1 prisoners at the Pinal County Jail would be rejected by mailroom staff and would not be
2 delivered.” (*Id.* ¶ 3.) Holmes states that Read Between the Bars ceased sending materials
3 to Pinal County Jail after April 2010, but that a few volunteers were unaware of this
4 change and sent books to prisoners as recently as April 2012, after the jail instituted the
5 new policy. (*Id.* ¶¶ 5–7.) Those books were rejected and no notice was given as to the
6 reasons for rejection. (*Id.* ¶ 7.)

7 PLN cannot use Holmes’s affidavit to show that, despite Deputy Chief Kimble’s
8 training, the message has not gotten through and frontline mailroom staff are still rejecting
9 publications on an ad-hoc basis. Holmes’s statements lack foundation. The Federal Rules
10 of Evidence state that “[a] witness may testify to a matter only if evidence is introduced
11 sufficient to support a finding that the witness has personal knowledge of the matter.” Fed.
12 R. Evid. 602. PLN apparently relies on Holmes’s status as “a core member” of Read
13 Between the Bars to supply the foundation for her later claims about the packages sent to
14 the Pinal County Jail. Nowhere does Holmes establish what “a core member” means. Nor
15 does she claim that she sent the packages to the jail; indeed, it is clear that other
16 volunteers sent those packages and received them back again. (Doc. 148-3 ¶¶ 6–7.) Her
17 affidavit lacks foundation as to her claims about what happened with those packages—it
18 is not clear what channels of communication she employed to ascertain what happened.
19 Absent that foundation, she lacks sufficient personal knowledge to testify as to what the
20 jail did with certain packages.

21 And in any event, her testimony does not establish that Pinal County has not fixed
22 its former unconstitutional denial of access. It is not clear when Deputy Chief Kimble
23 conducted the training he references in his affidavit. He cites incidents from December
24 2011, January 2012, and February 2012 where jail staff rejected materials from non-
25 profits like PLN, and then states that “[s]ince that time, I have . . . personally instruct[ed]
26 lower and upper supervisory staff on the proper implementation of the policy.” (Doc. 144-
27 1 ¶ 8.) According to Holmes, Read Between the Bars volunteers sent books in April 2012
28 and “[a]fter April 2012.” (Doc. 148-3 ¶¶ 6–7.) On this incomplete record, the Court
cannot determine that the jail rejected books from Read Between the Bars after Deputy

1 Chief Kimble conducted the training. Deputy Chief Kimble admitted that mailroom staff
2 did not understand the new policy for a period of time after implementation and
3 improperly rejected books from some “recognized” entities. PLN has not shown the jail is
4 still administering the policy on an ad-hoc basis.

5 PLN has thus failed to show a likelihood that its materials will be denied in the
6 future under the policy. Deputy Chief Kimble has standardized the approval process and
7 ensured that frontline mailroom staff are aware of and are acting according to that policy.
8 PLN has produced no evidence to the contrary. Consequently, PLN has not shown that it
9 is likely to suffer future injury on the facts before the Court. Its Motion for a Permanent
10 Injunction is denied.

11 **II. MOTION FOR RECONSIDERATION**

12 PLN filed a Motion for Reconsideration (Doc. 145) of the Court’s decision that the
13 jail’s prior policy limiting correspondence to one-page letters or postcards was not
14 unconstitutional. (Doc. 143 at 13–15.) PLN contends that Court’s ruling was manifest
15 error because Defendants had previously conceded that the policy was unconstitutional.

16 **A. Legal Standard**

17 A motion for reconsideration can be granted only on one of four grounds: “1) the
18 motion is necessary to correct manifest errors of law or fact upon which the judgment is
19 based; 2) the moving party presents newly discovered or previously unavailable evidence;
20 3) the motion is necessary to prevent manifest injustice or 4) there is an intervening
21 change in controlling law.” *Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058,
22 1063 (9th Cir. 2003) (internal quotations and emphasis omitted). In addition, L.R. Civ.
23 7.2(g)(1) provides that “No motion for reconsideration of an Order may repeat any oral or
24 written argument made by the movant in support of or in opposition to the motion that
25 resulted in the Order.”

