No. 72950-1-I

THE COURT OF APPEALS
of the
STATE OF WASHINGTON

FRED STEPHENS,

APPELLANT

v.

DEPARTMENT OF CORRECTIONS,

RESPONDENT,

OPENING BRIEF OF APPELLANT
APPEAL FROM THE SUPERIOR COURT OF
SNOHOMISH COUNTY

Fred Stephens, pro se
Monroe Correction Complex
PO Box 888, TRU
Monroe, WA 98272

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I. NATURE OF THE CASE

This appeal is brought by Fred Stephens an inmate at the Twin Rivers Unit. He appeals the decision of Judge George Bowden granting Summary Judgment to the Department of Corrections (herein DOC).[1/] The underpinnings for Summary Judgment, among other points, raises three issues of first impression: First, Stephens challenges DOC's censorship of his incoming mail from the interent (i.e. websites). Second, in the context of prisons, this is the first case to argue that Article 1, sec. 5 is more protective than the First Amendment. And third, this is the first case to claim a State agency violates federal law governing the internet. CP-08. [47 U.S.C. § 230 & 18 U.S.C. §2703 (b)(2)]. The case is only the second one before the courts concerning censorship of the internet.[2/] As argued herein, the principle target on appeal is Policy 450.100 and DOC's decision to apply the THIRD PARTY mail prohibition to internet providers and users.

In addition, the appeal will argue that the trial court incorrectly applied the laws and decisions of this court in granting Summary Judgment.

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1. Snohomish County Superior Court, No. 14-2-03048-2

2. In Bradburn v. N. Central Regional Library, 168 Wn.2d 789, 231 P.3d 166, 173 (2010), the court noted that "there are ... no cases [involving the interent] decided under article 1, sec. 5."

II. ERRORS ON APPEAL

This appeal claims the trial judge erroneously granted Summary Judgment as follows:

1. The trial court erred when it failed to consider the state constitution and Stephens' Gunwall analyis before turning to federal law. Q. Whether Art. 1, sec. 5, grants enhanced or broader protection than the First Amendment?

2. The trial court erred in concluding that DOC's THIRD PARTY MAIL policy does not constitute a prior restraint? Q. Whether DOC's THIRD PARTY mail policy, as applied to the internet, is a prior restraint when it censors internet speech before Stephens receives it?

3. The trial court failed to consider Stephens' complaint that DOC's "Third Party Mail Policy", as applied, is overbroad and unconsitutional?

4. The trial court erred, contrary to Turner v. Safley, granting Summary Judgment based on DOC's "Bald Assertions". Q. Whether the trial court improperly applied Turner granting Summary Judgment on "BALD ASSERTIONS"?

5. The trial court incorrectly applied the law of Summary Judgment where the Plaintiff provided evidence that impeached the single Declaration of Roy Gonzalez?

6. The trial court erred in not finding federal law barred DOC from imposing its policy to restrict information from internet providers and users. Q. Whether Stephens was a user of the internet?

7. The trial court erred granting Summary Judgment on the issue of retaliation? Q. Was the evidence sufficient to support a claim of retaliation?

III. STATEMENT OF THE CASE

A. PROCEEDING

1. On 7/23/2014, Stephens Petition for a Temporary Restraining Order (TRO). At the hearing, Judge Millie D. Judge denied the TRO and opined Stephens must provide a Gunwall Analysis. (Sub #20, CP-174). The order was unaccompanied with Findings of Fact & Conclusions of Law.

2. On 10/8/2014, Stephens filed an Amendment Complaint. CP-157--173.

3. On 12/9/2014, the court held a hearing on Defendant's "2nd Motion for Summary Judgment". Following the hearing, Judge Bowden granted DOC's motion for Summary Judgment. (Sub #65, attached to Notice of Appeal).

B. RELEVANT FACTS. It is undisputed that DOC rejected Stephens mail printed and sent by internet website providers and users. DOC officials have not claimed the "CONTENT" of any mail sent threatens the "security and safety" of the institution; rather, officials reject mail premised on its source, i.e. being THIRD PARTY.

1. Rejection IN-MCC-10/10/13-751. DOC claims the mail was rejected "because it contained two persons' addresses on them which were obtained through an internet company." CP-60. Stephens debunked this claim providing a true copy of the mail that was rejected. See Stephens' Declaration, Appendix A, Ex 15; attached herein Ex 15.

2. Rejection I-12/6/13-751, mail from Help From Out Side; held a short "email from...Norma Didomo". CP-61. The email identified all parties to include email addresses. The content of the email concern the welfare of Ms. Didomo after the Typhoon in the Philippines. Attached herein Ex 8.

3. Rejection IN-MCC-3/5/14, mail from Inmate Scribes and "contained ... six profiles and messages from potential pen-pals." CP-61. The messages were simple requests to make contact. CP 125 thru 130.

