IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 02-cv-001239-MSK-KLM

MARK JORDAN,

Plaintiff,

v.

MICHAEL PUGH, et al.,

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO AMEND JUDGMENT

Plaintiff, Mark Jordan, by and through counsel, submits the following Response to Defendants' Motion to Amend Judgment (Doc. #358).

INTRODUCTION AND STANDARD OF REVIEW

On August 9, 2007, this Court issued its Memorandum Opinion and Order (Doc. #354) in which it held that the portion of 28 C.F.R. § 540.20(b) that prohibits an inmate from "publishing under a byline" is unconstitutional. *Jordan v. Pugh*, --- F.Supp.2d ---, 2007 WL 2288189, *15. The Court entered judgment in favor of Plaintiff, declared that the byline provision of 28 C.F.R. § 540.20(b) violates the First Amendment, and enjoined the Federal Bureau of Prisons (BOP) from "punishing any inmate" for violation of the byline provision. *Id*. The BOP now seeks amendment of the Court's judgment in two ways. First, to enter judgment on behalf of Defendants on the Court's finding that Mr. Jordan did not have constitutional standing to

challenge the regulation's prohibition on acting as a reporter, and second, to restrict application of the judgment solely to the plaintiff, Mr. Jordan.

Pursuant to Federal Rule of Civil Procedure 59(e), a court may alter or amend its judgment upon a showing of "an intervening change in the controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." *Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179, 1185 (10th Cir. 2000), *Brumark Corp. v. Samison Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995). Defendants have not made the required showing with respect to either request and their motion therefore should be denied.

ARGUMENT

I. BECAUSE THE COURT DID NOT RULE ON THE MERITS OF PLAINTIFF'S CHALLENGE TO THE "ACT AS A REPORTER" PROVISION OF THE REGULATION, IT IS INAPPROPRIATE TO ENTER JUDGMENT FOR DEFENDANTS ON THAT ISSUE.

In its *Memorandum Opinion and Order*, the Court stated that at the time Mr. Jordan commenced his lawsuit, "he did not have constitutional standing to challenge the regulation's prohibition on acting as a reporter because he had not acted, nor had he been punished, for acting as a reporter."[1] *Jordan v. Pugh*, 2007 WL 2288189 at *5. Because of this finding, the Court did not analyze the "act as a reporter" provision under either the *Martinez* or the *Turner* tests, and did not rule on the constitutionality of that provision.

In the absence of a ruling on the merits, an order entering judgment for Defendants on this issue is inappropriate. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-101 (1998) (distinguishing between jurisdictional and merits issues and finding that the former should be resolved prior to determining the latter). A preliminary finding that this Court relied

[1] Plaintiff disagrees with the Court's finding on this issue.

upon in restricting its ruling cannot, through bureaucratic alchemy, be turned into a judgment for Defendants. Accordingly, the Court should deny Defendants' request to amend the judgment on this issue.

II. THE SCOPE OF THE JUDGMENT AND RELIEF IS APPROPRIATE.

As this Court observed in its Memorandum Opinion and Order, Plaintiff sued all Defendants in their official capacities.[2] *Id*. at *1. "Consequently, the action is deemed to be one against the Bureau of Prisons." *Id*., *citing Hafer v. Melo*, 502 U.S. 21, 25 (1991) and *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Just as Plaintiff's cause of action appropriately lies against the BOP, so too does the judgment and the relief. Defendants do not appear to dispute this. *See* Doc. 358 at 4, n.2. Rather, the BOP takes issue with the scope of the Court's relief, claiming that it should be limited solely to the plaintiff in this action, Mark Jordan.[3] For the reasons explained below, the nationwide scope of the injunction is proper and should not be disturbed.

A. Because the Court Properly Held that Plaintiff Has Standing to Assert His Overbreadth Claim On Behalf of Himself, Other Inmates and the Press, the Scope of Relief Is Appropriate.

Both the Supreme Court and the Tenth Circuit have recognized that "'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.'" *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1233 (10th Cir. 2005), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946).

[2] Plaintiff's claims against Defendants in their individual capacities were dismissed earlier in the litigation.
[3] The BOP's argument is really two arguments: first, that the injunction is too broad in that it applies to the BOP nationwide; and second, that the only person who has standing to enforce the injunction is Mr. Jordan. The Court need not resolve the second issue as it is not yet ripe for review; the question of whether a prisoner in federal custody in a different jurisdiction can *enforce* the injunction issued in *Jordan v. Pugh* against the BOP is a matter for another day.

