Anderson, Ryan

From: Bailey, Michael
Sent: Tuesday, November 10, 2015 10:45 AM
To: Anderson, Ryan
Subject: RE: Chase investigation

Thanks.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Anderson, Ryan
Sent: Tuesday, November 10, 2015 10:02 AM
To: Bailey, Michael
Subject: RE: Chase investigation

It's fine. I believe the outcome is correct, but there's one area I wish the letter was closer to the memo. The memo Jim prepared is actually very good.

Specifically, "[redacted]

[redacted]

From: Bailey, Michael
Sent: Tuesday, November 10, 2015 8:49 AM
To: Anderson, Ryan
Subject: FW: Chase investigation

Any input?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Lopez, John
Sent: Tuesday, November 10, 2015 8:01 AM
To: Bailey, Michael
Subject: FW: Chase investigation

Mike:

We are ready to issue a letter of findings concerning Pinal County Supervisor Chase relating to her use of a campaign poster on a County vehicle. As explained in Jim's memo, we do not intend to file a lawsuit for the reasons discussed therein. I think this is the right decision, but I wanted to run it by you before we sent it out.

Thanks,
John

MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
SOLICITOR GENERAL'S OFFICE

JIM DRISCOLL-MACEACHRON
ASSISTANT ATTORNEY GENERAL
DIRECT NO. (602) 542-8137
JAMES.DRISCOLL-MACEACHRON @AZAG.GOV

October 28, 2015

Sent via U.S. Mail and E-Mail to:

Supervisor Cheryl Chase
P.O. Box 827
Florence, AZ 85132

Re: Violations of A.R.S. § 11-410

Dear Supervisor Chase:

Our office has completed our investigation into whether you violated A.R.S. § 11-410 during the San Tan Valley Holiday parade on December 6, 2014. After reviewing the evidence, we have concluded that there is reason to believe you may have violated A.R.S. § 11-410; however, our office will not be bringing a lawsuit against you under A.R.S. § 11-410 at this time. Any violation of that statute appears to have been isolated and insufficiently unambiguous to require redress through the courts. We do caution you to fully abide by the requirements of A.R.S. § 11-410 moving forward. The Attorney General's Office reserves the right to reopen this complaint if we learn of additional violations during your campaign.

If you have any questions, please contact me at james.driscoll-maceachron@azag.gov or (602) 542-8137.

Sincerely,

Jim Driscoll-MacEachron
Assistant Attorney General

cc: Mr. Jeffrey Kramer

#4693739

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, November 09, 2015 1:52 PM
To: Brnovich, Mark; Medina, Rick; Anderson, Ryan
Subject: RE: internet gaming and hood

Ryan,

Did we ever get any feedback from the NAAG distribution asking for feedback?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Monday, November 09, 2015 12:35 PM
To: Medina, Rick; Anderson, Ryan; Bailey, Michael
Subject: internet gaming and hood

I spoke to MS jim hood last week. What's our plan regarding sending something out re RAWA? He said we could send an email to our colleagues asking their thoughts? Or just circulate a draft letter? Who will draft it? Should we have a POC at MS office? He said he's against internet gaming and leaned toward RAWA, but hes worried about federal preemption.

Mark Brnovich
Arizona Attorney General

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, November 09, 2015 9:54 AM
To: Anderson, Ryan
Cc: Baer, Aaron
Subject: FW: MELTDOWN MYTH: Antarctic ice growing is just the first EVIDENCE global warming is NOT REAL

Add to the book.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: ryan.anderson@azag.gov [mailto:ryan.anderson@azag.gov]
Sent: Thursday, November 05, 2015 10:33 PM
To: Bailey, Michael
Subject: MELTDOWN MYTH: Antarctic ice growing is just the first EVIDENCE global warming is NOT REAL

Hi,

we should start banking these stories for future talking points or in response to constituent questions

I thought you'd like this:
Read the article

MELTDOWN MYTH: Antarctic ice growing is just the first EVIDENCE global warming is NOT REAL
Antarctica is growing not shrinking, the latest satellite records show.

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:59 PM
To: Brnovich, Mark
Subject: FW: Elections law material

Here's one more from our librarian.
Probably good to have the links, even if you don't need them for the overview.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Dalton, Joan
Sent: Friday, November 06, 2015 3:36 PM
To: Bailey, Michael
Subject: RE: Elections law material

This is just in case you're looking for Redistricting law:

Redistricting Litigation: An Overview of Legal, Statistical & Case Management
https://a.next.westlaw.com/Browse/Home/SecondarySources/TextsTreatises/CivilRightsTextsTreatises/RedistrictingLitigationAnOverviewofLegalStatisticalCaseManagementIssues?originationContext=AutoComplete&contextData=(sc.Default)&transitionType=CategoryPageItem

---

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:28 PM
To: Dalton, Joan
Subject: RE: Elections law material

Thanks for looking Joan. For now, no need to look further. I'll let you know if that changes.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Dalton, Joan
Sent: Friday, November 06, 2015 3:27 PM
To: Bailey, Michael
Subject: RE: Elections law material

Beau Roysden just checked out 2 Election books but I think they are circa 2012.

One of the books he checked out was America Votes! A Guide to Modern Election Law and Voting and we do have that also on WestlawNext so it should be more current. Here is the WLN link:
https://a.next.westlaw.com/Browse/Home/SecondarySources/TextsTreatises/OtherTopicalTextsTreatises/AmericaVotesAGuidetoModernElectionLawVoting?originationContext=AutoComplete&contextData=(sc.Default)&transitionType=CategoryPageItem

Also:

Principles of Election Law: Resolution of Election Disputes—Report to ALI (April 16, 2012)
https://a.next.westlaw.com/Browse/Home/SecondarySources/RestatementsPrinciplesoftheLaw/PrinciplesofElectionLawResolutionofElectionDisputes?originationContext=AutoComplete&contextData=(sc.Default)&transitionType=CategoryPageItem

If those don't suffice I can try to find post *Shelby County (2013)* election law books at local law libraries....

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:11 PM
To: Dalton, Joan
Subject: Elections law material

Joan,

Do we have any volumes on election law post *Shelby County*?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:37 PM
To: Brnovich, Mark
Cc: Kredit, Beth; Anderson, Ryan; Medina, Rick
Subject: RE: French Ambassador

Maybe we really should have Jacques sit in for you then – like Affleck in Good Will Hunting.

Consul: Nous opposons le penaltie du mort.
Jacques: RETAINER!

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Friday, November 06, 2015 3:33 PM
To: Bailey, Michael
Cc: Kredit, Beth; Anderson, Ryan; Medina, Rick
Subject: Re: French Ambassador

Yea, I have twenty million things going on, a Supreme Court argument, and a bad wheel. No meetings.

Attorney General Mark Brnovich
Sent from my iPhone

On Nov 6, 2015, at 3:32 PM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

> Then there's no need whatsoever to meet that particular week.....
>
> **Michael G. Bailey**
> Chief Deputy / Chief of Staff
> Office of the Arizona Attorney General
> 1275 W. Washington Street
> Phoenix, AZ 85007
> 602-542-8080 Office
> 602-542-4085 Fax

michael.bailey@azag.gov

From: Kredit, Beth
Sent: Friday, November 06, 2015 3:31 PM
To: Brnovich, Mark; Bailey, Michael
Cc: Anderson, Ryan; Medina, Rick
Subject: RE: French Ambassador

I just called to confirm with the atty from Polsinelli – I misunderstood, the person coming to AZ is the French Consul General assigned to the Southwest US, based in Los Angeles. Sorry for the confusion. His name is Chrisophe Lemoine.

From: Brnovich, Mark
Sent: Friday, November 06, 2015 3:28 PM
To: Bailey, Michael
Cc: Kredit, Beth; Anderson, Ryan; Medina, Rick
Subject: Re: French Ambassador

Is Jacques Munro available?

Attorney General Mark Brnovich
Sent from my iPhone

On Nov 6, 2015, at 3:27 PM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:

> Beth got a call a bit ago from someone in Polsinelli asking that you accept a meeting with the French Ambassador on 11/17, the only day he's in town. The call came not from Patterson, but from someone referred by Patterson.
>
> Ordinarily, we'd think you'd jump at this, notwithstanding the other commitments that week. However, one of the reasons the Ambassador wants to meet with you relates to a French citizen who's charged with a capital crime here. I think it's probably not a good week to listen to European death penalty grievances. But your call. Let us know if you'd like us to put him on the calendar.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:34 PM
To: Brnovich, Mark
Subject: RE: Question.

Yes - that request has been made. That's what I was trying to say vaguely in number 1.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

-----Original Message-----
From: Brnovich, Mark
Sent: Friday, November 06, 2015 3:32 PM
To: Bailey, Michael
Subject: Re: Question.

So we haven't sent anything to her attys asking for a defense?

Attorney General Mark Brnovich
Sent from my iPhone

> On Nov 6, 2015, at 3:31 PM, Bailey, Michael <Michael.Bailey@azag.gov> wrote:
>
> We're waiting for 2 things.
>
> 1) Legal defense, if any, to our interpretation of related companies (this request has been extended and a response is in the works);
> 2) Material from across the street as to how many times the parent/sister company had matters before the agency.
>
> Our people are aware that final answers are expected well before the end of the month.
>
>
> Michael G. Bailey
> Chief Deputy / Chief of Staff
> Office of the Arizona Attorney General

> 1275 W. Washington Street
> Phoenix, AZ 85007
> 602-542-8080 Office
> 602-542-4085 Fax
>
> michael.bailey@azag.gov
>
> NOTICE: This email (and any attachments) may contain PRIVILEGED OR CONFIDENTIAL information and is intended only for the use of the specific individual(s) to whom it is addressed. If you have received this email in error, please immediately notify Valerie Neumann at 602-542-8017 and delete the original email. Thank you.
>
>
> -----Original Message-----
> From: Brnovich, Mark
> Sent: Friday, November 06, 2015 3:27 PM
> To: Bailey, Michael
> Subject: Question.
>
> Where we at with letter to SBS from beau?
>
> Attorney General Mark Brnovich
> Sent from my iPhone

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:19 PM
To: Anderson, Ryan
Subject: FW: Letter to Obama Requesting NPL Listing
Attachments: 2015.9.7 Ltr fr RBegaye to GMcCarthy & JHickenlooper.pdf; CLAIM FOR DAMAGE FORM-FINAL.docx; 2015-10-22 Letter to President Obama re NPL listing.docx; NavajoNationAttorneyGeneralLetterGovernorDucey.pdf

I think you should probably go ahead and forward.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Friday, November 06, 2015 9:55 AM
To: Medina, Rick; Bailey, Michael
Subject: FW: Letter to Obama Requesting NPL Listing

Is someone going to forward all of this to ethel branch? Do we have a contact within her office?

From: Anderson, Ryan
Sent: Thursday, November 05, 2015 6:14 PM
To: mliburdi@az.gov
Cc: Brnovich, Mark; dseiden@az.gov
Subject: FW: Letter to Obama Requesting NPL Listing

Mr. Liburdi –

Attached, you will find several attachments for Governor Ducey concerning the Navajo Nation's request that Arizona sign on to its petition for the EPA to place Upper Animus Mining District on the National Priorities list. We are forwarding this material along with a letter from our office after consulting with the Navajo Nation. The Navajo Nation is preparing a formal request to President Obama, and as Governor, a similar request from you to the president would be greatly appreciated by the Navajo Nation.

A hard copy of the attachments will be delivered to your office on Friday, November 6.

Best regards,

Ryan Anderson
Director of Communications

Office of Attorney General Mark Brnovich
1275 W. Washington, Phoenix, AZ 85007
Desk: 602-542-8302 I Cell: 602-339-6208
Ryan.Anderson@azag.gov
http://www.azag.gov

THE NAVAJO NATION

RUSSELL BEGAYE PRESIDENT
JONATHAN NEZ VICE PRESIDENT

September 7, 2015

Gina McCarthy, Administrator
United States Environmental Protection Agency
Office of the Administrator, Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

John W. Hickenlooper, Governor
State of Colorado
200 E. Colfax Ave., #136
Denver, CO 80203

Re: Request to Place Upper Animas Mining District on National Priorities List

Dear Administrator McCarthy and Governor Hickenlooper:

We request your attention to the important and urgent matter of protecting the Navajo Nation from upstream threats of contamination coming from the 140-square-mile Upper Animas Mining District (District).[1] Specifically, we request that you immediately place the District on the CERCLA National Priorities List (NPL) so that prompt action may be taken to address and contain the long-standing risks to human health and the environment posed by the historic mining and processing activities in the District. As the Gold King Mine (GKM) spill demonstrated, the District and its over 300 abandoned hard rock mines[2] pose a looming threat to us downstream communities, and it is a threat that is far beyond the control of the local community. It is well past time for the United States Environmental Protection Agency (EPA) to step in and remediate the site in a meaningful manner to protect downstream communities. The first step in that process is to list the Upper Animas Mining District on the NPL. This will provide the much needed funding and technical assistance to responsibly address the threats posed by the District.

On August 5, 2015, the EPA and other potentially responsible parties caused millions of gallons of acid mine drainage—containing toxic substances such as aluminum, lead, zinc, arsenic, cadmium, manganese, iron, vanadium, and copper—to spill from the Gold King Mine outside of Silverton, Colorado into Cement Creek, which flows into the Animas River and ultimately reaches the San Juan River. In a flash the GKM spill illuminated the significant risk that District mines

[1] http://www2.epa.gov/region8/upper-animas-mining-district
[2] *Id.*

present to the people, animals, culture, ecosystem and economy of the Four Corners region. Despite the very real and significant risk posed by the District, it is not currently NPL-listed. The current system of management of the hazardous substances in the District does not protect the people or the environment of the rest of the Four Corners region. The health and well-being of the region should be of primary importance to the EPA. The time has come for the Upper Animas Mining District to be given NPL status.

In the 1990s, "EPA and the Colorado Department of Public Health and Environment (CDPHE) conducted a Superfund Site Assessment of the [District]."[3] The assessment concluded "that water quality standards were not achieved" in the District[4]—which includes private, federal, and state lands, and the town of Silverton[5]—and identified the District's "severe impacts to aquatic life in the Upper Animas and its tributaries."[6] Despite the serious harm being caused by the District, EPA postponed listing the District on the NPL because the local community asked for a "community-based collaborative effort" that would allow local cleanup and mitigation efforts to proceed "as long as progress was being made to improve the water quality of the Animas River."[7] In 2005, the "water quality ha[d] declined significantly" in the area despite the combined efforts of the local community and EPA.[8]

In 2008, EPA performed another NPL assessment, this time on the Upper Cement Creek alone, and the study again confirmed "that the area would qualify for inclusion" on the NPL.[9] Despite the carve-out of Silverton from the area of study and the additional confirmation that the GKM area should be listed on the NPL, "EPA [again] postponed efforts to include the area on the National Priorities List," "after receiving additional community input."[10] Yet the City of Durango, the Southern Ute Indian Tribe, the State of New Mexico, the Navajo Nation, the Ute Mountain Ute Tribe, the State of Utah, and the State of Arizona are all downstream interested parties whose input matters with respect to toxic releases and the threat thereof from GKM and the District. Our input and concerns should matter to you as you contemplate listing the District on the NPL.