26 **B. Analysis**

27 PLN fails to show why the Court should grant the Motion under the strict standards
28 that govern these requests. When PLN tried to send its materials into the jail, at least some
materials were rejected under the jail’s policy limiting correspondence to one-page letters

1 or postcards. (Doc. 88-5, Ex. Q at PCSO 000048; *id.* at PSCO 000062.) The Court upheld
2 that policy under *Turner v. Safley*, 482 U.S. 78, 84 (1987). The arguments PLN makes,
3 and the evidence it cites to show that the decision was manifestly erroneous, were either
4 previously made or could have been made at the summary judgment stage. At no point
5 does PLN attempt to fit its argument to one of the limited bases that can support a Motion
6 for Reconsideration.

7 It is true that PLN described the postcard and one-page letter policy and how
8 certain PLN materials were denied under that policy in its Motion for Partial Summary
9 Judgment. (Doc. 86 at 4.) But when PLN laid out its legal challenge to the mail policies, it
10 chose not to make any specific arguments about the unconstitutionality of the one-page
11 policy. Instead, PLN argued broadly that “[t]he Jail’s policies and practices violate
12 established law on the First Amendment rights of publishers and prisoners.” (*Id.* at 5.) At
13 no point in its Motion did PLN differentiate between the policy banning newspapers and
14 magazines, the publisher-only rule, or the postcard/one-page letter policy. PLN lumped
15 all of the policies together into a generalized argument that all of Defendants’ policies
16 were patently unconstitutional.

17 With regard to the one-page/postcard policy, PLN made only one specific point:
18 “Defendants’ person-most-knowledgeable testified that there was no legitimate
19 penological interest for the postcard only policy, and that in his professional experience
20 there were penological benefits to allowing inmate correspondence.” (*Id.* at 7.) PLN
21 supported that statement with a citation to Deputy Chief Kimble’s deposition. (*Id.*) At his
22 deposition, Deputy Chief Kimble was asked why he changed the policy from allowing
23 only postcards to allowing both postcards and one-page letters. (Doc. 88-1, Ex. I at 60:19–
24 61:13.) Deputy Chief Kimble responded by stating that “we don’t have anything to show a
25 legitimate penological interest” to justify allowing only postcards but not letters. (*Id.* at
26 61:14–25.) He also added that allowing prisoners to write letters is helpful in maintaining
27 order. (*Id.* at 62:1–7.) Nowhere did he state that the jail lacked a legitimate penological
28 interest in limiting correspondence to postcards and one-page letters.

Defendants likewise did not directly address the constitutionality of the

1 postcard/one-page letter policy in their Response/Cross-Motion for Summary Judgment,
2 but, unlike the other policies, neither did Defendants concede that the postcard/one-page
3 letter policy was unconstitutional. (Doc. 101 at 7.) Finally, in its Reply/Response to
4 Defendant’s Cross-Motion, PLN made its first specific argument for why the
5 postcard/one-page letter policy was unconstitutional. First, it claimed, citing supporting
6 facts, that “PLN has demonstrated that Jail policy allowed inmates to receive
7 correspondence only in the form of postcards and one-page letters, and that delivery of
8 PLN’s materials, including its information packs, was refused as a result.” (Doc. 117 at 6;
9 Doc. 87 ¶¶ 2, 5, 24.) The Court accepted these facts in its Order. PLN then claimed that
10 “Defendants have offered no evidence that this policy served a legitimate penological
11 objective. [citation]. It follows that summary judgment should be granted.” (Doc. 117 at
12 6.) Those statements constituted the extent of PLN’s case against the postcard/one-page
13 letter policy. Defendants argued in their Reply that “PLN errs in suggesting that the jail’s
14 one-page letter policy was unconstitutional Prison officials are free to limit the
15 number of pages of material an inmate may receive or send in the mail in order to reduce
16 the volume of materials they must screen for contraband.” (Doc. 132 at 3.)