4. Rejection IN-MCC-3/31/14-751, mail send from Inmate Scribes. This mail contained "two more profiles of prospective female pen-pals." CP-62.

5. Rejection IN-MCC-4/17/14-751. The mail held "two profiles and messages from potential pen-pals." CP-62. Each message was merely an invitation to make contact: Hello, here I am, call me.

6. In Stephens' Amended Complaint, he raised a claim for rejection #IN-MCC-7/1/14, but this rejection went unanswerred by DOC. See CP-160, @ ¶7.

7. Stephens' Amended Complaint also raised a claim of mail rejection IN-MCC-8/19/2k014-751, but this rejection went unanswered by Respondent DOC. CP-160, @ ¶8.

IV. ARGUMENT

A. STANDARD OF REVIEW

On appeal from Summary Judgment, this court reviews the trial court's decision de novo. Keck v. Collins, 325 P.3d 306, 312 (2014). De novo review includes the court's independent examination of the evidence. Id. When reviewing the evidence, the court "construes all facts and reasonable inferences from those facts in the light most favorable to the non-moving party." Woods v. H.O. Sports Co., Inc., 333 P.3d 455, 456 (2015).

Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing no genuine issue of material fact, and meets its burden by showing an absence of evidence to support the non-moving party's case." Brummett v. Wash. Lottery, 288 P.3d 48, 53 (2012), see CP-63. On motion for Summary Judgment, the court does not weigh the evidence; rather, it decides whether the evidence gives rise to any issue of material fact. American Exp. Centurion Bank v. Stratman, 292 P3d 128 (2012). If the non-moving party presents contradictory evidence and the evidence is not too incredible to be believed by reasonable minds or the movant's evidence is impeached, an issue of credibility is present and the court should deny the motion. Space Needle v. Kamla, 105 Wn. App. 123, 19 P.3d 461, 465 (2001); Montaney v. J-M Mfg Co., 314 P.3d 1114, 1147 (Div 1, 2013).

B. GROUNDS FOR APPEAL

IT WAS PLAIN ERROR FOR THE SUPERIOR COURT NOT TO CONSIDER CENSORSHIP OF STEPHENS'S MAIL AND FREE SPEECH UNDER THE STATE CONSTITUTRION, Art. 1 sec. 5.

1. **IGNORED BRIEFING.** Stephens raised the issue that the State Constitution is "different" and requires an independent interpretation than the First Amendment. CP-17. In opposite, Respondents argued that a Gunwall analysis

is necessary. CP-66. In Respondents' "Reply to Defendants' Second Summary Judgment", they claim: "Stephens provides no evidence or analysis that the state constitution contemplates greater protections for prisoners than the First Amendment." CP 2. Said claim is wrong for three reasons: First, the state has the burden to justify abrigement of its citizens rights. Ino, Ino Inc. v. City of Bellevue, 937 P.2d 154, 162 (1997). Second, Art. 1, § 5 has already been held to grant greater protection. State v. Reece, 757 P2d 847, 952 (1988) ("The language of article 1 section 5 is significantly different from the First Amendment and often will support a broader protection for free speech in Washington); And third, Respondents ignore the fact that Stephens did submit a Gunwall Analysis. CP 17-22.

As discussed below, the case is one of first impression, in the context of prisons no case has considered whether Art. 1, § 5 is more protective. Yet, because Art 1, sec. 5 grants free speech to "every person" (inmates not excluded) the question needs to be argued.

2. **COURT'S DUTY.** In this case, the trial Court ignored its duty to first consider the state constitution: "The judiciary has the primary responsibility for interpreting [Art. 1, § 5] to give it meaning and legal effect." McCleary v. State of Wash., 269 P.3d 227, 246, (2012).

This court repeated the premise in Collier v. City of Tacoma, holding: "This court has a duty, where feasible, to resolve constitutional questions first under the provisions of our own constitution before turning to federal law". 854 P.2d 1046, 1050 (1993). Given the clarity of law, it was plain error for the trial court not to consider Stephens' claim of Free Speech under Art. 1, § 5. (Here after Section 5).

3. GUNWALL ANALYSIS? The legal landscape concerning Art 1, § 5, supports Stephens' position that an independent analysis under the State Constitution is warranted without Gunwall analysis. Starting with State v. Rinaldo, 36 Wn. App. 86, 95 (1984), the court recognized two things:

> "First, the delegates [to the state constitution] were at least as familiar with the First Amendment ... as we are today. Second, the difference between the First Amendment and article 1, section 5,... which these delegates drafted and adopted, was earnestly intended.... It follows that the courts of this state have the power to interpret our state constitution as being more protective of press freedoms than the parallel provision of the [U.S. Constitution]."