Additionally, several circuits have held that "there is no general requirement that an injunction affect only the parties in the suit." *Bresgal v. Brock*, 843 F.2d 1163, 1169 (9th Cir. 1987), citing *Evans v. Harnett County Bd. of Educ*., 684 F.2d 304, 306 (4th Cir. 1982); *Meyer v. Brown & Root Construction Co*., 661 F.2d 369, 373-74 (5th Cir. 1981).

In assessing the proper scope of an injunction, the Supreme Court has noted that the relief granted must be "no more burdensome than necessary to redress the complaining parties." *Califano v. Yamasaki*, 442 U.S. 682, 702-03 (1979). Nevertheless, "an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit . . . if such breadth is necessary to give prevailing parties the relief to which they are entitled." *Bresgal*, 843 F. 2d at 1170-71; *Gregory v. Litton Systems, Inc*., 472 F.2d 631, 633-34 (9th Cir.1972); *Professional Ass'n of College Educators v. El Paso County Community College Dist.*, 730 F.2d 258, 274 (5th Cir.), *cert. denied*, 469 U.S. 881 (1984). This is particularly true where, as here, a plaintiff successfully challenges a rule of "broad applicability" since the relief—the invalidation of the rule—will naturally extend to persons beyond the named plaintiffs. Thus, when a reviewing court determines that an agency regulation is unlawful, "the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed." *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (citing *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C.Cir.1989).

A number of district and circuit courts have granted nationwide relief to prevailing plaintiffs where it is appropriate, even where no class was certified. *See, e.g., N. Jersey Media Group, Inc. v. Ashcroft*, 205 F.Supp.2d 288, 305 (D.J.J. 2002) (enjoining implementation of administrative directive that would have applied to any media group nationwide), *rev'd on other*

grounds, 308 F.3d 198 (3d Cir. 2002); *see also Livestock Mktg. Ass'n v. U.S. Dep't of Agric*., 207 F.Supp.2d 992, 1007 (D.S.D. 2002); *scope of injunction aff'd in Livestock Mktg. Ass'n v. U.S. Dep't of Agric*., 335 F.3d 711, 772 (8th Cir. 2003), *judgment vacated in* 544 U.S. 550 (2005). Indeed, some courts have found that "class-wide relief may be appropriate even in an individual action." *Bresgal*, 843 F.2d at 1171, citing *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1136 (11th Cir.1984); *Harnett County Bd. of Educ*., 684 F.2d at 306; *Meyer*, 661 F.2d 369, 373.[4]

In this case, the particular nature of Plaintiff's First Amendment challenge to the regulation makes nationwide relief especially necessary and appropriate. Plaintiff asserted and this Court held that because Plaintiff's First Amendment claim is grounded in overbreadth, "his challenge is also on behalf of third parties, such as other inmates and the press." *Jordan*, 2007 WL 2288189 at *15. Under the First Amendment overbreadth doctrine, an individual whose own speech may be protected under a given provision is permitted to challenge its facial validity because of the threat that the speech of third parties not before the Court will be chilled. *See Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569, 574 (1987); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1973).

Here, the Court held that "the effect of the regulation is clearly overbroad." *Jordan*, 2007 WL 2288189 at *7. Specifically, the Court stated that "the effect of the Byline Regulation is to limit or discourage inmates from submitting their writings to the news media for publication" because inmates can be "punished for the *publisher's* act of publishing the article under a

[4] This Court, too, has issued nationwide injunctions against federal agencies in non-class actions. *See Mainstream Marketing Services, Inc. v. FTC*, 283 F.Supp.2d 1151, 1168 (D.Colo. 2003) (holding that FTC's "do-not-call" list violates First Amendment and permanently enjoining FTC from enforcing the do-not-call list against any telemarketer nationwide). The Tenth Circuit, however, later reversed this decision and upheld the constitutionality of the do-not-call list. *See* 358 F.3d 1228 (2004).

byline," despite the fact that the inmate cannot control whether a writing is published once he sends it out of the institution. *Id*. at *6. Consequently, the only means for the prisoner to ensure he or she evades violation of the regulation and punishment is to refrain from mailing the written words in the first instance. *Id*.