The chemicals found in the District pose significant human health risk, such as cardiovascular, respiratory, gastrointestinal and reproductive systems. One early post-incident report from the EPA indicated that "arsenic levels in the Durango area of the Animas River were, at their

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[3] http://www2.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf at 2.
[4] *Id.*
[5] http://www2.epa.gov/region8/upper-animas-mining-district.
[6] http://www2.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf at 2.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

peak, 300 times the normal level, and lead was 3,500 times the normal level."[11] Another report of EPA data indicated that "lead was found below Silverton's 14th Street bridge at more than 200 times higher than the acute exposure limit for aquatic life, and 3,580 times higher than federal standards for human drinking water. Levels of arsenic were more than 24 times the exposure limit for fish and 823 times the level for human ingestion. Cadmium was found at more than six times the aquatic limit, 33 times that for humans."[12]

The GKM spill in the Animas and San Juan rivers has imposed an unmitigated crisis upon the Navajo Nation. Coursing through 215 miles of the Navajo Nation, the San Juan River is a critical water source and significant spiritual icon for the Navajo Nation. EPA's determination that they "do not anticipate adverse health effects from exposure to the metals detected in the river"[13] is premature because "[t]he effects of lead may not be seen right away or may not be noticed for many years,"[14] and is indeed contradictory to the EPA's statements to the Navajo Nation made immediately after the spill that we will be dealing with these effects "for decades."[15] The Navajo Nation is gravely concerned with the spill's yet unknown impacts to river sediment and adjacent waterways, and is especially concerned about the ongoing releases from the District that U.S. Geological Survey measures to be at a rate of 610 gallons per minute.[16] Due to the long-term risk that these chemicals present, as well as the continued significant releases coming from the GKM and the District, estimated to now exceed a total release of over 27 million gallons, an NPL listing is well warranted.

The threats posed by the District are felt by the many people connected to the District through the San Juan River watershed, a significant singular surface water supply to the Four Corners region. As one of the impacted jurisdictions, the Navajo Nation's impacts are felt most significantly by our farmers and ranchers, and our traditional people. Many Navajo people rely on the San Juan River to sustain life through irrigating our farmed goods and watering our livestock. Our families then consume these fruits of their labor. The San Juan River also sustains our culture by watering the many unique species of Navajo corn plants that are critical to our prayers and ceremonies. Our traditions and culture are also kept alive by our San Juan River valley farmers' growing of heirloom Navajo fruits and vegetables from seed strains steadily refined by our people since time immemorial. The River is also an important male deity to our people. Its contamination by the GKM has been a significant spiritual blow.

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[11] http://www.usatoday.com/story/news/2015/08/09/navajo-nation-epa-spill/31384515/
[12] http://m.startribune.com/nation/321518301.html
[13] http://www2.epa.gov/goldkingmine/frequent-questions-related-gold-king-mine-response EPA frequently asked questions
[14] http://www.atsdr.cdc.gov/csem/lead/docs/lead_patient-education.pdf at 1.
[15] Telephone Call with Joan Card, Senior Policy Advisor for USEPA Region 8, and Shaun McGrath, Administrator for USEPA Region 8 (Aug. 7, 2015).
[16] http://fox6now.com/2015/08/13/gold-king-mine-owner-i-foresaw-disaster-before-epa-spill-into-animas-river-in-colorado/

Contamination of the River is also a blow to our economy. The Nation faces a daunting unemployment rate of 42 percent.[17] Yet along the San Juan River, many of our people are able to make a life for themselves and support their families through farming and ranching. According to the 2012 Census of Agriculture there are approximately 1,500 farms in the Shiprock Agency alone. The Bureau of Indian Affairs estimates that there are about 1,175 grazing permit holders in the region. Many of our farmers create additional economic value for themselves by carefully growing profitable organic crops. Some of our ranchers produce grass-fed and organic beef product. Their livelihoods have been significantly disrupted by the GKM spill.

The River has always been of the upmost import to our people. Indeed, when our leaders negotiated our release from internment by the federal government at Fort Sumner in the Treaty of 1868, they were certain to include the San Juan River and its adjacent rich farmlands within our Nation's boundary. The reliance of our people on the River and the significance of the River to our people cannot be overstated.

The waste from the mines in the Upper Animas Mining District is also harmful to wildlife found in the Animas River below Cement Creek. In April, EPA released a *Draft Baseline Ecological Risk Assessment Upper Animas Mining District*, which documented the harmful impacts from the combination of mining and naturally occurring hazardous substances.[18] Among the various wildlife that are impacted, the report found that "[m]etals concentrations in the Animas River below Mineral Creek have eliminated virtually all fish down to Elk Creek and all cutthroat and rainbow trout down to Cascade Creek, where only a small community of brook and brown trout exist."[19] Further, the study found "that the benthic invertebrate community is impaired in most sections of the Animas River, Cement Creek and Mineral Creek."[20] The Upper Animas Mining District is causing portions of the Animas River to be uninhabitable for certain wildlife—and the generally negative impacts on wildlife are even broader. The Upper Animas Mining District should be a candidate for listing on the NPL due to its impacts on wildlife alone.

The danger of a spill in the Upper Animas Mining District will continue to exist under the current management scheme, and the spill on August 5 was not an isolated incident. In fact, there were two previous releases of hazardous mine waste from the area in 1975 and 1978. In 1975, "50,000 tons of heavy-metal-loaded tailings" were dumped into the Animas River.[21] And in 1978, "500 million gallons" of water contaminated with "tailings and sludge" spilled into the Animas

---

[17] http://navajobusiness.com/fastFacts/Overview.htm
[18] http://www2.epa.gov/sites/production/files/2015-06/documents/upper-animas-bera-fact-sheet-april-2015.pdf at 1
[19] *Id.* at 2.
[20] *Id.*
[21] http://www2.epa.gov/sites/production/files/2015-08/documents/goldkingminewatershedfactsheetbackground.pdf at 1.

River.[22] The damage caused by the Upper Animas Mining District has gone on far too long, and the health and well-being of our people cannot endure a repeat of the GKM spill. Please, do the right thing for us downstream communities. List the Upper Animas Mining District on the NPL. The current approach is inadequate to protect our people and environment. The delay in listing the site can only cause harm to our region. Please contact Jackson Brossy, Executive Director, Navajo Nation Washington Office, 202-682-7390 or jbrossy@nnwo.org.

Respectfully,

THE NAVAJO NATION

Russell Begaye, President

Jonathan Nez, Vice-President

Cc: Mayor Christine M. Tookey, City of Silverton, Colorado
Chairman Ernest Kuhlman, Board of County Commissioners of San Juan County, Colorado
Mayor Sweetie Marbury, City of Durango, Colorado
Chairman Clement Frost, Southern Ute Indian Tribe
Governor Susana Martinez, State of New Mexico
Chairman Manuel Heart, Ute Mountain Ute Indian Tribe
Governor Gary Herbert, State of Utah
Governor Doug Ducey, State of Arizona
U.S. Senator Tom Udall
U.S. Senator Martin Heinrich
U.S. Senator John McCain
U.S. Senator Jeff Flake
U.S. Senator Orrin Hatch
U.S. Senator Mike Lee
U.S. Senator John Barrasso
U.S. Senator John Tester
U.S. Representative Ann Kirkpatrick
U.S. Representative Paul Gosar
U.S. Representative Rob Bishop
U.S. Representative Jason Chaffetz
U.S. Representative Don Young

[22] *Id.*

CLAIM FOR DAMAGE, INJURY OR DEATH RESULTING FROM GOLD KING MINE INCIDENT	**INSTRUCTIONS:** Please read carefully the instructions on the reverse side and supply information requesting on both sides of this form. Use additional sheet(s) if necessary. See reverse side for additional instructions.	APPROVED BY NAVAJO NATION DEPARTMENT OF JUSTICE

1. Submit to:	2. Name, address of claimant, and claimant's personal representative if any (See instructions on reverse). Number, Street, City, State and Zip code.
Richard Feldman Claims Officer U.S. EPA Office of General Counsel 1200 Pennsylvania Avenue, NW (MC 2399A) Washington, DC 20460	

3. TYPE OF EMPLOYMENT ___MILITARY ___CIVILIAN	4. DATE OF BIRTH	5. MARITAL STATUS	6. DATE AND DAY OF ACCIDENT	7. TIME (AM OR PM)

8. BASIS OF CLAIM (State in detail the known facts and circumstances attending the damage, injury, or death, Identifying persons and property involved, the place of occurrence and the cause thereof. Use additional pages if necessary).

9. **PROPERTY DAMAGE**

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (Number, Street, City, State, and Zip Code).

BRIEFLY DESCRIBE THE PROPERTY, NATURE AND EXTENT OF THE DAMAGE AND THE LOCATION OF WHERE THE PROPERTY MAY BE INSPECTED.
(See instruction on reverse side).

10. **PERSONAL INJURY/WRONGFUL DEATH**

STATE THE NATURE AND EXPENT OF EACH INJURY OR CAUSE OF DEATH, WHICH FORMS THE BASIS OF THE CLAIM. IF OTHER THAN CLAIMANT, STATE THE NAME OF THE INJUIRED PERSON OR DECEDENT.

11. **WITNESS**

NAME	ADDRESS (Number, Street, City, State, and Zip Code)

12. (See instructions on reverse) AMOUNT OF CLAIM (in dollars)

12a. PROPERTY DAMAGE	12b. PERSONAL INJURY	12c. WRONGFUL DEATH	12d. TOTAL (Failure to specify may cause forfeiture of your rights).

I CERTIFY THAT, TO THE BEST OF MY KNOWLEDGE, THE AMOUNT OF THE CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE INCIDENT ABOVE. I HEREBY EXPRESSLY RESERVE MY RIGHT TO FILE SUPPLEMENTAL CLAIMS FOR DAMAGES AND INJURIES IN THE EVENT OF ANY FUTURE DISCOVERY OR ASSESSMENT OF ADDITIONAL DAMAGES OR INJURIES CAUSED BY THE INCIDENT ABOVE.

13a. SIGNATURE OF CLAIMANT (See instruction on reverse side).	13b. PHONE NUMBER OF PERSON SIGNING FORM	14. DATE OF SIGNATURE

INSURANCE COVERAGE	
15. Do you carry accident insurance? ____ If yes, give name and address of insurance company (Number, Street, City, State and Zip Code) and policy number. ____ No	
16. Have you filed a claim with your insurance carrier in this instance, and if so, is it full coverage or deductible? ____Yes ____No	17. If deductible, state amount.
18. If a claim has been filed with your carrier, what action has your insurer taken or proposed to take with reference to your claim? (It is necessary that you ascertain these facts).	
19. Do you carry public liability damage insurance? ____Yes If yes, give name and address of insurance carrier (Number, Street, City, State, and Zip Code). _____ NO	

INSTRUCTIONS

Claims presented under the Federal Tort Claims Act with respect to the release from the Gold King Mine should be submitted directly to the USEPA. If the incident involves more than one claimant, each claimant should submit a separate claim form.

Complete all items – Insert the word NONE where applicable.

A CLAIM SHALL BE DEEMED TO HAVE BEEN PRESENTED WHEN USEPA RECEIVES FROM A CLAIMANT, HIS DULY AUTHORIZED AGENT, OR LEGAL REPRESENTATIVE, THIS EXECUTED FORM OR ANY SUPPLEMENT THERETO, ACCOMPANIED BY A CLAIM FOR MONEY DAMAGES FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT. THE CLAIM MUST BE PRESENTED TO THE USEPA WITHIN **TWO YEARS** AFTER THE DISCOVERY OF DAMAGES FOR INJURY TO OR LOSS OF PROPERTY, PERSONAL INJURY, OR DEATH ALLEGED TO HAVE OCCURRED BY REASON OF THE INCIDENT.

Failure to completely execute this form or to supply the requested material within two years from the date the claim accrued may render your claim invalid. A claim is deemed presented when it is received by the appropriate agency not when it is mailed.

If instruction is needed in completing this form, the agency listed in item #1 on the reverse side may be contacted. Complete regulations pertaining to claims asserted under the Federal Tort Claims Act can be found in Title 28, Code of Federal Regulations, Part 14, Many agencies have published supplementing regulations. If more than one agency is involved, please state each agency.

The claim may be filled by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with the claim establishing express authority to act for the claimant. A claim presented by an agent or legal representative must be presented in the name of the claimant. If the claim is signed by the agent or legal representative , it must show the title or legal capacity of the person signing and be accompanied by evidence of his/her authority to present a claim on behalf of this claimant as agent, executor, administrator, parent, guardian or other representative.

If claimant intends to file for both personal injury and property damage, the amount for each must be shown in item number 12 of this form.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of the claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of the injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property, which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically repairable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

August 29, 2016

The President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, DC 20500

Gina McCarthy, Administrator
United States Environmental Protection Agency
Office of the Administrator, Mail Code: 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

John W. Hickenlooper, Governor
State of Colorado
200 E. Colfax Ave., #136
Denver, CO 80203

Dear Mr. President:

We request your immediate attention to the important matter of protecting the health and safety of the people of the Navajo Nation. On September 7, 2015, the Navajo Nation asked the United States Environmental Protection Agency ("EPA") and the State of Colorado to place the Upper Animas Mining District (District) on the CERCLA National Priorities List ("NPL"). This much needed step will ensure prompt action is taken to address and contain the long-standing risks to human health and the environment posed by the District's historic mining and processing activities. The EPA and Colorado have not responded to our request. A copy of the request is enclosed for your review.

On August 5, 2015, the EPA and other potentially responsible parties caused over three million gallons of acid mine drainage—containing harmful toxic contaminants such as lead and arsenic—to spill from the Gold King Mine near Silverton, Colorado into Cement Creek. As a result, toxic sludge flowed south from Cement Creek into the Animas River, then into the San Juan River, a major water source for the Navajo Nation. The impact of the Gold King Mine spill has been devastating to our community. The San Juan River flows through 215 miles of some of the richest farmland in the Nation's territory. Navajo farmers and ranchers rely on the San Juan River for their livelihoods. But beyond the economic and resource impacts, our people have also sustained deep cultural and spiritual losses.

There are over 300 abandoned hard rock mines in the District, like the Gold King Mine, that pose similar threats of substantial contamination to the Navajo Nation and surrounding areas. Despite this serious and significant risk, the District is not currently NPL-listed. The EPA and Colorado previously refrained from listing the District on the NPL because the local community insisted it be permitted to handle the District's dangerous problems through local cleanup and mitigation efforts. But the looming threat to downstream communities is far too immense to be handled by the local community. We need the funding and technical assistance to properly address the danger posed to our community. This is the first step.

The Navajo Nation respectfully asks that the administration make the health and well-being of the region a priority by promptly placing the District on the NPL. The damage caused by the District has gone on far too long, and the Navajo people cannot endure a repeat of the Gold King Mine spill.

Most respectfully,

THE NAVAJO NATION

Russell Begaye, President

MARK BRNOVICH
ATTORNEY GENERAL

OFFICE OF THE ARIZONA ATTORNEY GENERAL
CIVIL LITIGATION DIVISION

PAUL WATKINS
DIVISION CHIEF COUNSEL

November 5, 2015

Office of Governor Doug Ducey
State Capitol
1700 West Washington
Phoenix, AZ 85007

Dear Governor Ducey:

Our office has reviewed the attached documents regarding the Navajo Nation's ("Nation") request that Arizona sign on to its petition for the Environmental Protection Agency ("EPA") to place Upper Animus Mining District ("District") on the National Priorities ("NPL") list. We are forwarding this material after consulting with the Nation. The Nation is preparing a formal request to President Obama, and as Governor, a similar request from you to the president would be greatly appreciated by the Nation.