The Rinaldo opinion creates a presumption that Art 1, § 5 is more protective. Continuing with the same logic, in 1988 the court in O'Day v. King, held: "[Art. 1, § 5] differs significantly from the First Amendment, and it is well settled its protections afforded constitute a 'preferred right.' " 749 P.2d 142, 146 (1988). Again, in State v. Thorne, 921 P.2d 514, 537 (1996), the court

(Madsen dissent) wrote: "This court has stated that 'resort to the Gunwall analysis is unnecessary' where the court has already decided that the scope of protection under both the federal and state constitution is co-extensive." Citing State v. Earls, 116 Wn.2d 364, 374.[3/] Because the subject is "stare decisis", Stephens was not required to offer a Gunwall analysis. Thus, the trial court erred in not considering Stephens complaint under Section 5. CP 17.

4. WHY ARTICLE 1, SECTION 5 GRANTS ENHANCED PROTECTION

a) **Prior History.** In 1889, when the State Constitution was adopted, the First Amendment was not obligatory upon the States. Patterson v. St. of Colorado ex rel Atty Gen., 27 S.Ct. 556, 559 (1907). Yet, the founding fathers knew of the First Amendment and intended enhanced protection. Rinaldo, id at 95. Indeed, the conventioneers of 1889 considered three proposals, each became progessively more liberal. "The third version...went all the way and was an affirmative grant of guaranteed right to every person." Id. at 93-94. CP 19. It reads:

> "FREEDOM OF SPEECH: Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

b) **Mandatory Right.** When Section 5 is read "in pari materia" with Art. I, sec. 29, there can be no doubt that Section 5 grants absolute free speech to "every person", Art. I, sec. 29 reads:

> "The provision of this constitution are mandatory, unless by express words they are declared to be otherwise."

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3. In accord, World Wide Video, Inc. v. City of Tukwila, 816 P.2d 18, 20 (1991); Voters Educ. Committee v. WA. St. Pub. Disclosure Comm'n, 161 Wn.2d 470, 493 (2007); Am. Legion Post #149 v. Wash. State Depart. of Health, 164 Wn.2d 570, 192 P.3d 306, 320 (2008).

The expressed words "every person" in Art 1, § 5 cannot be re-interpreted to mean "every person" except prisoners. Westerman v. Cary, 125 Wn.2d 277, 288 (1994) (cannon for constitutional construction requires words to be given their ordinary meaning); Delong v. Parmelee, 336 P.2d 936, 950 (2010) (holding that the phrase "any person" guaranteed prisoners equal rights under the PRA).

c) Prisoners NOT Excluded. The founding fathers knew how to exclude prisoners. In other sections of the Constitution the founders expressly excluded prisoners from exercising certain rights. Const. Art VI, sec 3 "no right to vote"; Const. Art V. sec 2, "cannot hold public office"; and Art II, sec 29, prohibition against slavery. It is crystal clear that Art 1, sec 5 must include prisoners.

d) Individual right. Unlike the First Amendment (directed at the U.S. Congress) Free Speech under Art 1, sec 5, is not a mere guide to the formation of state policy, but a command, the breach of which cannot be tolerated. As held in Rinaldo, at 93-94:

> "Those hardy frontier lawyers, newspaper people and their collagues at the 1889 constitutional convention said it as clearly as they possibly could, ... the right to free speech and press in the State of Washington is a privilege guaranteed to all."

Therefore, under Art 1, § 5, Stephens has the same right to receive internet speech as other citizens. To abridge his internet speech, unlike the four part test of Turner v.

Safley, "officials must show that a regulation authorizing mail censorship furthers one or more...substantial governmental interests"; e.g. "preservation of internal order, discipline, security ..., or unauthorized entry." Robinson v. Peterson, 87 Wn.2d 665 (1976).

e) **Enhanced Protections** of **Article I, section** 5

First enhanced protection of Art 1, § 5 is the Standard of Review. Because section 5 is an individualized privilege of free speech, DOC must put forth evidence its Third Party mail policy is necessary to achieve a substantial interest of safety & security of the prison. On this point, the DOC offers no evidence that internet website providers, as a party, threaten the security & safety of the prison; nor has DOC advanced any complaint that the content of e-mails sent to Stephens pose a threat to the prison. Rather, DOC supports its argument with Roy Gonzales' declaration who claims DOC needs to identify the parties to prevent violation of no contact orders? CP 78-79. Yet, Gonzales' supposition, standing alone, does not create a substantial interest of security & safety to the prison. Ibid

Second enhanced protection of Section 5 are the words "being responsible for that right"; these final words place the burden on DOC to show the content of internet speech and printed information is an abuse of the free speech. In other words, unlike the First Amendment, Stephens' right of

free speech cannot be abridged unless the DOC can show that messages mailed to him constitute an abuse of free speech; e.g. abusive speech include: calls to riot, hate speech, obscene utterances, plans to escape, criminal activity, and threats to assault staff or inmates. Of course, to justify censorship of speech, DOC's mail examination must find contraband. In the instant case, the DOC does not claim Stephens abused his right of free speech.