Where, as here, the prisoner chooses to forego mailing his otherwise unobjectionable writing for fear that the writing will be published and he will be punished, the rights of the publisher to publish and to decide what to publish necessarily will be affected. *Id*. at *7, *15; *see also Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) (the right to publish and to exercise "editorial discretion concerning what to publish" is protected); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper…constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees on a free press…"); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (an essential element of the liberty of free press is freedom from all censorship over what shall be published).[5]

Because the Byline Regulation produces this chilling domino effect on the free speech of Plaintiff, other inmates and the press, this Court properly held that Plaintiff has standing to assert the interests of those parties whose rights also are affected by the regulation. Consequently, the Court's injunction prohibiting enforcement of the Byline Regulation properly applies not only to

[5] The liberty of free press also affects the rights of non-inmates to receive and read the information published or reported, *see Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) ("Freedom of [speech and press] . . . necessarily protects the right to receive") (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)); *Bd. of Educ., Island Trees Union Free Sch. Dist. v. PICO*, 457 U.S. 853, 866-67 (1982); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 395 (1950) ("[T]he public has a right to every man's views"). First Amendment protection is afforded "to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976).

the BOP's treatment of Mr. Jordan, but also to all those whose rights he has standing to assert, including other inmates and the press.

B. The Nationwide Scope of the Injunction Is Appropriate Because It Is No More Burdensome Than Necessary to Give Plaintiff the Relief to Which He Is Entitled.

Because this Court has held that the "Byline Regulation" is overbroad in violation of the First Amendment, nationwide relief is necessary to correct the violation of Plaintiff's rights and the rights of those in privity with him. Despite this, Defendants offer two additional arguments for limiting the scope of the injunction: first, that the Prison Litigation Reform Act (PLRA) requires that the injunction be limited solely to Mr. Jordan, and second, that the nationwide injunction improperly extends to other jurisdictions. Both arguments are unavailing.

1. Because the Court's Award of Injunctive Relief Extends No Further Than Necessary to Correct the Violation of the Federal Right of the Plaintiff, the Scope of the Injunction is Consistent with the PLRA.

Plaintiff recognizes that the PLRA requires that "prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," and that a court issuing prospective relief in such cases must find that such relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1). A review of the Court's findings and analysis demonstrates that with minor modifications, the Court's order can easily satisfy the PLRA criteria; consequently, the scope of the injunction is proper.

As explained above, the fact that Plaintiff's First Amendment claim sounds in overbreadth permits him to challenge the regulation not only on his own behalf, but also on

behalf of those in privity with him. The Supreme Court has recognized that the communication between prisoners and their intended correspondents are "inextricably meshed." *Procunier v. Martinez*, 416 U.S. 396, 409 (1974) (prisoners' challenge to correspondence rules decided based on rights of outside correspondents, since these were "inextricably meshed" with the plaintiffs' rights). Here, Plaintiff asserted and the Court found that by prohibiting him from publishing under a byline, and consequently forcing him to refrain from mailing his writings to news media representatives for fear of sanctions under the regulation, the Byline Regulation infringes not only on his rights, but also upon the First Amendment right of the press to publish and decide what to publish, since "the only way that an inmate can be sure that he or she will not violate the regulation is not to submit a writing to a news media source for publication in the first place." *Jordan*, 2007 WL 2288189 at *6; *see also Canadian Coal. Against the Death Penalty v Ryan*, 269 F. Supp. 2d 1199, 2001 (D. Ariz. 2003) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 (1963)) ("Although the enforcement of the regulation 'is directed at prisoners,' the prisoner as a Plaintiff has 'standing to challenge [the regulation's] limiting effects on the circulation of their message'").

For the same reason that Plaintiff has standing to assert the rights of third parties such as other inmates and the press, those parties similarly are entitled to benefit from the Court's injunction. Specifically, because the Court held that Byline Regulation violates the federal rights of Plaintiff, and that his rights are inextricably meshed with those of third parties such as other inmates and the press, the Court's order enjoining the BOP from enforcing the Byline Regulations "extends no further than necessary to correct the violation of the federal right of a

particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1).[6] As the Second Circuit has held, "Although the PLRA's requirement that relief be 'narrowly drawn' and 'necessary' to correct the violation might at first glance seem to equate permissible remedies with legal minimums, a remedy may require more than the bare minimum federal law would permit and yet still be necessary and narrowly drawn to correct the violation." *Handberry v. Thompson*, 436 F.3d 52, 63-63 (2d Cir. 2006), quoting *Benjamin v. Fraser*, 343 F.3d 35, 56 (2d Cir. 2003); *see also Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) ("[t]he scope of injunctive relief is dictated by the extent of the violation established.")