The NPL is a list of hazardous waste sites in the U.S. and its territories that are remediated under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), also known as "Superfund". While the Superfund provides funding, EPA and the respective states/territories work together to complete investigation and remediation of these sites.

To be listed on the NPL, EPA assesses the site and scores it based on criteria set forth under CERCLA, 42 U.S.C. § 9605(a)(8)(B). That score determines whether the site should be listed.

Further, each state can also designate *one* "top-priority" site within its jurisdiction to be listed regardless of its score. However, Indian Tribes are specifically excluded from having this designation power under the National Contingency Plan at 40 C.F.R. § 300.425(c).

Finally, a site can be listed if the Agency for Toxic Substances and Disease Registry issues a health advisory removing people from the site, EPA determines the site poses a significant public health risk, and EPA believes its remedial authority is more cost-effective than emergency removal authority.

If you choose to support this petition, it appears that there would be little to no legal obligation for our state. The District is located in Colorado and is in Region 8 EPA (Arizona is in Region 9). Thus, even if the site were listed on the NPL, Arizona would have no role in the remediation of the District.

A few months ago, the Arizona Department of Environmental Quality stated that the Animus River event had not impacted Arizona. Nevertheless, the Nation's concern is for possible future release events that, depending on the severity, may impact Arizona. Signing on to this request articulates a desire to see precautions taken to help avoid any future events.

The September 7th letter from the Nation mentions that EPA refrained from listing the District because "the local community insisted it be permitted to handle the District's dangerous problems through local cleanup and mitigation efforts".

After an initial review, it is our informal opinion that placing the District on the NPL would pose no significant monetary or legal issues for Arizona. This request is a policy decision for your consideration. The Nation strongly believes that it is in everyone's best interest for the District to be listed.

Sincerely,

Paul Watkins
Division Chief

PNW/gc
cc:
Enclosures

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:08 PM
To: Brnovich, Mark; Anderson, Ryan
Subject: RE: Talking point

Were you talking 111d or the SSM?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

-----Original Message-----
From: Brnovich, Mark
Sent: Friday, November 06, 2015 2:19 PM
To: Bailey, Michael; Anderson, Ryan
Subject: Talking point

Don't we have some general talking points on epa emission lawsuit.

Attorney General Mark Brnovich
Sent from my iPhone

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 3:04 PM
To: Brnovich, Mark
Subject: RE: kanefield recommended this book

Doh. Hadn't seen this yet when I sent you the email.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Brnovich, Mark
Sent: Friday, November 06, 2015 12:05 PM
To: Bailey, Michael
Subject: kanefield recommended this book

This is probably too much info. And written pre Shelby county.

http://www.amazon.com/Election-Law-Nutshell-Daniel-Tokaji/dp/0314268472

Mark Brnovich
Arizona Attorney General

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 2:38 PM
To: Brnovich, Mark
Subject: FW: A Citizen's Guide to Redistricting
Attachments: A Citizen's Guide to Redistricting.pdf

Beau dropped this off for you. I have the hard copy here.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Neumann, Valerie
Sent: Friday, November 06, 2015 2:37 PM
To: Bailey, Michael
Subject: A Citizen's Guide to Redistricting

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, November 06, 2015 10:00 AM
To: 'BLAKE BEE'; Anderson, Ryan
Cc: DELISA JONES; MEREDITH ALDRIDGE; Medina, Rick
Subject: RE: Internet Gaming Regulations

Thanks Blake. Ryan Anderson will follow up with you.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: BLAKE BEE [mailto:BLBEE@ago.state.ms.us]
Sent: Friday, November 06, 2015 9:44 AM
To: Anderson, Ryan; Bailey, Michael
Cc: DELISA JONES; MEREDITH ALDRIDGE; Medina, Rick
Subject: RE: Internet Gaming Regulations

Mike,

Mississippi is happy to help with this letter. Please let us know what we need to do.

Thanks, Blake

Blake Bee
Executive Counsel
Special Assistant Attorney General
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205-0220
PH: (601)359-3070
FX: (601)359-2009
blbee@ago.state.ms.us

From: Brnovich, Mark [mailto:Mark.Brnovich@azag.gov]
Sent: Tuesday, October 27, 2015 6:02 PM
To: Anderson, Ryan
Cc: DELISA JONES; MEREDITH ALDRIDGE; BLAKE BEE; Medina, Rick
Subject: Re: Internet Gaming Regulations

Great idea. Does general hood want to help draft a dear colleague response? Maybe incorporate some of the issues I raised in my letter to senator flake?

Attorney General Mark Brnovich
Sent from my iPhone

On Oct 27, 2015, at 1:07 PM, Anderson, Ryan <Ryan.Anderson@azag.gov> wrote:

> Thank you for the quick reply and great feedback. We will keep you updated with any progress on our end.
>
> Best,
>
> Ryan Anderson

From: DELISA JONES [mailto:DJONE@ago.state.ms.us]
Sent: Tuesday, October 27, 2015 1:06 PM
To: Anderson, Ryan
Cc: MEREDITH ALDRIDGE; BLAKE BEE
Subject: Internet Gaming Regulations

Ryan,

Attorney General Jim Hood agrees that internet gambling regulation is a matter best left to the individual states, and he would hope that any opposition letter would set forth this point in a way that is respectful to AGs who have signed the letter in support of the Act. As a suggestion, the opposition letter could agree that something needs to be done to address the problem, but that no federal preemption should be considered.

Please let me know if I can be of any further assistance. Thank you.

Delisa Jones

Mississippi Attorney General's Office

Executive Assistant
Post Office Box 220
Jackson, Mississippi 39205
601-359-3692
djone@ago.state.ms.us

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, November 05, 2015 2:04 PM
To: Garcia, Mia
Cc: Anderson, Ryan
Subject: Re: response to suit filed Nov. 5

No. Try Kevin ray

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

(This email was sent from a mobile device and likely used voice transcription and automatic correction applications. For that reason, please note the possibility of inadvertent content error.)

On Nov 5, 2015, at 1:59 PM, Garcia, Mia <Mia.Garcia@azag.gov> wrote:

> Anyone know about this?
>
> ---
>
> **From:** Tarangioli, Natalie [mailto:Natalie.Tarangioli@arizonarepublic.com]
> **Sent:** Thursday, November 05, 2015 1:15 PM
> **To:** Garcia, Mia
> **Subject:** response to suit filed Nov. 5
>
> Good afternoon,
>
> I am interested in a response or statement from the Attorney General Mark Brnovich to the lawsuit filed this morning from the Arizona Association of Midwives.
>
> According to the lawsuit, they are suing the Attorney General because since 2013, the office has attempted to suspend the licenses of several midwives.
>
> Thanks,
> Natalie Tarangioli
>
> Natalie Tarangioli
> The Arizona Republic

Natalie.Tarangioli@arizonarepublic.com
602-444-8076 (o)
650-[redacted] (c)

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, November 05, 2015 11:33 AM
To: Brnovich, Mark
Subject: Re: do we have soda?

Don't think so.
Val can get you some from machine.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

On Nov 5, 2015, at 11:26 AM, Brnovich, Mark <Mark.Brnovich@azag.gov> wrote:

> Mark Brnovich
> Arizona Attorney General

Anderson, Ryan

From: Bailey, Michael
Sent: Thursday, November 05, 2015 9:48 AM
To: Brnovich, Mark
Subject: this afternoon

I'm heading to the state tournament in Prescott.

http://www.azpreps365.com/articles/5578/d-iv-volleyball-state-tourney-primer

Available, of course, by email and phone.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Wednesday, November 04, 2015 4:01 PM
To: Conrad, Donald
Subject: just tried to return your call

Call at your convenience

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, November 02, 2015 11:09 AM
To: Medina, Rick; Brnovich, Mark
Cc: Lopez, John
Subject: RE: Google Matter/Oral Argument

John,

This probably belongs to you – but please let me know if it doesn't.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Medina, Rick
Sent: Monday, November 02, 2015 11:07 AM
To: Brnovich, Mark; Bailey, Michael
Subject: FW: Google Matter/Oral Argument

Received this email. Not sure who it is that he should be speaking with ...

From: BLAKE BEE [mailto:BLBEE@ago.state.ms.us]
Sent: Monday, November 02, 2015 10:49 AM
To: Medina, Rick
Subject: Google Matter/Oral Argument

Rick,

Do you have time this afternoon for a quick call regarding the upcoming oral argument on the Google v. Jim Hood matter?

Thanks, Blake

Blake Bee
Executive Counsel
Special Assistant Attorney General
Office of the Attorney General
P.O. Box 220

Jackson, MS 39205-0220
PH: (601)359-3070
FX: (601)359-2009
blbee@ago.state.ms.us

Anderson, Ryan

From: Bailey, Michael
Sent: Monday, November 02, 2015 10:15 AM
To: Conrad, Donald
Subject: RE: my absence on Friday

Got it. Thanks.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Conrad, Donald
Sent: Monday, November 02, 2015 9:47 AM
To: Bailey, Michael
Subject: my absence on Friday

I will be out all day this Friday. FYI.

Donald E. Conrad
Division Chief Counsel
Criminal Division
(602) 542-3881

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 30, 2015 4:03 PM
To: Baer, Aaron; Brnovich, Mark
Cc: Medina, Rick
Subject: RE: Updated Op-ed

I thought this was really good. I handed Aaron a sheet with a few typos. Otherwise, the only thing I would question is whether we want to concede that we're all in love with the 75ppb that's already there. As opposed to simply saying "we're all for clean air"

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Baer, Aaron
Sent: Friday, October 30, 2015 3:46 PM
To: Brnovich, Mark
Cc: Bailey, Michael; Medina, Rick
Subject: FW: Updated Op-ed

Here's the most recent version.

Aaron Baer
Policy Advisor

Office of Attorney General Mark Brnovich
1275 W. Washington, Phoenix, AZ 85007
Desk: 602-542-6903 | Cell: 602-540-6745
Aaron.Baer@azag.gov
http://www.azag.gov

From: Baer, Aaron
Sent: Thursday, October 29, 2015 4:33 PM
To: Anderson, Ryan
Subject: Fwd: Updated Op-ed

Sent from my iPhone

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 30, 2015 2:23 PM
To: Conrad, Donald
Subject: FW: Meeting Follow-up

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Conrad, Donald
Sent: Thursday, October 29, 2015 4:47 PM
To: Bailey, Michael
Subject: FW: Meeting Follow-up

Mike, Will you authorize the return of vacancy savings so that we can hire needed expertise in the La Paz County homicide case?

From: Ahler, Paul
Sent: Thursday, October 29, 2015 1:25 PM
To: Perkovich, Mark; Conrad, Donald
Cc: Syms, Maria; Stevens, John
Subject: RE: Meeting Follow-up

Don, I think this has merit. Maggazeni is a really good homicide detective and it would be worth it to contract with him part time to take a look at the La Paz homicide. Paul

Paul W Ahler
Section Chief, Fraud and Public Corruption
Attorney General's Office
1275 West Washington
Phoenix, AZ 85007
602 542-8507

From: Perkovich, Mark
Sent: Monday, October 26, 2015 10:25 AM
To: Ahler, Paul

Cc: Syms, Maria; Stevens, John
Subject: Meeting Follow-up

As a follow up to last Friday's meeting, I wanted to let you know I successful in speaking with Tom Magazzeni. This was the detective I worked with in homicide for several years. Tom worked cold case homicides for as long as I can remember and this particular case is directly in his wheelhouse. Currently, although he is retired, Tom is doing some part-time contract work with Tempe PD as it relates to sex crime evidence kits so his availability here would be on a part-time basis which I think would work just fine. My plan would be to have Tom examine the case file in its' entirety and address solvability factors as well as the critical investigative steps necessary to hopefully get the case prepared for prosecution. After our meeting, John provided me an example of what needs to occur administratively to get Tom on payroll. If this sounds like a viable option to you, please let me know and I will get the process started. Upon doing so, we should probably communicate our intent with Chief Renfro in Quartzsite. I would view Tom's involvement as investigative support and not as the case agent unless something else is negotiated or his involvement would dictate otherwise.

Mark

Mark Perkovich
Chief Agent

Office of the Attorney General
Special Investigations Section
1275 W. Washington, Phoenix, AZ 85007
Desk: 602.542.7944 I Cell: 480.[redacted] Fax: 602.542.4882
Mark.Perkovich@azag.gov
http://www.azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 30, 2015 2:23 PM
To: Conrad, Donald
Subject: RE: Meeting Follow-up

Sorry – that was supposed to be a forward to Leslie.

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Conrad, Donald
Sent: Thursday, October 29, 2015 4:47 PM
To: Bailey, Michael
Subject: FW: Meeting Follow-up

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From: Ahler, Paul
Sent: Thursday, October 29, 2015 1:25 PM
To: Perkovich, Mark; Conrad, Donald
Cc: Syms, Maria; Stevens, John
Subject: RE: Meeting Follow-up

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Paul W Ahler
Section Chief, Fraud and Public Corruption
Attorney General's Office
1275 West Washington
Phoenix, AZ 85007
602 542-8507

From: Perkovich, Mark
Sent: Monday, October 26, 2015 10:25 AM
To: Ahler, Paul

Cc: Syms, Maria; Stevens, John
Subject: Meeting Follow-up

As a follow up to last Friday's meeting, I wanted to let you know I successful in speaking with Tom Magazzeni. This was the detective I worked with in homicide for several years. Tom worked cold case homicides for as long as I can remember and this particular case is directly in his wheelhouse. Currently, although he is retired, Tom is doing some part-time contract work with Tempe PD as it relates to sex crime evidence kits so his availability here would be on a part-time basis which I think would work just fine. My plan would be to have Tom examine the case file in its' entirety and address solvability factors as well as the critical investigative steps necessary to hopefully get the case prepared for prosecution. After our meeting, John provided me an example of what needs to occur administratively to get Tom on payroll. If this sounds like a viable option to you, please let me know and I will get the process started. Upon doing so, we should probably communicate our intent with Chief Renfro in Quartzsite. I would view Tom's involvement as investigative support and not as the case agent unless something else is negotiated or his involvement would dictate otherwise.

Mark

Mark Perkovich
Chief Agent

Office of the Attorney General
Special Investigations Section
1275 W. Washington, Phoenix, AZ 85007
Desk: 602.542.7944 I Cell: 480.[redacted] I Fax: 602.542.4882
Mark.Perkovich@azag.gov
http://www.azag.gov

Anderson, Ryan

From: Bailey, Michael
Sent: Friday, October 30, 2015 12:32 PM
To: Brnovich, Mark; Anderson, Ryan
Subject: FW: Party Memo in Jones v. Prison Legal News (11th Cir.)
Attachments: Party Memo - Court of Appeals.doc; FDOC's Initial Brief.stamped.pdf; DE 279 Amended Order on Bench Trial.pdf

Any interest in helping them, or at least offering to?

Michael G. Bailey
Chief Deputy / Chief of Staff
Office of the Arizona Attorney General
1275 W. Washington Street
Phoenix, AZ 85007
602-542-8080 Office
602-542-4085 Fax

michael.bailey@azag.gov

From: Dan Schweitzer [mailto:DSCHWEITZER@NAAG.ORG]
Sent: Friday, October 30, 2015 11:29 AM
To: Dan Schweitzer
Cc: Lance Neff; Susan Maher
Subject: Party Memo in Jones v. Prison Legal News (11th Cir.)