In summary, Respondents have not carried their burden of showing a substantial government interest to merit censorship of Stephens' incoming internet mail. Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 114 (1997) (The state bears tne burden of justifying restrictions on speech). In addition, where abuse of speech is not alleged, no censorship can occur. Rinaldo, at 95-96 ("The record ... being devoid of any showing of abuse").

C. GROUND TWO ON APPEAL

THE STATE CONSTITUTION, ARTICLE I, SECTION 5 PROVIDES GREATER PROTECTION AGAINST PRIOR RESTRAINTS OF SPEECH THAN THE FIRST AMENDMENT.

1. **ISSUE RAISED.** Stephens raised the issue that DOC's THIRD PARTY mail policy, as applied to website providers, constitutes an unconstitutional prior restraint of speech. CP 1, & 164. However, the Respondents did not address the issued in their Motion for Summary Judgment. CP 63-70.

2. LEGAL HISTORY. While the application of Section 5 in the prison context is an issue of first impression, state court's have a long history of invalidating the form of censorship at issue. A "prior restraint" means:

> "[A]ny form of govenment action which tends to suppress or interfere with speech activity before it is ultimately punished through civil or criminal sanctions in a court of law. State v. J-R Dist. Inc., 111 Wn.2d 764, 776 (1988).

a) Prior restraints are NOT unconstitutional per se under the First Amendment, but they are under Section 5; JJR Inc. v. Seattle, 126 Wn.2d 1, 6 (1995). Section 5, "categorically rules out prior restraints of constitutionally protected speech under any circumstances", Voters Educ. Committee, supra at 470, "where the information sought to be restrained was lawfully obtained, true, and a matter of public record." State v. Coe, 101 Wn.2d 364, 374-75 (1984). This strict standard for evaluating prior restraints lies in the plain language of Section 5. Ibid.

Our Supreme court has struck down prior restraints in most contexts. Adams v. Hinkle, supra (enjoining "Comic Book Act" because it vested power to enter final censorship determinations to a state administrative agency); Fine Arts Guild v. City of Seattle, 74 Wn.2d 503 (1968) (enjoining administrative agency to censor sexually explicit films for the same reason); JJR, id at 1 (holding that licensing scheme was unconstitutional prior restraint); Coe, at 375

(court order invalidated because it was a pror restrain of lawfully obtained information).

Despite the precedent of our Supreme Court prohibiting agencies from imposing prior restraint censorship, the DOC is operating such a system under the facts of this case. See CP 58 & 75.

3. **POLICY EXAMINED.** First, the words "THIRD PARTY" appear twice: "DOC 450.100 IV A.3." CP 85; and again under "B. Outgoing Offender Mail". CP 86. Yet, none of the mail rejections violate the policy. The incoming mail is only for Stephens and not "FOR" a third party (anotner inmate); none of the mail rejections concern outgoing mail. [See disputes at CP 10]. Stephens reiterates: A plain reading of the mail policy shows his incoming mail was not in violation. Ibid. The policy at issue here is the verbal or internal memos from Gonzales and stated in his declaration. CP 74. Second, the term "Third Party Mail" is not defined. CP 98-101. Last, the "Third Party" mail policy does not appear in the list of "UNAUTHORIZED MAIL". CP 97-101. Thus, this court is addressing an unwritten mail policy that is arbitrarily & capriciously applied.

A studied read of Gonzales' declaration certainly speaks of a prior restraint, he states: "Under DOC policy 450.100, offenders are prohibited from engaging in any

kind of third party communications in a number of ways". (CP 75, para. 4). Though not specifically written in policy, Roy Gonzales gives an official command that constitutes a prior restraint of speech, to wit:

a) The policy is imposed by "government action", DOC seizes and rejects mail, J-D Dist. Inc., supra.;

b) The policy as applied "suppresses or interfers" with protected free speech and associations. (Websites are the modern day newspaper, the information highway).

c) The speech DOC seeks to abridge is "punishable" by prison infraction, WAC 137-48-010 (Unauthorized Communication with another Inmate), or RCW 26.50.110 (Violation of an Order), or RCW 2.28.020 (Contempt);

d) The policy blocks all protected speech as well as the speech the DOC seeks to prohibit, and;

e) The policy is administered at the discretion of prison mailroom staff. (See CP 16 discussion of internet mail that was not censored).

The DOC's Third Party Mail policy, as applied to the internet, is a prior retraint and invalid under Section 5. Therefore, Stephens seeks this court's decision holding DOC's mail policy invalid as a prior restraint of speech. Importantly, holding the Third Party mail policy invalid does not impede DOC's ability to examine the mail for contraband or speech content that threatens the safety & security of the prison.