17 In light of the portions of the record that the Parties cited and the arguments they
18 made, the Court concluded that

19 [t]here appears to be a common-sense connection between a jail goal of
20 reducing contraband and limiting the number of pages a particular piece of
21 correspondence contains. . . . PLN has not provided any evidence that
22 would refute the obvious connection between a page limit and volume
23 control. The remaining *Turner* factors do not counsel against the
24 constitutionality of the jail’s policy. Sufficient alternative avenues of
25 communication remain open for publishers like PLN who wish to
26 communicate with inmates at the Pinal County Jail: newspapers,
27 magazines, books, brochures and other publications. The jail’s policy
28 limiting correspondence to one-page and postcards did not violate the First
Amendment.

(Doc. 143 at 14–15.)

For the first time in its Motion for Reconsideration, PLN claims that Defendants
disclaimed any legitimate penological interest in their discovery responses and waited

1 until their Reply to raise the issue. PLN’s argument fails for two reasons. First, it is not a
2 proper basis for a Motion for Reconsideration. PLN’s citations to other evidence in the
3 record are unavailing. Most of that evidence was already considered by the Court in its
4 Order. As to the statements PLN cites for the first time, PLN could have cited those
5 statements in its original Motion and did not. None of the evidence qualifies as newly-
6 discovered. The remainder of PLN’s Motion for Reconsideration rehashes why certain
7 cases that the Court relied on are inapplicable. None of those are proper bases for a
8 Motion for Reconsideration.

9 The second reason PLN’s argument is unconvincing is because it is incorrect. PLN
10 bore the burden on its Motion for Summary Judgment to show that the postcard/one-page
11 policy was not “rationally related to a legitimate and neutral governmental objective.”
12 *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) (citing *Turner*, 482 U.S.
13 at 89–90); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (“In our view, the
14 plain language of Rule 56(c) mandates the entry of summary judgment, after adequate
15 time for discovery and upon motion, against a party who fails to make a showing
16 sufficient to establish the existence of an element essential to that party's case, and on
17 which that party will bear the burden of proof at trial.”) PLN attempts to avoid its failure
18 to meet that obligation by contending that it thought Defendants had already conceded the
19 point. PLN then references Defendants’ Responses to two Interrogatories as evidence of
20 the concession. The Court has reviewed those discovery responses (Doc. 145-1, Ex. B)
21 and nowhere did Defendants concede that there was no legitimate penological interest in
22 the decision to restrict incoming mail to postcards/one-page letters. They conceded that
23 the materials were not denied “based on content” or because the materials themselves
24 “implicated a health or safety concern” or would have “an adverse impact on other guards
25 and prisoners”. (*Id.*) But they did not concede that the specific policy that allows only
26 postcards and one-page letters was unconstitutional. PLN still had to carry its burden on
summary judgment and it did not.

27 Accordingly, PLN has failed to show clear error. There is no basis for
28 reconsideration.

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CONCLUSION

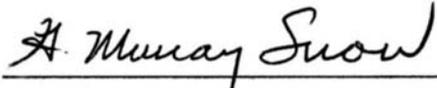
PLN has failed to show that its materials are likely to be rejected under the publisher-only rule, and is therefore not entitled to a permanent injunction. PLN has likewise failed to show manifest error in the Court’s decision upholding the postcard/one-page letter policy.

IT IS THEREFORE ORDERED that PLN’s Motion for Permanent Injunction (Doc. 85) is **DENIED**.

IT IS FURTHER ORDERED that Defendants’ Motion to Strike (Doc. 149) is **granted in part and denied in part** as described herein.

IT IS FURTHER ORDERED that PLN’s Motion for Reconsideration (Doc. 145) is **DENIED**.

Dated this 1st day of May, 2013.



G. Murray Snow
United States District Judge