To: Civil Amicus Contacts and Corrections Contacts

Attached is a Party Memo through which Florida seeks a state willing to prepare an amicus brief supporting its position in the Eleventh Circuit in *Jones v. Prison Legal News*. As explained in greater detail in the memo, the two questions presented are: (1) Whether a prison can reject entry of a magazine based solely on the advertisements in that magazine? (2) Can procedural due process be violated by the aggregate negligent actions of various individuals over a nearly five year timeframe? Also attached is the lower court order and the Florida DOC's initial Eleventh Circuit brief.

Any amicus brief would be due on November 4, 2015. If you are interested in the case, please contact:

Lance E. Neff
Senior Assistant Attorney General
Office of the Florida Attorney General
Phone: (850) 414-3633
Lance.Neff@myfloridalegal.com

****

Dan Schweitzer
Director and Chief Counsel
NAAG Center for Supreme Court Advocacy
2030 M Street, NW, 8th Floor
Washington, DC 20036
(202) 326-6010
(202) 785-0410 - fax
dschweitzer@naag.org

PARTY MEMO -- COURT OF APPEALS BRIEF

The State of Florida is a party in a case before the Eleventh Circuit Court of Appeals and is seeking a state that is willing to draft an amicus brief in support of its position. Please review this memorandum and advise the person listed in Item 2 by the deadline set forth in Item 1 if your state is so willing. Please also feel free to contact that person if your state is unable to draft an amicus brief but would join one.

PART I -- ACTION ITEMS

1. **Date by which to contact us if you are willing to draft an amicus brief:** as soon as possible.

Date by which state party's brief must be filed is: The initial brief was filed October 28, 2015. Our cross appeal response brief will be due sometime in December depending on when the appellee/cross appellant files their brief.

Date by which any amicus brief in support of state party must be filed is: November 4, 2015, unless an extension is granted by the court, to support the due process issue. Sometime in December to support the First Amendment issue. Rule 29(e), Fed.R.App.P

2. **Attorney handling the case.** ***(Include address, phone and fax numbers and E-Mail address).***

Lance Eric Neff
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 488-4872
lance.neff@myfloridalegal.com

3. **Court:** 11th Circuit Court of Appeals

PART II -- BASIC CASE INFORMATION

4. **Case name and number.** Jones v. Prison Legal News, 15-14220 and 15-14221

5. **State is X Appellant/Petitioner X Appellee/Respondent** Appellant and Cross-Appellee

6. **Decision below -- Citation and One to Two Sentence Summary.**
Prison Legal News v. Jones, --- F.Supp.3d ----, 2015 WL 5047957 (N.D.Fla. Aug. 27, 2015)

Per Westlaw: FDOC regulation prohibiting prisoner access to publications with specific type of advertisements did not violate First Amendment; and FDOC's repeated failure to provide impoundment notice to publisher violated due process.

PART III -- DETAILED CASE INFORMATION

7. Questions Presented. ***(Verbatim or summary of cert petition).***

Whether a prison can reject entry of a magazine based solely on the advertisements in that magazine?

Can procedural due process be violated by the aggregate negligent actions of various individuals over a nearly five year timeframe?

8. (a) Legal arguments to be made by state party. (b) Possible impacts on other states and/or legal arguments state amici may make.

On October 5, 2015, a district judge in the Northern District of Florida issued a published amended order following a bench trial regarding the following issues: 1) whether a department of corrections may validly reject a publication from entering its facilities where the advertisements in the publication are deemed a threat to the security of the facilities, the safety of the inmates and correctional officers, and the rehabilitation of inmates; 2) whether the publisher had its due process rights violated. The judge ruled in favor of the Florida Department of Corrections on the first issue and against the FDOC on the second issue. The publication at issue was *Prison Legal News*. The advertisements in question regarded companies that provide cash or services in exchange for stamps, three-way/call-forwarding telephone providers, pen pal services, person search providers, and prisoner concierge services.

The FDOC has filed an appeal regarding the due process claim. The first issue is whether negligence, or gross negligence, is sufficient to find a procedural due process violation. The district court found negligence – the inadvertent failure of various mailroom staff to provide notice to PLN when its publications were impounded – to be a sufficient basis for constitutional liability despite the clear admonition of Davidson v. Cannon, 474 U.S. 344 (1986). In Davidson, the Supreme Court stated, "As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." Id. at 348. Alternatively, the district court determined that negligent acts by various mailroom personnel over a four-and-a-half year period was grossly negligent or reckless and therefore sufficient to subject the FDOC to constitutional liability. The district court did this without ever finding that any single person acted in a grossly negligent or reckless manner; but instead the finding was based on the aggregate acts of various mailroom personnel over a four-and-a-half year period.

The second issue involves the power of the district court under Rizzo v. Goode, 423 U.S. 362 (1976) to grant injunctive relief against the Secretary of the FDOC where the Secretary had no knowledge that various subordinates were negligently failing to provide notice to PLN. There was no actual FDOC policy, or policy adopted by the Secretary, that allowed a subordinate to fail

to provide a publisher notice that its publication was being impounded. In fact, as the district court stated after the close of evidence, "[I]t is clear from the testimony that the rule of the department and its policy is to send out notices of the initial impoundment."

The third issue is whether a due process problem even arose in a situation where Prison Legal News received thousands of pages of notice; appealed to the FDOC via letter, phone, and email; gave up further appeal by claiming appeal to the FDOC was futile and that only a federal court could provide recourse; and refused to even consider adequate state court remedies.

Prison Legal News has cross-appealed and its brief is due by the beginning of December. PLN will be challenging the district court's determination that under Turner v. Safley, 482 U.S. 78 (1987), the FDOC's decision to keep out PLN's publications is justified under each of the four prongs of the Turner test.

PLN has solicited at least two briefs by amici curiae, and possibly a third one as well. I write to ask you to consider contacting your own departments of corrections to see if there is any interest in joining Florida in these very important correctional issues. And as a practical matter, the due process issue, if affirmed, could have broad implications for any state agency as it alters the requirements to find a constitutional violation. The district court determined that aggregated acts of negligence by different persons over a nearly five year period were sufficient to create constitutional liability. That standard, if affirmed, would be ground breaking in the area of constitutional jurisprudence. I have attached the district court's order and the FDOC's initial brief for your review. Thank you for your consideration.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 15-14220-AA

JULIE L. JONES, SECRETARY, FLORIDA DEP'T OF CORRECTIONS,

Defendant-Appellant/Cross-Appellee,

vs.

PRISON LEGAL NEWS,

Plaintiff-Appellee/Cross-Appellant.

On Appeal from the United States District Court
Northern District of Florida, Tallahassee Division

4:12-cv-239-MW/CAS

APPELLANT'S INITIAL BRIEF

PAMELA JO BONDI
Attorney General

Lance Eric Neff
Senior Assistant Attorney General
Florida Bar No. 0026626
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Counsel for Secretary Jones

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JULIE L. JONES, in her official capacity as Secretary of the Florida Department of Corrections,

Appellant/Cross-Appellee,

vs.

Case No.: 15-14220-AA
Dist. Court No.: 4:12cv239-MW/CAS

PRISON LEGAL NEWS,

Appellee/Cross-Appellant.

_____/

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26-1, Appellant, through undersigned counsel, hereby states that, to the best of Appellant's knowledge, the following individuals and entities have an interest in the disposition of this case:

1. Abudu, Nancy Gbana, ACLU of Florida, Counsel for Prison Legal News

2. Berg, Randall, Florida Justice Institute, Counsel for Prison Legal News

3. Bondi, Pamela Jo, Attorney General, State of Florida

4. Garland, Cedell Ian, Assistant Attorney General, Office of the Attorney General

5. Gellis, Sean, Assistant Attorney General, Office of the Attorney General

6. Jones, Julie L., Secretary, Florida Department of Corrections

7. Maher, Susan A., Chief Assistant Attorney General, Office of the Attorney General

8. Neelakanta, Sabrish, Human Rights Defense Center, Counsel for Prison Legal News

9. Neff, Lance Eric, Senior Assistant Attorney General, Office of the Attorney General

10. Prison Legal News, a project of the Human Rights Defense Center

11. Stampelos, Hon. Charles, United States Magistrate Judge

12. Stevenson, Benjamin James, ACLU of Florida, Counsel for Prison Legal News

13. Tietig, Lisa, Assistant Attorney General, Office of the Attorney General

14. Trevisani, Dante, Florida Justice Institute, Counsel for Prison Legal News

15. Walker, Hon. Mark, United States District Judge

16. Weber, Lance, Human Rights Defense Center, Counsel for Prison Legal News

17. Wright, Paul, Editor of Prison Legal News

CORPORATE DISCLOSURE STATEMENT

Not applicable.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rules 34(a)(1) and 34(a)(2), Federal Rules of Appellate Procedure, the Secretary submits that oral argument is necessary in this matter. The Secretary submits that oral argument would be of material benefit to this Court in deciding the issue and identifying record support as to why the lower court's decision to grant injunctive relief should be reversed. The factual record is vast and assistance in identifying record evidence relating to the Court's specific questions may be useful.

TABLE OF CONTENTS

ISSUE I-DUE PROCESS

Department mailroom personnel are busy. Because of this busy atmosphere, the lower court found that the various mailroom staff negligently failed to provide notice to PLN over a four-and-a-half year period. The lower court ultimately found the Secretary liable for the various acts of negligence by the mailroom staff. Can negligence alone form the basis for a procedural due process claim? Alternatively, may a district court find a constitutional violation based on the collective negligence of various mailroom staff occurring over a four-and-a-half year period?

ISSUE II-DUE PROCESS

The clear policy of the Department requires staff to provide notice to a publisher when its publication is impounded. The lower court found that individual mailroom staff members were so busy they committed acts of negligence by not sending notice to PLN when its publication was impounded. May the Secretary have injunctive relief granted against her based upon the aggregate negligent actions of various subordinates where she neither knew of nor approved of those actions?

ISSUE III-DUE PROCESS

Prison Legal News received thousands of pages of actual notice from the FDOC and from inmates stating the reasons its publications were being denied; reviewed and meticulously organized these notices; had an opportunity to be heard via email, telephone, and written correspondence; and concluded that further appeal was futile and its only recourse in federal court. Is there a due process violation where actual notice was received and an opportunity to be heard was available?

TABLE OF CITATIONS

Other Authorities

STATEMENT OF JURISDICTION

This is an appeal from an order following a bench trial and an order of final judgment, both entered on August 27, 2015. [Doc's 251 and 252] The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 as the action arose under the Constitution and laws of the United States, and pursuant to 28 U.S.C. § 1343(a)(3) as the action sought redress for alleged civil rights violations under 42 U.S.C. § 1983. The Secretary filed a notice of appeal on September 18, 2015. [Doc. 257] PLN then filed a motion to alter or amend the judgment. [Doc. 258] The lower court issued an order on the post-trial motions, entered an amended order on the bench trial, and entered an amended judgment on October 5, 2015. [Doc's 278, 279, 280] Secretary Jones filed a timely amended notice of appeal on October 6, 2015. [Doc's 281 and 282] This Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The first issue is whether negligence, or gross negligence, is sufficient to find a procedural due process violation. Below, the lower court found negligence [Doc. 279 at 58] – the inadvertent failure of various mailroom staff to provide notice to PLN when its publications were impounded – to be a sufficient basis for constitutional liability despite the clear admonition of Davidson v. Cannon, 474 U.S. 344 (1986). In Davidson, the Supreme Court stated, "As we held in *Daniels*, the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials." Id. at 348. Alternatively, the lower court determined that negligent acts by various mailroom personnel over a four-and-a-half year period was grossly negligent or reckless and therefore sufficient to subject the FDOC to constitutional liability. [Doc. 279 at 58-59] The lower court did this without ever finding that any single person acted in a grossly negligent or reckless manner; but instead the finding was based on the aggregate acts of various mailroom personnel over a four-and-a-half year period. [Id.]

The second issue involves the power of the lower court under Rizzo v. Goode, 423 U.S. 362 (1976) to grant injunctive relief against the Secretary where the Secretary had no knowledge that various subordinates were negligently failing

to provide notice to PLN. There was no actual FDOC policy, or policy adopted by the Secretary, that allowed a subordinate to fail to provide a publisher notice that its publication was being impounded. In fact, as the court below stated after the close of evidence, "[I]t is clear from the testimony that the rule of the department and its policy is to send out notices of the initial impoundment." [Doc. 240 at 17:20-22]

The third issue is whether a due process problem even arose in a situation where PLN received thousands of pages of notice; appealed to the FDOC via letter, phone, and email; gave up further appeal by claiming appeal to the FDOC was futile and that only a federal court could provide recourse; and refused to even consider adequate state court remedies.

PRELIMINARY STATEMENT

Appellant Julie L. Jones, Secretary of the Florida Department of Corrections, will be referred to as "Appellant" or "Secretary." The Florida Department of Corrections will be referred to as "FDOC."

Appellee is Prison Legal News. Appellee will be referred to as "Appellee" or "PLN."

Citations to the record on appeal will be made by referring to the appropriate district court docket number, followed by the page number. [For example, "Doc. 1 at 1"] Citation to the bench trial exhibits will be made by referencing the party who submitted the exhibit and the number of the exhibit. [For example, "Def's Trial Exh. 1] Citations to transcripts will be in the following formats: Doc. 1 at 1:1-2 or Doc. 1 at 1:1 – 2:1. The former refers to page one at lines one through two while the latter refers to page one at line one through page two at line one. The transcript for day one of the bench trial is located at lower court docket entry 261; day two at docket entry 262; day three at docket entry 263; and day four at docket entry 240.

STATEMENT OF THE CASE

(A) COURSE OF PROCEEDINGS

On December 16, 2011, PLN filed a First Amended Complaint wherein it brought two claims against the Secretary.[1] [Doc. 14 at 11, 13] Count III claimed unconstitutional censorship under the First Amendment. [Doc. 14 at 11] Count VI claimed a violation of the Fourteenth Amendment per the "[Secretary]'s failure and refusal to provide Plaintiff with constitutionally required notice and an opportunity to be heard and/or protest the decision each time Plaintiff's publications are censored by [the Secretary]." [Doc. 14 at 13] The Secretary and PLN filed cross motions for summary judgment on March 8, 2013. [Doc's 135 and 139] Responses and replies were filed by both parties. [Doc's 152, 153, 154, and 155] On August 11, 2014, the court denied the cross motions for summary judgment. [Doc. 195] The case went to trial on January 5, 2015 and ended on January 8, 2015. [Doc. 238] On the last day of trial, the court requested briefing on issues the parties had not previously briefed. [Doc. 240 at 19:19 – 20:4] Both parties submitted additional briefing as the lower court requested. [Doc's 241 and 242] The lower court issued an order on August 27, 2015 wherein it found in favor of the Secretary on the First Amendment claim and in favor of PLN on the Fourteenth

[1] Originally, there were two other defendants, The GEO Group, Inc. ("GEO") and Corrections Corporation of America ("CCA"). [Doc. 14 at 1] GEO and CCA settled with PLN. [Doc. 117]

Amendment due process claim. [Doc. 251] A judgment was entered the same day. [Doc. 252 at 1-2] Regarding the due process claim, the lower court determined that 42% of the time over a four-and-a-half year period, Department mailroom personnel failed to send proper notice to PLN when its publications were impounded. [Doc. 279 at 58-59] The court did not find that any single mailroom employee failed at this rate, but that collectively[2], the mailroom staff across the state failed at this rate when handling PLN's publications. [Id.] Further, the court found no intent or deliberate indifference on behalf of any individual employee, but rather based the constitutional violation on the collective negligence of the various mailroom employees across the state. [Id. at 56-59] The lower court connected these actions to the Secretary without any explanation or citation by stating, "The high failure rate indicates a substantial risk, one disregarded by FDOC administrators." [Id. at 58] Based on this finding, an injunction was granted against the Secretary. [Id. at 64-65]

A timely notice of appeal was filed by the Secretary on September 18, 2015. [Doc. 257] PLN then filed a motion to alter or amend the judgment in the district court. [Doc. 258] The FDOC responded to the motion to alter or amend the judgment. [Doc. 265] The district court issued an order on the post-trial motions,

[2] The Florida Department of Corrections has 142 correctional institutions and facilities statewide. See http://www.dc.state.fl.us/pub/annual/1213/AnnualReport-1213.pdf at pg. 5 (last visited October 20, 2015).

entered an amended order on the bench trial, and entered an amended judgment on October 5, 2015. [Doc's 278, 279, 280] Secretary Jones filed an amended notice of appeal on October 6, 2015. [Doc's 281 and 282]

(B) STATEMENT OF FACTS

The facts necessary for the Court to understand the due process issues are five-fold: 1) what due process does Rule 33-501.401 ("the Rule") require, 2) what does the FDOC do to ensure compliance with the rule, 3) what did the Office of the Secretary know regarding the due process PLN was receiving, 4) what actual notice and opportunity to be heard did PLN receive, and 5) the context for the district court's findings of negligence by Department mailroom staff.