D. GROUND THREE ON APPEAL

DOC'S THIRD PARTY MAIL POLICY, AS APPLIED, IS OVERBOARD AND THEREFORE UNCONSTITUTIONAL

1. AGENCY AUTHORITY. The statute DOC claims vests it with authority to censor internet speech with the label of "Third Party" is RCW 72.09.530. However, to the extent that DOC interprets RCW 72.09.530 to censor interent speech, the statute is overbroad. Stephens also claims the statute is void for vagueness where it labels speech printed from the internet contraband. (Argued at CP 70).

2. LEGAL STANDARD. Several principles guide Stephens' overbreadth argument of RCW 72.09.530. "A law is overbroad if it sweeps within its prohibitions constitutionally protected free speech activities." City of Seattle v. Huff, 111 Wn.2d 923, 925 (2000); Ashcroft, 122 S.Ct. at 1403 ("The government may not suppress lawful speech as a means to suppress unlawful speech). In determining overbreadth, "a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct". Huff, id. A statute or ordinance will be overturned only if the court is unable to place a sufficiently limiting construction on a standardless sweep of legislation." State v. Immelt, 173 Wn.2d 1, 11 (2009). The concept of "substantial overbreath" is not readily reduced to an exact definition. However there must be a realistic

danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before court." Immelt, at 11. A statute is constitutionally vague if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. O'Day, 109 Wn. at 810.

As the record of this case shows, there is no limiting construction on the standardless sweep of the term "contraband" and "Third Party Mail". Ibid.

3. PRISON CONTEXT. RCW 72.03.530 was intended to prohibit the introduction of real contraband to include: explosives, chemicals, deadly weapons, tools, alcoholic beverages, drugs, tobacco and obscene materials. WAC 137-48-020. Prohibiting physical contraband from entering the prison is a legitimate agency interest. However, DOC is sweeping within the statute's ambit one of the most comprehensive and advanced platforms for free speech ever conceived--the World Wide Web, the internet. The DOC accomplishes this prohibition by labeling internet providers and users as a "Party" to the speech being delivered.

Because DOC's mail policy restricts a voluminous amount of protected speech, in its attempt to restrict a tiny amount of unprotected speech, its Third Party Mail policy is overbroad and invalid under Article I, sec. 5 and the First Amendment of the U.S. Constitution.

E. GROUND FOUR--TURNER V. SAFLEY

THE TRIAL COURT IMPROPERLY APPLIED THE FOUR PART TEST OF TURNER V. SAFLEY ACCEPTING DOC'S ASSERTIONS WITHOUT ANY SUPPORTING EVIDENCE. First & Fourteenth Amendment.

1. **Turner Test.** The Supreme Court (herein SCOTUS) has repeatedly recognized that restrictions on the delivery of mail burdens an inmate's ability to exercise his ... First Amendment rights. Clements v. Calif. Dept. of Corr., 364 F.3d 1148, 1151 (2004), [CP 14]. When a prisoner files a complaint under 42 U.S.C. § 1983, the courts apply the familiar four part test of Turner v. Safley, 482 US 78, 89 (1987): (1) there must be a "valid, rational connection" between the regulation and the governmental interest to justify a restriction. (2) whether there are alternative avenues that remain open to the inmate to exercise the right. (3) the impact that accommodating the asserted right will have on otner guards and prisoners, and on the allocation of resources; (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials. Clements, at 1152. The first factor constitutes "sine qua non". If a regulation is not rationally related to a legitimate and neutral agency objective, a court need not reach the remaining three factors. Prison Legal News v. Lehman, 397 F.3d 692, 699 (CA 9 2005); Turner, 482 US at 89-90.

Though the Turner decision grants prison officials deference toward their polices; said deference does not mean abdication of judicial oversight. Officials must still put fourth evidence to justify restrictions on First Amendment rights. Turner, id at 89-90.

2. TURNER APPLIED. Factor One. Stephens asserts there is no legitimate or logical connection for DOC's stated goal and its Third Party Mail policy applied to the internet. "A regulation cannot be sustained where the logical connection between the regulation and the asserted goal is to remote as to render the policy arbitrary or irrational." Ashker v. Calif. DOC, 350 F.3d 917, 922 (CA 9 2003). Here, Stephens cited Clements, supra at 1152, as dispositive; where the District Court granted an injunction against the prison for banning pen-pal and website mail. In Clements, prison officials advanced two reasons to ban internet mail: First, they contended the volume of mail was a burden on prison resources; second, they asserted that internet-generated mail creates security concerns because it is easier to insert coded messages into internet material. The Court dismissed CDOC's claims because they did not "articulate a rational or logical connection between its policy and these interests. Clements, id. [The Calif. DOC did not deem a ban on "Third Party Mail" necessary to enforce prohibited contacts; nor did they consider internet mail Third Party?]. Other courts have held the absence of evidence fatal to policy: Ashker, supra, (Overturning policy that approved vendor labels must be affixed to books and magazines); Jordan v. Pugh, 504 F. Supp.2d 1109, 119 (2007) (Overturning BOP

policy preventing prison from writing a "byline" where no "proof of a past problem"); Jackson v. Pollard, 208 Fed 457, 461 (2006) (Jackson has raised a genuine issue of material fact as to whether the regulation prohibiting delivery of printed e-mail responses to personal web pages rationally advances the goal of protecting the public).