Second, the Court's Order and Judgment contains findings and analysis from which it can be concluded that the injunction is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct [th]at violation." 18 U.S.C. § 3626(a)(1). Nevertheless, Plaintiff concedes that the opinion does not specifically recite the required PLRA findings, and that Tenth Circuit law requires that it do so. *See Alloway v. Hodge*, 72 Fed.Appx. 812, 816 (10th Cir. 2003) ("While later review of the substance of the order may reveal that the prospective relief, in fact, is narrowly drawn, extends no further than necessary to correct the violation, and is the least intrusive means necessary to correct that violation, the relevant statutory passages reveal that it was Congress's intent that a district court make these findings explicit to demonstrate that the court considered the

[6] To hold otherwise would be to conclude that in enacting 18 U.S.C. § 3626(a)(1), Congress stripped the courts of their Article III grant of power to decide First Amendment overbreadth challenges involving third party standing when such challenges are brought by prisoners. Such a conclusion offends separation of powers principles. The constitutional grant to the courts of judicial power includes all powers necessary for the complete performance of the judicial function and establishes certain limits beyond which the legislature may not go in specifying how judicial power is to be exercised. *See Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 218-19 (1995); *see also U.S. v. Raines*, 362 U.S. 17, 20 (1960) ("The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies properly before them").

appropriate factors in a timely manner.") (Exh. A.) For that very reason, Plaintiff himself filed a "Motion for Finding Pursuant to 28 U.S.C. § 3626(a)(1)" in which he requests that this Court modify its Memorandum Opinion and Order to include the findings required by 18 U.S.C. § 3626(a)(1). (Doc. #357.) In that motion, Plaintiff asserts that the substance of the requisite § 3626(a)(1) findings are implicit in the Court's decision; consequently, amending the Order to expressly recite those findings is simply a matter of making the implicit explicit.

The Court's findings demonstrate that the injunction against the BOP prohibiting the enforcement of the Byline Regulation is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation. First, the Court's order makes clear that the BOP is enjoined from disciplining prisoners only under the byline provision of the regulation. *Jordan v. Pugh*, 2007 WL 2288189 at *15. Second, application of the injunction to the BOP nationwide is necessary to correct the violation of the right, given the Court's finding that the rights of Mr. Jordan, 198,000 other federal prisoners, and the press are infringed by the Byline Regulation. *Id*. at *7 and *15. Finally, there is no less intrusive means of correcting the unconstitutional portion of the regulation than enjoining the BOP from enforcing it. *See, e.g., Clement v. California Dep't of Corrections*, 364 F.3d 1148, 1153 (9th Cir. 2004) (holding that an injunction that does not require court supervision of prison system but instead enjoins only enforcement of the unconstitutional policy meets PLRA requirements).

2. The Nationwide Injunction Does Not Improperly Intrude Into Other Jurisdictions.

Finally, Defendants claim that the Court's grant of nationwide relief improperly extends into other jurisdictions on the theory that it precludes other districts and circuits from ruling on

the constitutionality of the regulation. (Doc. #358 at 5-6.) The gravamen of the BOP's argument for limiting the scope of the Court's order is that the Government has an interest in obtaining multiple judicial interpretations of the constitutionality of the Byline Regulation. In making this argument, the BOP relies on the general rule prohibiting the use of "nonmutual collateral estoppel against the government" discussed in *United States v. Mendoza*, 464 U.S. 154 (1984), and asserts that this rule requires that the Court's relief in this case be limited to Mr. Jordan. Recently, this argument was rejected in *Earth Island Institute v. Ruthenbeck,* 459 F.3d 954, 966 (9th Cir. 2006) (rejecting Forest Service request that nationwide injunction be restricted to the Eastern District of California), *amended by* 490 F.3d 687, 699 (9th Cir. 2007) (affirming nationwide injunction for same reasons stated previously).

The Supreme Court did not hold to the contrary in *Mendoza.* *Mendoza* stands for the proposition that the BOP is not estopped from taking positions unsuccessful here in litigation in other cases. It does not say that a district court should refrain from enjoining a federal agency from enforcing regulations it has judged to be unconstitutional. Indeed, nothing about the injunction in this case would prevent another court in any other circuit or district from entertaining a similar suit and reaching a different or contrary result as to other parties. If the BOP is faced with such litigation in other districts, it remains free to present any claims and defenses independent of and notwithstanding the judgment in this action.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' Motion to Amend Judgment.

DATED: September 12, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I HEREBY CERTIFY that on this 12th day of September, 2007, a true and correct copy of the above and foregoing **Plaintiff's Response to Defendants' Motion to Amend Judgment** was delivered via the electronic case filing procedure for civil cases in the United States District Court District of Colorado to the following addresses:

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s/ Laura L. Rovner

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