1. What Rule 33-501.401, F.A.C., requires regarding to notice to the publisher

As Allen Overstreet – one of the drafters of the Rule – stated at trial, the Rule was specifically created to meet the requirements of due process. [Doc. 262 at 80:21 – 81:9] In its order on the cross motions for summary judgment, the lower court provided a succinct synopsis of the rule and its requirements:

> The FDOC's mail inspection and impoundment process is set forth in detail in Title 33 of the Florida Administrative Code. The first step in the process is inspection by mailroom staff. *See* Fla. Admin. Code R. 33-210.101(5); *see also McDonough*, 200 F. App'x at 875. Upon inspection, if a mailroom employee believes that a publication violates the Admissible Reading Rule, that employee then forwards the offending publication to the warden or warden's designee for review, who then makes the impoundment decision. *See* Fla. Admin.

Code R. 33-501.401(8)(a). According to the governing rules, "[i]f only a portion of a publication meets one of the criteria for rejection established in [the Admissible Reading Rule], the entire publication shall be impounded." *Id.*

Once the warden or designee elects to impound a publication, that individual must then "advise the inmate in writing" of the impoundment decision, including the specific reasons for impoundment. *Id.* at r. 33-501.401(8)(b). Notice is provided on Form DC5-101, entitled Notice of Rejection or Impoundment of Publications ("Notice of Rejection"). *Id.*

Significantly, the requirement of notifying the effected *inmate* applies regardless of whether the publication at issue – e.g., the March 2012 edition of *Prison Legal News* – has or has not been previously rejected. *See id.* at rr. 33-501.401(7) & (8)(b) (each requiring notice).

In the event of a publication's *initial* impoundment or rejection, but not for subsequent rejections of the identical publication, the impounding party must also provide a Notice of Rejection to both the literature review committee and to the "publisher" or "sender" of the publication. *Id.* at r. 33-501.401(8)(b).

Once the required notices have been sent, the final step is review by the literature review committee, whose decisions are final. *See id.* at rr. 33-501.401(8)(c) & 33-501.401(14)(a). Although the rules outlined above ensure that all impoundment decisions are reviewed by the literature review committee, additional rules provide publishers such as PLN the right to "an independent review [by the literature review committee] of the warden's decision to impound a publication" upon a proper written request made "within 15 days following receipt of [the Notice of Rejection]." *Id.* at rr. 33-501.401(15)(a) & (15)(b).

In the instant case, the parties do not dispute the essential requirements of the governing administrative rules, as outlined above. *Compare* ECF No. 139 at 10-11, *with* ECF No. 135, at 9-10. Those requirements, in turn, fully comply with the following, constitutional

> requirements set forth in *Martinez*: (1) notification to the inmate; (2) a reasonable opportunity for the sender to protest the decision; and (3) review of complaints by a prison official other than the person who originally disapproved the correspondence. 416 U.S. at 418-19.

[Doc. 195 at 39-41] At trial, PLN representative Paul Wright acknowledged that the FDOC requires its employees by rule to provide notice of impoundment of PLN's publications. [Doc. 261 at 154:21-23] After the close of evidence on the last day of the bench trial, and with all testimony still fresh, the lower court stated: "[I]t is clear from the testimony that the rule of the department and its policy is to send out notices of the initial impoundment." [Doc. 240 at 17:20-22]

2. What the FDOC does to ensure compliance with Rule 33-501.401

Form DC5-101 was created to ensure that the Rule was followed by mailroom staff and includes all pertinent information required by the Rule. [Def's Trial Exh. 4] The form is to be filled out by mailroom staff upon the impoundment or rejection of a publication. Rule 33-501.401(8)(b), F.A.C. Once a publication is received that has not been previously impounded or rejected, mailroom staff reviews it and if anything is found to violate the rules, mailroom staff fills out Form DC5-101 and forwards the form and the publication to the warden or his designee for review. [Doc. 263 at 163:16 – 164:3] If the warden or his designee agrees with the mailroom staff, mailroom staff makes five copies of the form. Two copies go to the inmate, one goes to the publisher, one goes to the sender, and one

is kept in the mailroom files. [Doc. 263 at 164:4-6] Mailroom staff then fills in the section that says "date mailed to sender" so there is a record of when the notice was sent and mails the notice to the sender of the publication. [Doc. 263 at 176:22 – 177:7] For any publication initially impounded, a copy of the DC5-101 and a copy of the offending pages of the publication are also sent the Literature Review Committee ("LRC") for review. Rules 33-501.401(8)(b) and (c), F.A.C.

Once an impoundment is sent to the LRC for review, the head of the LRC reviews the DC5-101 form to ensure that the publisher receives notice of the impoundment. As the head of the LRC and the FDOC's Rule 30(b)(6), Fed. R. Civ. P., representative Martha Morrison testified at trial, it is the official policy of the FDOC at the LRC level to ensure that impoundment notices are sent to the publisher. The LRC does this by contacting mailroom staff at the impounding institution if any DC5-101 is received by the LRC without a filled in "date sent to sender." [Doc. 262 at 88:13-16 and 91:18 – 92:16]

So in short, the FDOC's rule and official policy require its staff to provide notice to a publisher when a publication is impounded. It is also the official policy of the FDOC to review all DC5-101 forms received at the LRC for compliance with that rule and policy. To this end, if the DC5-101 does not include a filled in

"date sent to sender," the head of the LRC contacts the staff at the impounding institution to ensure staff has complied with the rule by sending the notice.

3. What the Office of the Secretary knew regarding the due process PLN was receiving

The Office of the Secretary knew the following regarding the due process PLN was receiving. First, the two FDOC employees who testified under penalty of perjury regarding mailroom procedures at Florida State Prison[3] were adamant that if a publication was impounded, a notice of impoundment (DC5-101) was mailed to the publisher of the publication. [Doc. 263 at 163:16 – 165:6, 166:24 – 169:4, 174:22 – 175:3, 184:8 – 186:15, 192:19 – 194:4, 200:1-14][4] Thus, even if the Secretary or the LRC had inquired with the mailroom staff, the Secretary would have been told that the Rule was being followed and PLN was receiving notification when its publications were impounded.

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[3] While PLN's publications had been impounded at institutions across the State of Florida, see Defendant's Trial Exhibit 5, the two mailroom staff from Florida State Prison were brought in to testify as they were the ones who stated they sent to PLN the impoundment notices for the six issues PLN claimed it did not receive in the two years prior to trial: June, August, and September of 2013 and March, April, and June of 2014.

[4] At their depositions taken before trial, which were entered into the record [Doc. 261 at 7:2-5], the mailroom staff offered the exact same testimony. [Doc. 223-2 at 7-8, 10; Doc. 223-3 at 7-9, 13]

Second, according to the combined records of PLN and the FDOC, PLN was sent[5] notice for every impounded monthly magazine from January 2013 through the last issue impounded prior to trial. [Doc. 263 at 172:22 – 173:10, 178:3 – 182:9, 193:22 – 199:5] The only impoundment notices PLN testified that it did not receive during this timeframe were June, August, and September of 2013 and March, April, and June of 2014. [Doc. 261 at 280:18 – 281:8] The Department's mailroom employees testified under oath at trial that they personally mailed PLN notices of impoundment for all issues of the PLN magazine that were impounded by Florida State Prison during those two years and they authenticated the Department records indicating to the Office of the Secretary that those notices were in fact mailed. [Doc. 263 at 178:3 – 182:9, 193:22 – 199:5] These included the six impoundment notices PLN claimed it did not receive. [Id.] Thus, the DC5-101 forms received at the LRC would have shown a "date sent to sender" filled in on all DC5-101 forms it received regarding the PLN magazine from January 2013 through the last issue impounded prior to trial. In fact, the trial documents show that a signed and dated DC5-101 existed for each and every month from September

[5] There is no direct evidence in the record that notices from this period were not sent to PLN. PLN offered no proof on this subject. The FDOC, on the other hand, offered testimony regarding the sending of the notices from two of its employees which was based on the records kept by those employees. PLN only offered evidence that they *did not receive* notice from the FDOC for 6 months in the two years preceding trial. [Doc. 263 at 172:22 – 173:6]

2009 through November 2014. [Def's Trial Exh. 5] From the LRC's perspective, PLN was getting notice because the forms the LRC was receiving from mailroom personnel stated a specific date mailroom staff was sending the notice to PLN and the unrebutted testimony of the LRC Chairperson is that any DC5-101 without such a date would result in a phone call to the mailroom to verify that the notice was actually sent.

Third, PLN, despite keeping meticulous records [Doc. 279 at 25] and apparently knowing precisely which months it did not receive notice from the Department, never once informed the Department of any widespread problem of receiving at least one notice per monthly issue.[6] Defendant's Trial Exhibit 11 included the ten letters PLN sent to the Department challenging the Department's decisions to impound its various publications:

- The first letter was sent on October 27, 2009 and it involved an appeal of the Department's decision to reject PLN's renewal notification materials. [Doc. 135-46 at 1] As stated in the letter, PLN received notice of the rejection of these materials.

- A second letter was sent regarding the rejection of PLN's magazine at Santa Rosa C.I. [Doc. 135-46 at 3] PLN had received various notices regarding the rejection of the November 2009 edition of *Prison Legal News*. In the letter, PLN acknowledge it received notice from the Department, but not for every

[6] PLN made a distinct argument that due process entitled it to notice every time any copy of their publication was impounded or rejected instead of once per monthly issue. This argument was rejected by the District Court as well as the Fifth Circuit Court of Appeals. [Doc. 279 at 52-54] PLN v. Livingston, 683 F.3d 201 (5th Cir. 2012).

copy of that month's issue sent to FDOC prisoners. The letter stated that two of the notices were sent by prisoners, not the FDOC. [Id.]

- The third letter stated that notice had not been sent by the FDOC from Taylor C.I. for the November 2009 issue. [Doc. 135-46 at 5] However, as stated above, at least one notice had been sent from Santa Rosa C.I.[7]

- A fourth letter stated that a notice of impoundment for the September 2009 issue of *Prison Legal News* had not been sent by the Department, but PLN had instead received notices from two FDOC inmates. [Doc. 135-46 at 7]

- A fifth letter stated that although PLN had received a notice regarding the December 2009 issue, they had not received a notice for each copy of that month's issue that was rejected. [Doc. 135-46 at 9]

- In a sixth letter, PLN claimed it had not received from the FDOC a notice of impoundment for the April 2010 issue, but rather had received notices from FDOC inmates. [Doc. 135-46 at 11]

- In a seventh letter, PLN wrote regarding the rejection of its informational packets. [Doc. 135-46 at 15] Notice had been received by PLN from the FDOC regarding these packets. [Id.]

- In an eighth letter related to informational packets, PLN acknowledged in the letter it had received notice from the FDOC. [Doc. 135-46 at 17]

- A ninth letter regarded the impoundment of the May 2010 issue of *Prison Legal News*. PLN acknowledge it had received notice for this issue. [Doc. 135-46 at 19]

- The tenth and final letter PLN sent to the Department was sent by PLN's attorney to the incoming Secretary at the time, Edwin Buss. [Doc. 135-46 at 20] The letter was to inform the new secretary of the longstanding issues PLN had with getting its publications to FDOC inmates. The letter, dated February

[7] The record shows an impoundment notice received by PLN for the November 2009 issue. [Doc. 135-36 at 5; Def's Trial Exh. 5]

> 23, 2011, stated nothing whatsoever about the FDOC failing to provide PLN with appropriate notice when its publications were impounded. [Id.]

PLN, at best, informed the Department of not receiving any notice from the FDOC for only two issues: September 2009 and April 2010. Impliedly acknowledging that the problem was not widespread, a letter later sent stated that PLN did receive notice for the May 2010 issue. More significantly, the final letter to the Secretary from PLN's attorney stated nothing whatsoever about PLN having a widespread problem, or any problem at all, receiving notice regarding the impoundment of its publications.

In summary, the Office of the Secretary had the following information: 1) the Department had a rule requiring its employees to provide notice to publishers when a publication is impounded; 2) mailroom employees were adamant they were sending notices of impoundment and mailroom employees stated they were filling in the "date sent to sender" section in the DC5-101 forms memorializing when the notice was being sent[8]; 3) the LRC had a policy to review the DC5-101 forms to ensure the "date sent to sender" section was being filled in so as to ensure publishers were being sent notice by mailroom staff and to contact mailroom staff to ensure compliance if the date was missing; 4) PLN, a meticulous keeper of

[8] At trial, PLN provided no evidence at all that the FDOC, through any of its employees, intentionally failed to provide PLN notice of impoundment for PLN's publications. [Doc. 261 at 154:24 – 155:4, 284:15-18; Doc. 263 at 167:14-16, 193:12-14]

records as to when it received notice, failed to ever claim to the Department that it had not been receiving notice on a widespread basis; and 5) there is no evidence in the record that any other publisher claimed the FDOC was failing to send it notices of impoundment.