In summary, DOC fails Factor One, Gonzales' declaration provides no evidence that the Third Party Mail policy is legitimately or logically related to accomplish its goal to ban prohibited contacts. CP 126. Inmates still violate prohibited contacts using U.S. Mail.

Factor Two. Inmates do not have direct access to the internet, and there is no speech medium that matches the specificity, speed, deepth and low costs of internet searches. Clements, at 1151. The internet allows family & friends to use their time and money efficiently. As the court knows, newspapers and yellow pages are now very limited. Certain information can only be obtained from the internet. There is simply no alternative to the internet. 47 U.S.C. §230 (a) Findings.

Factor Three. DOC mail policy has no limit on the amount of mail an inmate may received. CP 82. Respondents raises no issue that internet mail will burden prison resources. Thus, this is a non-issue.

Factor Four. The DOC's Third Party mail policy as applied to the internet is an exaggerated response for three reasons: First, Mr. Gonzales' declaration presents no evidence that Internet Providers have facilitated prohibited contacts. Second, Stephens provided

evidence that many prisons across American allow pen-pals and internet materials. CP 40 "WriteAPrisoner.com", (Attached Ex 13, "PenACon.com"). Third, Internet materials are printed, not hand-written, therefore, they require less scrutiny than regular mail.

3. PARTY ID. Roy Gonzales' declaration advances a false narrative that e-messages printed and mailed from a website do not provide DOC with party identification. CP 78. This assertions is not true. Unlike U.S. Mail, where citizens can write a false, non-traceable return address (see fictitious addresses: CP 33 & 34), e-mails and websites are fully traceable. Based on expert opinion, the Ninth Circuit recognized that e-mails can be traced to the computer's IP address. Clements, at 1152 (Expert testimony [that] it is easier to determine the origin of a printed email than to track handwritten or typed mail); in accord State v. Peppin, WL 1592442 (Div 3, 2015) (Detective used IP address to access the host computer...IP address is a unique address to each computer, that an e-mail address is linked to). This court should also give deference to website providers and presume that they will not participate in illegal activities.

Therefore, Stephens argues that Respondents cannot survive Turner's four part test; the Third Party mail policy, as applied to the internet is a prior restraint, overbroad and does not serve to achieve the goal of preventing inmates from prohibited communications. This court should hold the policy unconstitutional and overturn the Superior Court's grant of Summary Judgment.

F. GROUND FOUR--SUMMARY JUDGMENT

THE COURT COMMITTED PLAIN ERROR GRANTING SUMMARY JUDGMENT BY IGNORING THE NON-MOVING PARTY'S EVIDENCE THAT RAISED GENUINE ISSUES OF MATERIAL FACT--FORECLOSING SUMMARY JUDGMENT. CR 56.

1. CREDIBILITY ISSUE. The non-moving party avoids summary judgment when it "set[s] forth specific facts which sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue of a material fact." And, "Summary judgment will be denied if the reviewing court is required to consider an issue of credibililty. FDIC v. Uribe, Inc., 287 P.3d 694, 171 Wn.App. 583 (Div 3, 2012).

2. **Key Issue.** The question to this case is whether inmates circumvent prohibited correspondance by using websites and internet providers, e.g. inmate-to-inmate correspondence? In its defense, the DOC offered the sole declaration of Roy Gonzales. CP 74-79. However, Gonzales' declaration provides no operative facts in support of his conclusions or expressed goals; rather, he offers a false narrative easily reduced to three postulates.

Premise 1: Websites or internet providers (unknowingly) may assist inmates to violate prohibited contacts;

Premise 2. Gonzales advances the claim that DOC needs to know the identify of the parties communicating with an inmate so they can enforce prohibited contacts; CP 78 and,

Premise 3. Inherent to Gonzales' declaration is the presumption (without discussion) that the DOC allocates resources to verify the return address on envelopes delivered by U.S. Mail; but, the same resources are not available to verify website or email addresses.

All three premises are false; as a result, Gonzales' Declaration falls to bald assertion that the Third Party Mail policy is necessary to identify the "parties with whom offenders correspond [because it is] important to public safety[,]" and prevents inmates from circumventing prohibited contacts. CP 78. But, Gonzales relates no personal experience or operative facts to support his conclusion. In rebuttal, Stephens impeached Gonzales' conclusions with hard evidence that the Third Party mail policy is arbitrarily & capricious.