4) What actual notice and opportunity to be heard did PLN receive

Although the district court found that PLN did not receive adequate due process [Doc. 279 at 52-61], the trial evidence demonstrated that PLN received a great deal of actual notice and took advantage of a variety of avenues to voice their concerns to the Department. PLN, as laid out above, wrote ten letters to the Department appealing various issues concerning the impoundment of its publications. Mr. Wright, editor of PLN, conceded that PLN had written numerous letters to the FDOC regarding its publications and that within those letters, PLN appealed all past, present and future impoundments of its publications. [Doc. 261 at 162:6-17; Def's Trial Exh. 11; Doc. 135-46 at 2, 3, 5, 7, 10, 12, 19] PLN also contacted Department officials via phone and email about the impoundment of its publications. [Doc. 261 at 160:5 – 161:11] Kendra Jowers, an employee in the FDOC's General Counsel's Office, contacted PLN via telephone to discuss PLN's informational packets that were being rejected. [Id.] Further, Mr. Wright acknowledged that PLN had received thousands of pages of DC5-101 forms from

inmates. [Doc. 261 at 154:15-17] PLN employee Zachary Phillips testified that PLN had received approximately 6,000 pages of notice, though not all 6,000 pages of the DC5-101 forms in PLN's possession were from the Department. [Doc. 261 at 272:3-10] Ultimately, Mr. Wright testified that after the "first couple of appeals," he believed that any further appeal to the Department was futile and that his sole recourse would be to the federal judiciary. [Doc. 261 at 161:19 – 162:5] Mr. Wright further admitted that PLN, despite having attorneys working for its parent organization the Human Rights Defense Center, did not seek any state court or state administrative remedies. [Doc. 261 at 162:20 – 163:16]

5) The context for the district court's findings of negligence by the mailroom staff

During trial, the Florida State Prison mailroom staff who testified described the mailroom to be a very busy place and stated that mailroom personnel had very little free time. [Doc. 263 at 162:12-21, 183:15-25, 189:8-10, 199:15-25] The district judge and PLN recognized how busy Department mailroom personnel were and stated this fact a number of times on the record during argument on the final day of trial. [Doc. 240 at 9:9-15, 10:20 – 11:18, 12:8-13, 39:10-13] PLN even argued that there was no intent standard required to find a due process constitutional violation. [Doc. 240 at 18:14 – 19:13] It was in this context the lower court ultimately determined that "[j]ust because past failures were the

product of negligent conduct does not absolve the FDOC of its constitutional obligation to provide notice going forward." [Doc. 279 at 58]

(C) STANDARD OF REVIEW

After a bench trial, factual findings made by a district court are reviewed for clear error. Holton v. City of Thomasville Sch. Dist., 425 F.3d 1325, 1350 (11th Cir. 2005); Fed.R.Civ.P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Conclusions of law made by a district judge following a bench trial are reviewed *de novo*. Thornburg v. Gingles, 478 U.S. 30, 79 (1986) (quoting Bose Corp. v. Consumers Union, 466 U.S. 485, 501 (1984)) (Review for clear error "does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.").

SUMMARY OF THE ARGUMENT

The district court's opinion radically changes the requirements to demonstrate a constitutional violation. It also fundamentally alters the evidentiary burden necessary to have extraordinary injunctive relief granted against an agency head. While this Court may be thinking this is yet another brief engaging in hyperbole and exaggeration, the Court should consider the following. The district court found a constitutional violation by the Secretary of the Florida Department of Corrections based on aggregate acts of negligence by various mailroom staff members. The court below also granted an injunction even though PLN failed to show any single person, much less the Secretary, violated the Constitution. And this permanent, mandatory injunction was granted without connecting any rule or policy of the Secretary with any alleged violation of the Constitution. Under Rizzo v. Goode, 423 U.S. 362 (1976), the district court went too far in granting PLN injunctive relief on far too little evidence. Because PLN put forth no evidence that the Secretary approved, supported, or even knew about, what the lower court found to be acts of negligence by overburdened mailroom staff, the decision should be reversed. In addition, the lower court should be reversed for failing to adhere to the Supreme Court's clear decision that negligence does not trigger a procedural due process violation. Davidson v. Cannon, 474 U.S. 344, 348 (1986).

The lower court also erred in finding a due process violation where PLN received thousands of pages of notice; appealed to the FDOC via letter, phone, and email; gave up further appeal by claiming appeal to the FDOC was futile and that only a federal court can provide recourse; and refused to even consider adequate state court remedies.

ARGUMENT

ISSUE I

Department mailroom personnel are busy. Because of this busy atmosphere, the lower court found that the various mailroom staff negligently failed to provide notice to PLN over a four-and-a-half year period. The lower court ultimately found the Secretary liable for the various acts of negligence by the mailroom staff. Can negligence alone form the basis for a procedural due process claim? Alternatively, may a district court find a constitutional violation based on the collective negligence of various mailroom staff occurring over a four-and-a-half year period?

A. Can negligence alone form the basis for a procedural due process claim?

The threshold issue for this Court to determine is whether a constitutional violation occurred. As the lower court stated, this appears to depend on whether Daniels v. Williams, 474 U.S. 327 (1986) applies only to substantive deprivations of due process or whether it extends to the process itself. The district court noted a circuit split and also noted that this Court has not spoken on the issue. [Doc. 279 at 56-58] The Sixth Circuit and the Seventh Circuit have held that negligent failure to provide notice, in light of Daniels, does not amount to a due process violation. Dale E. Frankfurth v. City of Detroit, 829 F.2d 38 (6th Cir. 1987) (unpublished); Brunken v. Lance, 807 F.2d 1325 (7th Cir. 1986).

In Frankfurth, a building was found to be dangerous by the city council and the building owner was to be sent a letter to appear before an administrative board to show cause why the building should not be demolished. 1987 WL 44769 at *1. Due to a clerk's error, the owner was not notified. Id. Thereafter, the building was demolished. Id. The owner brought suit against the city and its employees for a due process violation for failing to notify him of the pending demolition. Id. The district court dismissed the case based on Parrat v. Taylor, 451 U.S. 527 (1981) because the "failure was the product of an unauthorized act by a city employee as opposed to a city policy." 1987 WL 44769 at *1. The Sixth Circuit affirmed the district court's decision stating:

> In the instant case, no city policy maker directed that appellant's building be demolished without notice. Indeed, repeatedly in the past, the Council had refrained from ordering demolition and instead directed the Building and Safety Department to notify the owners. Appellant was not given notice of the demolition because the clerk forgot to mail the notice. This action was random and unauthorized. The clerk did not act pursuant to an established policy and procedure.

1987 WL 44769 at *2 (underlining in original). The Sixth Circuit further addressed the appellant's argument that because he had no post deprivation remedy, dismissal under Parratt was error. The Sixth Circuit stated that Daniels had overruled Parratt and determined that negligent action by government officials

did not constitutionally require a procedure for compensation. 1987 WL 44769 at *3. As concluded by the court:

> In the present case, appellant's failure to receive notice was due to the negligent act of a clerk. Because the act was negligent, no fourteenth amendment deprivation is involved and there is no constitutional need to provide a remedy. Thus, the absence of a state remedy by appellant does not act to preclude the dismissal of his § 1983 claim.

1987 WL 44769 at *3.

In Brunken, the State of Illinois took protective custody of a child without first notifying the child's father and grandfather. Before this occurred, the father was told that the state intended to proceed in state court for protective custody of the child as the state suspected the father of sexually abusing the child. The father was also informed that he would receive notice of any hearing that would occur. However, a hearing was held and the father was not provided notice of the hearing. At the state court hearing, the court found probable cause to believe the father was abusing the child and placed the child in the custody of the state. The father later found out about the hearing and moved to have the order set aside. The state court ultimately denied that motion. 807 F.2d at 1327-28.

In the interim, the father and grandfather filed a case in federal court claiming that the state and an individual employee "violated their due process rights by not giving notice to them before taking protective custody of [the child]."

Id. at 1238. The district court found in favor of the father and grandfather. The father was granted one dollar in nominal damages against the individual state employee. Id. "With respect to [the grandfather] and his due process claims, the court held that unless DCFS petitioned the Circuit Court within 30 days, it would be permanently enjoined from interfering with [the grandfather's] right to unsupervised visits with his granddaughter." Id.

The Seventh Circuit reviewed the case and determined the suit was improperly adjudicated for a variety of reasons. Id. at 1328-31. However, even if it had been properly adjudicated, the Brunken court found the case to be without merit:

> Alternatively, even if the district court was warranted in adjudicating Barry's constitutional claim of due process, in light of recent Supreme Court case law the claim was without merit. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662, teaches that an official does not "deprive" a person of life, liberty, or property, within the meaning of the Fourteenth Amendment, when an official's negligent act causes the unintended loss of or injury to life, liberty, or property. In the instant case, Lance claims that the State's Attorney told her that he would give notice to Barry of the February 14 shelter care hearing. The State's Attorney did not testify, nor is Lance's testimony controverted in any other fashion. Given this evidence, Lance's failure to notify Barry was at most negligent. Barry's claim that his due process rights were infringed therefore fails on this basis, wholly independent of Younger abstention. *Daniels*, 106 S.Ct. at 663.

807 F.2d at 1331.

Instead of following either Frankfurth or Brunken, the lower court relied on Sourbeer v. Robinson, 791 F.2d 1094 (3rd Cir. 1986) to supports its legal conclusion that intent did not matter in finding that Department mailroom staff committed a constitutional violation by negligently failing to send PLN notices of impoundment. [Doc. 279 at 56-58] In Sourbeer, an inmate was being kept in administrative custody and claimed he had a liberty interest in being in general population. Id. at 1100-1101. A due process violation had been found by the district court because the inmate was not being given a meaningful opportunity to be heard where the witnesses being called during the inmate's periodic review did not have day-to-day contact with the inmate. Id. at 1101-02.

On appeal, the individual defendants[9] raised a qualified immunity defense and argued that their actions were not intentional, but rather a product of gross negligence. Id. at 1104. Apparently the district court had made a finding of gross negligence in relation to the individual defendants' actions in failure to provide the inmate an adequate opportunity to be heard during the periodic reviews of his placement in administrative custody. Id. However, the Third Circuit determined the district court's finding of gross negligence did not matter. Id. Instead, the Sourbeer court determined that the prior act of placing the inmate in administrative

[9] The lower court applied Sourbeer to an injunctive relief claim without even considering Rizzo v. Goode, 423 U.S. 362 (1976). Secretary Jones will more fully explore this below in Issue Two.

custody was an intentional act regardless of whether there was fault in the periodic review process that occurred after the inmate had already been placed in administrative custody. Id. at 1104-05.

After reviewing Sourbeer, the lower court determined Sourbeer's reasoning was more sound in applying Daniels only to substantive deprivations of due process and not to the process itself. [Doc. 279 at 57-58] The lower court erred in this determination for two reasons. First, in Davidson v. Cannon, 474 U.S. 344 (1986) the Supreme Court unequivocally stated, "In *Daniels*, we held that the Due Process Clause of the Fourteenth Amendment is not implicated by the lack of due care of an official causing unintended injury to life, liberty or property. In other words, where a government official is merely negligent in causing the injury, no procedure for compensation is constitutionally required." Id. at 348. The Supreme Court further stated, "As we held in *Daniels*, the protections of the Due Process Clause, ***whether procedural or substantive***, are just not triggered by lack of due care by prison officials." Id. (emphasis added) The district court made no attempt to explain away these plain directives of the Supreme Court other than reliance on Sourbeer. [Doc. 279 at 56-58] Thus, it is clear from the plain language of the cited Supreme Court case law that simple acts of negligence, regardless of whether the deprivation is substantive or procedural, cannot form the basis for a due

process constitutional violation. Accordingly, the district erred by not following the law as set forth in Davidson and Daniels.

Second, even if the Supreme Court had not directly spoken on this issue, the facts of Frankfurth and Brunken are more analogous to what happened below than are the facts of Sourbeer. In both Frankfurth and Brunken, the state was expecting to take an action and should have provided notice to the one the action was being taken against, but failed to do so due to negligence. In Frankfurth, the city council wanted to demolish a dilapidated building and wanted to hear from the owner before proceeding. In Brunken, the state wanted to take custody of a child from her father and the state promised to inform the father of when the hearing on the matter was going to occur. In both instances, negligence by government officials was the reason notice was not provided to the one the action was being taken against before a final decision was made. That is exactly analogous to the facts below. In this case, FDOC personnel negligently failed to provide notice to PLN that its publications were being impounded. This failure to notify occurred before any decision was made by the LRC to reject any of PLN's publication. On the other hand, in Sourbeer, the inmate had already been placed in administrative custody. The final decision to take that action had already been made. The due

process violation[10] arose from the failure to give the inmate an adequate opportunity to be heard regarding the periodic reviews of that already made decision to place him in administrative custody. So in Sourbeer, a final, intentional decision had already been made before the alleged negligent action by state officials arose. Accordingly, the facts in Sourbeer are not analogous to the facts in this case and the district court erred in relying on Sourbeer instead of the more factually analogous cases of Frankfurth and Brunken.

B. May a constitutional violation be premised upon the collective negligence of various individuals over a period of four-and-a-half years?

The lower court next turned to what it calls the systemic failure of FDOC personnel to provide notice 42% of the time to PLN when its publications were impounded from September 2009 to November 2014. [Doc. 279 at 24, 58-59] It found that this rate of failure satisfies at least a recklessness or gross negligence threshold to support a constitutional violation. However, even if recklessness or gross negligence can support a constitutional violation, which the Supreme Court has not stated either could do so[11], the lower court did not find that any single

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[10] In Sourbeer, the district court's and the appellate court's due process determinations were based on Hewitt v. Helms, 459 U.S 460 (1983), a decision later overturned in Sandin v. Conner, 515 U.S. 472 (1995). This is yet another reason why Sourbeer should not be relied upon.

[11] The Supreme Court in County of Sacramento v. Lewis, 523 U.S. 833 (1998) stated, "We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution

person committed gross negligence or recklessness. [Doc. 279 at 58] Rather, the lower court based its finding on the collective actions of all mailroom staff that had reviewed PLN's publications over a four-and-a-half year period. [Id. (systematic failure of *FDOC personnel*) (emphasis added)][12] Such a basis for constitutional liability is unprecedented. If individual acts of negligence do not constitute a constitutional violation, then aggregated acts of negligence by various individuals over a four-and-a-half year period certainly cannot create constitutional liability either. The Tenth Circuit came to this conclusion in a due process claim brought by PLN. As stated in Jones v. Salt Lake City, 503 F.3d 1147 (10th Cir. 2007):

> PLN's due process claim suffers the same fate. While we recognize both inmates and publishers have a right to procedural due process when publications are rejected, *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir.2004), *Jacklovich* involved the prison's deliberate rejection of publications pursuant to policy. Here, the prison's

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does not guarantee due care on the part of state officials; *liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.*" Id. at 848-49 (emphasis added). Expounding upon Daniels v. Williams, 474 U.S. 327, 331 (1986) ("Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property.") (emphasis in original), the Lewis Court determined that a substantive due process claim required deliberate conduct and thus the minimum threshold for a due process violation was deliberate indifference. Lewis, 523 U.S. at 849, 853. It is apparent that the basement level for fault in a Section 1983 action is deliberate indifference. See also L.W. v. Grubbs, 92 F.3d 894, 899 (9th Cir. 1996) (establishing that "gross negligence, in and of itself, is not unconstitutional"); Lewellen v. Nashville, 34 F.3d 345 (6th Cir. 1994) ("The defendants may have been negligent, but it is now firmly settled that injury caused by negligence does not constitute a 'deprivation' of any constitutionally protected interest.") (citing Collins v. Harker Heights, 503 U.S. 115 (1992)).

[12] As documented in Defendant's Trial Exhibit 5, PLN's publications were reviewed and impounded by a variety of persons at various institutions within the FDOC.

> rejections of PLN's magazines was unintentional based on the negligence of its mailroom personnel. Therefore, due process is not implicated.

Jones, 503 F.3d at 1163 (citing Daniels v. Williams, 474 U.S. 327, 328 (1986)). This Court should follow the plain, yet compelling, logic of Jones as that case follows Supreme Court precedent and does not fundamentally change Section 1983 litigation to allow constitutional liability based on some form of negligence by a variety of different persons performing unauthorized acts.