3. **Rebuttal Evidence. Premise 1.** Stephens argued that Clements v. Calif. DOC, supra, was dispositive of emails sent to prisoners. In Clements, the U.S. District court struck down a similar policy, holding that under Turner, the prison's restrictions on emails was unconstitutional. Clements, 1151. The court found that prison officials produced no evidence to show that internet providers assisted inmates with coded messages. Id at 1152 ("CDC failed to meet the Turner test because it did not articulate a rational or logical connection between its policy and these interests [public safety]").

Premise 2. Stephens provided undisputed evidence that other American prisons allow inmates to receive emails from Pen-pal services via Third Party Mail, e.g. PenAcon.com (Ex 13); Write-A-Prisoner.com, (Ex 25 at CP 16). The reasonable inference is that other prisons allow (including BOP) the same mail rejected in this case.

Premise 3. Stephens provided undisputed evidence that DOC does not muster resources to verify return addresses and makes no effort to

verify an email's IP address. His evidence includes: Alex Peder's declaration that email addresses are more traceable than an envelopes return address (Ex 24, CP 37), declaration of Timothy Winger that he receives pen-pal mail (Ex 16, CP 31); Third party emails from Senator Pridemore (Ex 9, CP 29); profiles of women looking for work (Ex 18, CP 18); copy of incoming envelopes with bogus name & address that were not rejected by DOC's mailroom, (Ex 19 & 20 CP 33); and copy of email from "Sidney in Largo, FL" that includes her phone number, email address, and website contact code (Ex 22, CP 35). These exhibits, among others, impeach and discredit as untrue DOC's stated goals and assertions. Given Stephens' undisputed evidence, the trial court clearly erred granting summary judgment to the DOC.

G. GROUND Six. SUPREMACY CLAUSE

> THE COMMUNICATIONS DECENCY ACT OF 1996 (CDA) PROVIDES THAT NO INTERNET PROVIDER SHALL BE TREATED AS THE PUBLISHER OR SPEAKER OF INFORMATION. 47 U.S.C. § 230.

1. **Federal Law.** The Respondents' attorney claimed the CDA "is not applicable to Plaintiff's case because [it] does not involve tort liability." CP 69. However, Respondents' reading of of the CDA is too limited. Stephens' CDA claim mirrors that of Backpage.com, LLC v. McKenna, 881 F.Supp.2d 1262 (1996). In Backpage the Plaintiffs argued that SB 6251, Laws of Washington, violates Section 230 because it treats online service providers like Backpage.com as "the publisher or speaker of any information provided by another information content provider." Id at 1272. Applying the same logic, Stephens

argues that DOC's Third Party Mail ban of internet speech violates Section 230 and thus the Supremacy Clause.

2. **Supremacy Clause,** provides that federal law "shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to be Contrary not withstanding. Backstage, at 1272. Under this principle, Congress has the power to preempt state law. In this case, Stephens does succeed on this claim that RCW 72.09.530, vis-a-vis, DOC 450.100 (Third Party Mail) is preempted because it is expressly preempted and because it likely conflicts with federal law. The Third Party Mail policy is inconsistent with Section 230 for three reasons: First, Section 230 prohibits "treat[ing]" online service providers" as the "publisher or speaker of any information provided by another information content provider." Respondents have not disputed that Inmate Scribes and Help From Outside are information content providers and that Stephens is a "user" of online information. Second, violation of the Third Party mail policy, even for lawfully obtained and true speech is punishable by major or general infractions against the "user" Stephens. Third, the challenge Third Party Mail restriction stands as an obstacle to accomplishment and execution of the full purpose and objectives of Congress. Sec. 230(a), CP 21. For the above reasons, Stephens asks this court to find DOC 450.100, as applied, is preempted by Section 230 and 18 U.S.C. § 2703, et seq. Therefore, Summary Judgment must be reversed in favor of Stephens.

H. GROUND SIX-- RETALIATION.

FOR MORE THAN FOUR YEARS, THE RESPONDENTS HAVE ENGAGED IN ACTS OF RETALIATION, REJECTING STEPHENS INCOMING INTERNET MAIL AND DENIED HELP THE OPPORTUNITY TO WORK IN CORRECTIONAL INDUSTRIES.

1. A retaliation claim may assert an injury no more tangible than a chilling effect on First Amendment rights. Hines v. Gomez, 108 F.3d 265, 269 (CA 9 1997). The necessary elements of a retaliation claims are: (1) a prison official acting under color of state law; and (2) intential retaliation for the exercise of a constitutionally protected activity. Stephens alleges that mail rejections began in 2011 on the issue of "entering into an unauthorized contract". A lawsuit followed and was subsequently settled. Stephens v. Roy Gonzales, et al, U.S. District Court, Seattle, No. 13-2-05086-1 (March 4, 2014, "Stipulation and Order of Dismissal", paying Stephens money). While litigation continued in Federal Court, DOC began rejecting Stephens incoming internet mail. CP 76. Stephens alleges that Respondents had to twist the wording of DOC 450.100 to justify mail rejections; he further alleges that he was singled out were other inmates received internet mail. CP 31. In 2012, Stephens was suspended from his job as a Law Clerk and told he could only work in the unit housing as a janitor or wheelchair pusher. For more than two years, Stephens has been denied job opportunities in Correctionsal Industries, even though, other inmates serving live sentences were give jobs. CP 165 and CP 278. The evidence present adequately supports a claim of retaliation and constitutes a triable issue. 42. U.S.C. § 1983.