In summary, the lower court erred in two ways in its threshold determination as to whether a constitutional violation occurred. First, it found that negligence alone could form the basis of a due process violation as long as it involved the procedure and was not substantive based. [Doc. 279 at 56-58] This is in direct opposition to Davidson. 474 U.S. at 348. Second, it found a constitutional violation based on the aggregated acts of negligence by various mailroom personnel over a four-and-a-half year period. [Doc. 279 at 58-59] Such a determination, without finding *individual* liability, is wholly unprecedented and converse to the plain language of the statute. 42 U.S.C. § 1983 ("Every ***person*** who, under color of any statute . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution. . . .") (emphasis added).

In any event, even if this Court agrees with the district court in that a constitutional violation did occur, PLN failed to make any showing whatsoever that the actions by the mailroom staff were known, approved of, or condoned by the Office of the Secretary. Thus, as Section II makes clear, Rizzo v. Goode, 423 U.S. 362 (1976) precludes the granting of injunctive relief against an agency head where the agency head neither expressly approved of nor impliedly approved of the unconstitutional actions of its subordinates.

ISSUE II

The clear policy of the Department requires staff to provide notice to a publisher when its publication is impounded. The lower court found that individual mailroom staff members were so busy they committed acts of negligence by not sending notice to PLN when its publication was impounded. May the Secretary have injunctive relief granted against her based on the aggregate negligent actions of various subordinates where she neither knew of nor approved of those actions?

States, and state actors sued in their official capacity, generally have Eleventh Amendment sovereign immunity from suit. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54-56 (1996). "In *Ex parte Young*, the Supreme Court recognized an exception to sovereign immunity in lawsuits against state officials for prospective declaratory or injunctive relief to stop ongoing violations of federal law. 209 U.S. 123, 155–56, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Under the legal

fiction established in *Ex Parte Young*, when a state official violates federal law, he is stripped of his official or representative character and no longer immune from suit. *Id.* at 159-60." Alabama v. PCI Gaming Authority, --- F.3d ---, 2015 WL 5157426, at *5 (11th Cir. Sept. 3, 2015). Thus, in order to strip the immunity state officials have when acting in their official capacity, a plaintiff must show a violation of federal law by that official or must show that the official has adopted a policy that violates federal law. The Supreme Court in Rizzo v. Goode, 423 U.S. 362 (1976) provided guidance regarding the outer bounds of federal court authority to provide injunctive relief against an agency head.

The petitioners in Rizzo – who were the defendants at the trial level – were the mayor, the police commissioner, and the city managing director. Id. at 367. Suit had been brought against them for injunctive relief based on the unconstitutional conduct of various police officers. Id. at 366-67. As discussed by the Rizzo Court:

> Individual police officers not named as parties to the action were found to have violated the constitutional rights of particular individuals, only a few of whom were parties plaintiff. As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners express or otherwise showing their authorization or approval of such misconduct. Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur,

> not with respect to them, but as to the members of the classes they represented. In sum, the genesis of this lawsuit a heated dispute between individual citizens and certain policemen has evolved into an attempt by the federal judiciary to resolve a "controversy" between the entire citizenry of Philadelphia and the petitioning elected and appointed officials over what steps might, in the Court of Appeals' words, "(appear) to have the potential for prevention of future police misconduct." 506 F.2d, at 548.

Id. at 371. The Rizzo Court went on to say:

> The theory of liability underlying the District Court's opinion, and urged upon us by respondents, is that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' failure to act in the face of a statistical pattern is indistinguishable from the active conduct enjoined in *Hague* and *Medrano*. Respondents posit a constitutional "duty" on the part of petitioners (and a corresponding "right" of the citizens of Philadelphia) to "eliminate" future police misconduct; a "default" of that affirmative duty being shown by the statistical pattern, the District Court is empowered to act in petitioners' stead and take whatever preventive measures are necessary, within its discretion, to secure the "right" at issue. Such reasoning, however, blurs accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983. We have never subscribed to these amorphous propositions, and we decline to do so now.

Id. at 375-76. The Rizzo Court concluded, "Here, the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution. Under the well-established rule that federal 'judicial powers may be exercised only on the basis of a constitutional violation,' *Swann*,

supra, 402 U.S., at 16, 91 S.Ct., at 1276, this case presented no occasion for the District Court to grant equitable relief against petitioners."[13]

The district court in this case made findings of fact strikingly similar to the facts discussed in Rizzo. Both cases involved alleged misconduct by individuals far down the chain of command. In both cases, the agency heads had no official policy supporting the actions of the subordinates nor did the agency heads approve of such conduct. In both cases, statistical analysis was used to find a constitutional violation which served as the basis for the injunction entered. However, there is one major difference between the instant case and Rizzo: in Rizzo, it was proven that individual officers actually committed violations of the Constitution. Id. at 367. In the case before the Court, the evidence failed to demonstrate that any single FDOC staff member violated the Constitution through her own actions.[14] Instead, the district court imposed liability upon the agency head through the

[13] As succinctly stated in the Harvard Law Review, "But last Term, in *Rizzo v. Goode*, the Supreme Court may have approved an even stricter standard for the issuance of equitable relief than for an award of damages against supervisory officials. . . . But the Supreme Court reversed, resting its holding on a number of grounds, including the lack of any evidence that the supervisory officials had affirmatively implemented an unconstitutional policy, or ordered the lower officials' unconstitutional acts." Developments in the Law-Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1208 (1977).

[14] See Issue One, supra.

collective negligence of mailroom staff based on statistical aggregation.[15] The court below looked at all acts by various mailroom personnel over a four-and-a-half year period and found that 42% of the time, this *collection of persons* acted with recklessness or gross negligence. [Doc. 279 at 58-59] If, as in Rizzo, actually proven violations of the Constitution cannot form the basis for injunctive relief where the agency head did not have a policy causing the violation nor approve the inappropriate conduct, certainly the facts here cannot form the basis for injunctive relief where no single person was shown to have actually violated the Constitution.

However, even if a constitutional violation is found to have been committed by mailroom personnel, the facts simply do not demonstrate the Secretary approved of or condoned any action by mailroom staff that caused PLN not to be provided notice upon the impounding of its publications. As the lower court stated on the last day of the bench trial: "[I]t is clear from the testimony that the rule of the department and its policy is to send out notices of the initial impoundment." [Doc. 240 at 17:20-22] PLN's representative, Paul Wright, acknowledged that the FDOC requires its employees by rule to provide notice of impoundment of PLN's publications. [Doc. 261 at 154:21-23] Thus, it is undisputed that the FDOC has a

[15] "The *Rizzo* Court refused to infer the existence of a plan of concerted action from the facts before it. A mere 'failure to act (by responsible authorities) in the face of a statistical pattern' was found to provide no basis for injunctive relief." Lewis v. Hyland, 554 F.2d 93, 98 (3d Cir. 1977).

policy and rule that requires notice be provided to publishers upon the impounding of a publication. Further, there is absolutely no evidence in the record that the Office of the Secretary had any reason to know that 42% of the time, PLN was not receiving a DC5-101 form.

In addition, it is undisputed that it is the FDOC's rule and policy to have mailroom personnel fill out the DC5-101 form upon a publication being impounded and to mail a copy of the form to the sender of the publication. Rule 33-501.401(8)(b), F.A.C. [Doc. 263 at 163:16 – 164:16] The uncontroverted testimony is that the head of the LRC reviews the DC5-101 forms she receives to ensure that the "date mailed to sender" section is filled in and signed. [Doc. 262 at 88:13-16 and 91:18 – 92:6] It is also the unrebutted testimony of the head of the LRC that if the "date mailed to sender" was not filled in, it was the FDOC's policy to call the mailroom to make sure that a notice was mailed to the sender. [Doc. 262 at 91:18 – 92:6] So, not only does the Department have a rule and a policy that requires notice to be provided to a publisher, it also requires a form to be filled out to ensure mailroom personnel send notice. [Def's Trial Exh. 4] Those forms are reviewed by the LRC for compliance. [Doc. 262 at 91:23 – 92:3] Thus, there are redundant systems in place to ensure mailroom personnel send notice to the sender of a publication upon impoundment of that publication.

If anyone in the Office of the Secretary asked mailroom staff, or asked the LRC about the forms it was being provided, the Secretary would not have been made aware of any problem as mailroom staff[16] would have sworn that they were properly doing their jobs [Doc. 135-7 at 26:20 – 27:25; Doc. 223-2 at 7-8, 10; Doc. 223-3 at 7-9, 13; Doc. 263 at 163:16 – 165:6, 166:24 – 169:4, 176:22 – 182:9, 184:8 – 186:15, 192:19 – 194:4, 200:1-14] and the LRC would have stated that the forms were being properly filled out [Doc. 262 at 88:13-16 and 91:18 – 92:6]. Further, any review of the DC5-101 forms would have shown on the face of the form that mailroom personnel were properly doing their jobs as the forms in the record demonstrate a filled in "date sent to sender" section for all publications from September 2009 through November 2014. [Def's Trial Exh. 5]

Lastly, PLN – a meticulous keeper of records [Doc. 279 at 25] – failed to notify the FDOC that there was widespread failure to provide PLN at least one notice of impoundment for each monthly issue. PLN, at best, informed the Department of not receiving notice for only two issues: September 2009 and April 2010. [Doc. 135-46] Impliedly acknowledging that the problem was not widespread, a letter later sent stated that PLN did received notice for the May 2010

[16] As stated by the mailroom supervisor at Blackriver C.F., "If you went through all that trouble to impound, you would send [the notice of impoundment] out. It's a lot of work," and, "So I don't see why anyone would deliberately not fill [a DC5-101 form] out" because failure to do so would be "breaking the rules." [Doc. 135-7 at 27:17, 19-20, 24-25]

issue. [Doc. 135-46 at 19-20] Most significantly, the final letter PLN sent to the Department was sent by PLN's attorney to the incoming Secretary at the time, Edwin Buss. [Doc. 135-46 at 20] The letter was to inform the new secretary of the longstanding issues PLN had with getting its publications to FDOC inmates. The letter, dated February 23, 2011, stated nothing whatsoever about the FDOC failing to provide PLN with appropriate notice when its publications were impounded. [Id.]

There is nothing in the trial record that shows the Secretary had a policy supporting mailroom staff not providing PLN notice or that the Secretary knew about such a practice and condoned it. To the contrary, as the lower court stated on the last day of trial, "[I]t is clear from the testimony that the rule of the department and its policy is to send out notices of the initial impoundment." [Doc. 240 at 17:20-22] As the record demonstrates, the Secretary had a rule in place that required notice be provided and had redundant systems in place to ensure that the rule was being followed. Accordingly, PLN has failed to meet the burden of proof required to demonstrate the *Secretary* was deliberately indifferent[17] to the due

[17] As stated in Goebert v. Lee County, 510 F.3d 1312, 1326-27 (11th Cir. 2007), a plaintiff must show the following to prove a deliberate indifference claim, "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence." (quotations omitted). Under the deliberate indifference standard, there is also a requirement that the defendant have a causal connection to the constitutional harm. Goebert, 510 F.3d at 1327. As demonstrated herein, PLN failed to

process rights of PLN as nothing in the trial record supports a finding the Secretary was aware PLN was not receiving 42% of the notices from Department mailrooms and did nothing to remedy any alleged problem. See Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution."). And without this showing, Rizzo states that injunctive relief should not have issued.

Lastly, just because PLN should not have been granted injunctive relief does not mean it did not have a remedy if a constitutional violation was committed by mailroom staff without the knowledge of the Secretary. If PLN could show constitutional violations by rogue FDOC staff – *e.g.,* an FDOC employee filling out a DC5-101 form properly but intentionally not sending notice – it has other remedies at law. City of Los Angeles v. Lyons, 461 U.S. 95, 112-13 (1983) ("As we noted in *O'Shea,* 414 U.S., at 503, 94 S.Ct., at 679, withholding injunctive relief does not mean that the 'federal law will exercise no deterrent effect in these circumstances.' If Lyons has suffered an injury barred by the Federal Constitution, he has a remedy for damages under § 1983."). However, the "Due Process Clause is not a guarantee against incorrect or ill-advised personnel decisions" and a "city

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prove these four elements vis-à-vis the Secretary or any other FDOC employee. The record evidence simply does not show deliberate indifference by the Secretary.

is not vicariously liable under § 1983 for the constitutional torts of its agents: It is only liable when it can be fairly said that the city itself is the wrongdoer." Collins v. City of Harker Heights, 503 U.S. 115, 122, 129 (1992). In this case, the Secretary cannot be fairly said to be the wrongdoer as there are no facts in the record that demonstrate the Secretary knew of the failure to provide PLN notice and openly or tacitly approved of that failure.

ISSUE III

Prison Legal News received thousands of pages of actual notice from the FDOC and from inmates stating the reasons its publications were being denied; reviewed and meticulously organized these notices; had an opportunity to be heard via email, telephone, and written correspondence; and concluded that further appeal was futile and its only recourse in federal court. Is there a due process violation where actual notice was received and an opportunity to be heard was available?

The FDOC began impounding PLN's publications in September 2009. [Doc. 279 at 7] Between that date and the date of trial, PLN had received approximately 6,000 pages of actual notice. [Doc. 261 at 272:3-10][18] Each DC5-101 form PLN received gave it the opportunity to appeal the decision within fifteen days of receipt. [Def's Trial Exh. 4 at pg. 2; see also Doc. 261 at 103:1-19] The

[18] From September 2009 to July 2012, PLN had received 4,675 pages of actual notice and had received at least one notice for each monthly issue of *Prison Legal News* from that timeframe. [Doc. 262 at 164:1-11]

form states: "[S]enders may appeal an institution's decision to impound or reject reading materials by writing the Department's Library Services Administrator within 15 days of the receipt of the notice of impoundment or rejection." [Def's Trial Exh. 4 at pg. 2] Initially, PLN appealed the rejection of its publications through writing a number of letters to the FDOC challenging its decision to reject the monthly magazine and the informational packets. [Def's Trial Exh. 11; Doc. 261 at 162:6-19] Within many of these letters, PLN asked the FDOC to deliver all past, present, and future[19] publications regardless of PLN's advertising content. [Def's Trial Exh. 11; Doc. 135-46 at 2, 3, 5, 7, 10, 12, 14, 19] PLN also sent emails and had phone conversations with FDOC staff regarding PLN's publications. [Doc. 261 at 160:5 – 161:18] FDOC employee Kendra Jowers actually called Paul Wright, editor of PLN, and discussed the informational packets that were being rejected. [Doc. 261 at 160:8-13] Ultimately though, Mr. Wright believed further appeal to the FDOC was futile and completely stopped appealing to the FDOC on February 23, 2011, the date of the last letter to the FDOC. [Def's Trial Exh. 11; Doc. 135-46 at 20-23] As Mr. Wright stated at trial:

> Q. After your first couple of appeals -- of the rejection of appeal to the DOC officials, you determined that any further appeals would be

[19] PLN knew what was causing its publications to be impounded: the offensive advertisements at issue in this case. Otherwise, it would not have known that its future issues were going to be impounded and would not have preemptively appealed those impoundments.

> futile, correct?
>
> A. That is correct.
>
> Q. And after each time you received a DC5-101 from any source, you did not appeal, correct?
>
> A. After a certain point, that is correct, we did not appeal.
>
> Q. Because you felt any further appeals would be futile?
>
> A. Correct. And we believed that based on the Florida DOC's lengthy -- almost decades long -- history of censoring Prison Legal News that our only relief would be to apply with the federal judiciary to uphold our constitutional rights.

[Doc. 261 at 161:19 – 162:5][20] Mr. Wright not only believed that any further appeal to the FDOC to be futile, he neither made any effort to seek recourse in any state administrative forum or in the state courts of Florida. [Doc. 261 at 162:20 – 163:16; see also Doc. 135-1 at 160:8 – 163:8]

Despite not seeking any further appeal, PLN nonetheless continued to track the impoundments and rejections of its publications. As the court below found, PLN kept meticulous records. [Doc. 279 at 25] PLN reviewed and categorized the 6,000 pages of notice it received from inmates and the FDOC. [Doc. 261 at 259:19 – 261:25, 264:10 – 268:15, 276:3 – 280:17] In fact, PLN used software to assist in

[20] Mr. Wright was clear that after PLN stopped appealing to the FDOC, it never planned to appeal again as PLN believed the FDOC would not change its decision. PLN strongly believed throughout this litigation that its only recourse was to the federal judiciary. [See Doc. 135-1 at 143:4-24]

sorting the documents. [Doc. 261 at 279:2-9] Further, PLN was on notice of exactly why its publications were being rejected as it even offered at trial a chart of all the offending ads in each issue of the magazine. [Pl's Trial Exh. 79; Doc. 261 at 251:4 – 254:18; see also Doc. 261 at 134:16 – 135:6]

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). As the Fifth Circuit recently recognized in a case involving PLN, "[t]he right to receive notice exists only to effectuate the right to be heard . . . ." Prison Legal News v. Livingston, 683 F.3d 201, 224 (5th Cir. 2012). Further, actual notice is not even a requirement of due process. United States v. Robinson, 434 F.3d 357, 366 (5th Cir. 2005) ("Due process does not require actual notice or actual receipt of notice.") (citing Dusenbery v. United States, 534 U.S. 161, 170-71 (2002)); Cuvillier v. Rockdale County, 390 F.3d 1336, 1339 (11th Cir. 2004); Gonzalez-Gonzalez v.U.S., 257 F.3d 31, 36 (1st Cir. 2001) ("If, say, an interested party has actual knowledge of ongoing forfeiture proceedings from other sources, inadequacies in the notice afforded by the government will not work a deprivation of due process.").

Here, PLN received thousands of pages of notice and took advantage of that notice to communicate to and challenge the FDOC regarding its impoundment and rejection of PLN's publications due to the advertising content of those

publications.[21] PLN wrote letters. PLN made phone calls. PLN sent emails. There was no mystery as to why the publications were being rejected as PLN stated the reason in many of its letters to the FDOC. PLN understood it was the advertising content in the publications and it additionally knew precisely what types of ads were causing the rejection: pen pal advertisements, stamps for cash or services advertisements, three way calling advertisements, establishing a business advertisements, *etc.* And despite knowing what kinds of advertisements were causing the rejection of its publications, PLN continued to seek to have these types of advertisements in its publications. [Doc. 261 at 101:4-18] After numerous opportunities to explain to the FDOC why it should allow PLN's publications into the Department's prisons notwithstanding its advertising content, PLN decided that any further appeal was futile and stopped appealing. If the touchstones of due process are notice and an opportunity to be heard, PLN certainly received such notice and had numerous opportunities to explain why its advertising content

[21] Considering PLN sent letters to the FDOC acknowledging it had received notice for the impoundment of its informational packets, see Doc. 135-46 at 15-18 and Def's Trial Exh. 14, and had conversations regarding these packets initiated by the Department, the lower court's finding of a due process violation as to the packets must be erroneous as notice and an opportunity to be heard was given. All information packets were rejected based on the ability to purchase items with stamps. [Pl's Trial Exh. 86; Def's Trial Exh's 23] Further, any issue regarding the *Prisoners' Guerilla Handbook to Correspondence Course* is moot as the Department actually has 26 copies in its institutional libraries and has informed PLN that it will not impound the publication as long as the book did not change its current format. [Pl's Trial Exh's 55 and 56]

should be not be a reason for rejecting its publications. Barry v. Barchi, 443 U.S. 55, 65 (1979) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story" and suspension was based on an untested report by a single expert which the trainer was not given an opportunity to challenge); Madura v. BAC Home Loans Servicing, L.P., No. 8:11-cv-2511-T-33TBM, 2015 WL 1227466, at *3, n.7 (M.D.Fla. Mar. 16, 2015) (dismissing plaintiffs' assertion that court denied them due process and stating plaintiffs had numerous opportunities to present their "side of the story" to the court) (citing Barry, 443 U.S. at 65).

The Supreme Court has made clear that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Mathews v. Eldrige, 424 U.S. 319, 334 (1976). (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)). Rather, "(D)ue process is flexible and calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). To determine what process is constitutionally due, Mathews provided a three-part balancing test: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural

safeguards; and finally, the Government's interest." Mathews, 424 U.S. at 335.

PLN sends mass produced monthly magazines and mass produced informational packets to prisoners within the FDOC. PLN is not sending FDOC inmates individualized and personal letters like those discussed in Procunier v. Martinez, 416 U.S. 396 (1974). This Court has decided that mass produced publications require "a lower standard for due process guidelines." Perry v. Secretary, Fla. Dept. of Corrections, 664 F.3d 1359, 1368 (2011). PLN received this lowered standard of due process through the notice it received and through the numerous appeals it made to the FDOC via letter, phone, and email. Once PLN gave up pursuit of further appeals because it thought any further appeal futile, PLN waived the due process rights it had under Mathews. Maples v. Martin, 858 F.2d 1546, 1551 (11th Cir. 1988) ("The appellants failed to avail themselves of this procedure and presented no evidence that resort to it would have been futile. Thus, an opportunity to be heard that would have met the requirements of due process was lost to the appellants by their own inaction."); Lewis v. Hillsborough Transit Auth., 726 F.2d 664, 667 (11th Cir. 1983) (stating that the plaintiff could not make out a procedural due process claim where the alleged deprivation resulted from his own inaction in failing to utilize the available remedies).

Now, the lower court found the following: "That PLN did not appeal past

impoundments does not necessarily mean that it will not appeal future impoundments based on different reasons." [Doc. 279 at 60] However, the facts do not support this finding. PLN's last effort to appeal occurred on February 23, 2011 when PLN's attorney wrote to the then newly incoming secretary. [Def's Trial Exh. 11; Doc. 135-46 at 20] At trial, Mr. Wright made clear that he did not pursue any further appeal for a single reason: his belief that the FDOC was not going to change its mind about banning PLN's publication due to its advertising content and the only recourse PLN had was in federal court. [Doc. 261 at 162:1-5] Nothing anywhere in the record gives even the slightest hint that PLN may appeal again. That PLN appealed numerous times between September 2009 and February 2011 and never appealed again after February 2011 further proves that Mr. Wright meant what he said at the January 2015 trial and what he said at his January 2013 deposition. [Doc. 135-1 at 143:8-24] Mr. Wright believed that any attempt to appeal to the FDOC would be futile and his only recourse was federal court. Accordingly, the finding that PLN may appeal again was pure conjecture as the undisputed testimony introduced at trial was that PLN felt its *only* recourse was in federal court, not in further appeal to the FDOC.

The lower court also found that if PLN did not receive notice from the FDOC, the fact that it may have received notice from inmates after the LRC made

its decision was of no consequence. [Doc. 279 at 60] However, the trial evidence demonstrates that PLN did appeal even when it did not receive notice from the FDOC [Doc. 135-46 at 7, 11], at least until it believed further appeal was futile. Further, Martha Morrison, the FDOC's Rule 30(b)(6) representative for LRC issues, stated during trial that the LRC would re-review any publication already reviewed by the LRC upon request by the publisher.[22] [Doc. 262 at 94:9-25; see also Doc. 263 at 18:3-9] Thus, the FDOC's policy is that even after the LRC makes a "final" decision on a publication, the publication can be reviewed again if the publisher requests further review. [Id.] This is consistent with the statement on the second page of form DC5-101 which allows a sender to appeal an impoundment or rejection notice within 15 days of receipt of the notice. [Def's Trial Exh. 4] The DC5-101 form does not require the form to be sent from the FDOC in order for appellate rights to be valid. [Id.]

Considering the flexibility of due process and the meticulously organized 6,000 pages of notice PLN had in its possession, even if PLN did not receive notification on occasion from the FDOC, it had adequate post deprivation remedies to pursue, and in fact did pursue before it deemed further appeal futile. As the Supreme Court has stated, "Indeed, in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct.

[22] Not only would the LRC re-review a publication, it would even assist a publisher in altering its content so a particular publication would be admissible if the publisher was willing to change the content. [Doc. 263 at 18:10 – 19:1]

1908, 68 L.Ed.2d 420 (1981), overruled in part on other grounds, *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), we specifically noted that 'we have rejected the proposition that [due process] always requires the State to provide a hearing prior to the initial deprivation of property.' 451 U.S., at 540, 101 S.Ct., at 1915." Gilbert v. Homar, 520 U.S. 924, 930 (1997); see also Bass v. Perrin, 170 F.3d 1312, 1318-19 (11th Cir. 1999) ("In this case, the plaintiffs were given written notice of the charges, but only after placement on the YSL. We hold, however, that the failure to provide such notice in advance was irrelevant. It is a well-settled principle of law that 'the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise.'") (citing McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994)). Although the FDOC has a rule requiring pre-deprivation notice to a sender of a publication, it is undisputed that its policy also allows post-deprivation appeals by senders as stated by Ms. Morrison at trial and as stated on the DC5-101 form. Because the FDOC's rule and policy allowed PLN to challenge a determination regarding a publication in a variety of ways, and because PLN took advantage of this process prior to deeming further appeal futile, the lower Mathews standard for due process was met as

"[a]ny additional procedures would put an extra burden on the FDOC without necessarily adding any extra protections for [the plaintiff]." Perry, 664 F.3d at 1368.

Lastly, PLN never pursued any adequate state remedies available to it. [Doc. 261 at 162:20 – 163:16; Doc. 135-1 at 160:14 – 165:4] In fact, PLN's representatives never looked for state remedies nor did they care to engage in any available state procedures. [Doc. 135-1 at 162:23-24; 164:23-165:4] If PLN believed the rule needed to be changed to more adequately address PLN's concerns, PLN could have sought to initiate rulemaking under Florida's Administrative Procedures Act. Section 120.54, F.S. If PLN had doubts about the rights it had under Rule 33-501.401, F.A.C., it could have sought a declaratory judgment in the state court system. Section 86.021, F.S. Alternatively, if Department mailroom employees were acting negligently in the handling of PLN's impoundment notices, PLN could have sued the Department under Section 768.28, F.S. With accessible remedies under Florida law, PLN had no due process challenge available in federal court. See U.S. v. Georgia, 546 U.S. 151, 158 (2006) (citing Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 643–644, and n.9 (1999) (Florida satisfied due process by providing remedies for patent infringement by state actors)); Cotton v. Jackson,

216 F.3d 1328, 1331 n.2 (11th Cir. 2000) (noting that procedural due process violations do not even exist unless no adequate state remedies are available); McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994) (stating that only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation become actionable under section 1983); Burns v. Harris Co. Bail Bond Bd., 139 F.3d 513, 519 (5th Cir. 1998) ("[A] plaintiff cannot argue that her due process rights have been violated when she has failed to utilize the state remedies available to her.").

After receiving thousands of pages of notice; after appealing to the FDOC via letter, phone, and email; after giving up further appeal by claiming appeal to the FDOC was futile and that only a federal court could provide recourse; and after refusing to even consider adequate state court remedies, PLN should not now be allowed to claim a due process violation. Myrick v. City of Dallas, 810 F.2d 1382, 1388 (5th Cir. 1987) ("Furthermore, Myrick cannot dispute the adequacy of post-deprivation remedies. Myrick could have appealed her decision to a state court for review under the substantial evidence standard, a remedy that adequately protects her property interest in employment . . . . But Myrick instead sued in federal court. Of course, she was free to skip state remedies and proceed directly to federal court to vindicate state deprivation of her constitutional rights; exhaustion of remedies is

not ordinarily required. But she cannot skip an available state remedy and then argue that the deprivation by the state was the inadequacy or lack of the skipped remedy."); see also Christiansen v. West Branch Community School Dist., 674 F.3d 927, 935-36 (8th Cir. 2012) ("Especially relevant here, we have held that a government employee who chooses not to pursue available post-termination remedies cannot later claim, via a § 1983 suit in federal district court, that he was denied post-termination due process.").

If notice and an opportunity to be heard cannot be found under these facts – 6,000 pages of notice received; precise knowledge of the reason for the action, *i.e.*, advertisements for pen pals, three way calling, stamps for cash, *etc.*; opportunities to be heard via letter, email, and phone; refusal to make any further appeal; and refusal to seek adequate state remedies – then the due process clause as understood in Mathews no longer exists. No longer is due process a flexible and common sense notion, but instead it has become a highly technical structure where a person can know precisely why a state action is being taken, sit on her rights, and wait for a low-level employee to forget to mail a notice or mark the wrong box. Once this unauthorized mishap occurs, the person runs to federal court seeking an injunction and, of course, concomitant attorney's fees of a staggering amount. Such constitutional "gotcha-ism" should not be condoned by this Court. As the trial

facts make plain that PLN received an abundance of actual notice and had numerous opportunities and avenues to be heard before deeming further appeals futile, this Court should overturn the legal determination of the lower court and remand the case for judgment to be entered in favor of the FDOC.

CONCLUSION

Despite Supreme Court precedent contrary to its determination, the lower court found a constitutional violation based on aggregated acts of negligence by mailroom staff over a four-and-a-half year period. The lower court then determined the Secretary was responsible for these acts despite declaring on the last day of the bench trial that "it is clear from the testimony that the rule of the department and its policy is to send out notices of the initial impoundment." [Doc. 240 at 17:20-22] How it made this determination after making the above statement is a mystery never explained in the court's order as no record evidence is ever cited to support a causal connection between the actions occurring in the mailroom and a policy of the Secretary. This is necessarily so because no evidence to support such a causal connection was ever introduced at trial.

Additionally, if the touchstones of due process are only notice and an opportunity to be heard, then 6,000 pages of notice received; precise knowledge of the reason for the government's action, *i.e.*, advertisements for pen pals, three way

calling, stamps for cash, *etc.*; opportunities to be heard via letter, email, and phone; refusal to make any further appeal; and refusal to seek adequate state remedies, certainly meet those touchstones. PLN simply waived its due process rights by refusing to appeal to the Department due to its belief that any further appeal to be futile and its only recourse to be in federal court.

Accordingly, for the reasons stated in this brief, the district court's ruling against the Secretary on the due process count should be reversed, the injunction lifted, and the case remanded with instructions to enter judgment in favor of the Secretary.

Respectfully submitted,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Lance Eric Neff
Lance Eric Neff
Senior Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains approximately 12,888 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in the body of this brief is fourteen point Times New Roman.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed electronically via this Court's CM/ECF system and served via the same on all counsel or parties of record on this October 28, 2015.

I FURTHER CERTIFY that pursuant to Eleventh Circuit Rule 31-3, seven (7) paper copies of this brief, including one signed original, have been mailed to the court by using one of the methods outlined in Rule 25(a)(2)(B), Federal Rules of Appellate Procedure and/or Eleventh Circuit Rule 25-3(a), on this October 28, 2015.

/s/ Lance Eric Neff
Lance Eric Neff
Senior Assistant Attorney General