V. COST BILL

Stephens moves this court for Costs to include: U.S. postage, photocopy expenses, the filing fee of $290 and for a statutory attorney fee of $250.

VI. CONCLUSION

Based on the court's file and the arguments presented, Stephens prays for the court to reverse the Superior Court Order granting Summary Judgment to the Respondents and to grant Summary Judgment in favor of Mr. Stphens. Stephens seeks remand to the Superior Court for trial on the Federal Civil rights complaint under Section 1983 and for the issue or retaliation.

Submitted this 1 day of July 2015

Fred Stephens, 743751
Monroe Correction Complex
P.O. Box 888, TRU C-507
Monroe, WA 98272

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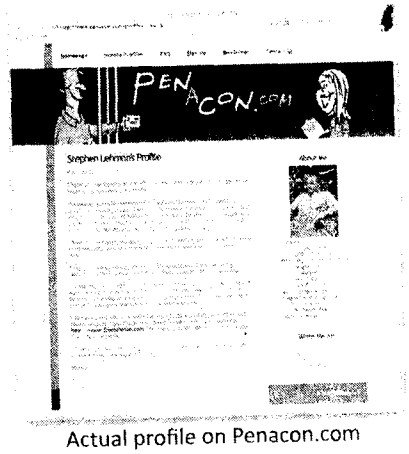

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Prosecutorial Misconduct (cont.)

training that all attorneys are presumed to have received. Sadly, the Court's reliance on such education and training appears misplaced.

Indeed, some law schools do not even require criminal procedure as mandatory coursework. The Tulane University Law School in New Orleans, where the *Connick* case originated, requires students to take Criminal Law. However, the Constitutional Criminal Procedure course at the school is an elective.

In no area of the law does an individual attorney have more effect on other peoples' lives than in the role of prosecutor, and it is therefore essential to ensure that prosecutors receive sufficient training on their professional and ethical obligations. For those who claim that prosecutors already receive education and training in those areas, it is apparent from the examples of misconduct cited in this article that the current syllabus is inadequate.

Methods to implement such a requirement include via bar certifications to practice as a prosecutor, or through statutory provisions or local court rules.

Greater Transparency

The practice of keeping attorney disciplinary proceedings secret is perhaps the greatest barrier to improving the accuracy and fairness of – and public confidence in – our nation's criminal justice system. In no other area of public service is there such a lack of transparency. This institutional secrecy extends to the judiciary, as many court rulings that address prosecutorial misconduct purposefully do not mention the name of the prosecutor involved.

United States v. Olsen, for example, in which Chief Judge Alex Kozinski voiced a strongly-worded dissent, involved allegations that a federal prosecutor had failed to disclose that a forensic analyst who handled evidence in the case was under investigation for misconduct which had already resulted in three wrongful convictions. Yet the Ninth Circuit's ruling never identified the prosecutor – Assistant U.S. Attorney Earl Hicks.

It is perhaps ironic that those who run for public office are often required to disclose detailed information about their personal life, finances and potential conflicts of interest, yet when it comes to prosecutors who engage in misconduct, such violations of the public trust are deemed too "sensitive" to reveal to the public. Requirements to disclose prosecutorial wrongdoing can only improve the public's trust and faith in the justice system.

After all, the transgressions of criminal defendants are public record; why should violations by those who prosecute them be any less transparent? Disciplinary proceedings need to be open to the public, which in itself would provide a deterrent effect to prosecutorial misconduct. Many state bar disciplinary boards also impose private sanctions that are not publicly reported, such as private reprimands or admonishments, which are insignificant punishments.

Additionally, in order to promote transparency, agencies that handle complaints involving prosecutors should be independent and not under the authority of the district attorney's office or U.S. Attorney's office on the state and federal levels, respectively.

As stated in the 2011 *Yale Law Journal Online* article on prosecutorial misconduct: "The lack of any external oversight of prosecutors' offices creates an environment in which misconduct can go undetected and undeterred."

Motions for Ethical Disclosures

As mentioned above, there appears to be little downside in promoting a campaign for defense attorneys to file pretrial motions asking courts to require prosecutors to confirm their compliance with ethical and regulatory obligations.

One critic of the current system that fails to adequately address prosecutorial