UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: July 10, 2014

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Re: Case No. 14-1617, *American Civil Liberties Unio v. Livingston, County Of, et al*
Originating Case No. : 2:14-cv-11213

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Michelle M. Davis
for Jeanine Hance, Case Manager
Direct Dial No. 513-564-7025

cc: Mr. David J. Weaver

Enclosure

No. 14-1617

UNITED STATES COURT OF APPEALS
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AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN,

Plaintiff-Appellee,

v.

COUNTY OF LIVINGSTON, et al.,

Defendants-Appellants.

O R D E R

Before: MOORE, COLE, and GIBBONS, Circuit Judges.

Livingston County, its sheriff, and its jail administer (collectively "Livingston") appeal the district court's grant of a preliminary injunction in this action challenging the constitutionality of the Livingston jail's postcard-only policy. (1) The preliminary injunction enjoins Livingston from not delivering legal mail from the American Civil Liberties Union ("ACLU") to inmates, provided that it is labeled as legal mail and sent by a licensed ACLU attorney; and (2) directs Livingston to return the mail if the inmate addressee is no longer in custody. Livingston moves to stay the district court's order. The ACLU opposes a stay.

Livingston "bears the burden of showing that the circumstances justify" the exercise of our discretion to grant a stay pending appeal. *Nken v. Holder*, 556 U.S. 418, 433−34 (2009). In determining whether to issue a stay, we consider the same four factors a district court considers when granting a preliminary injunction: (1) whether the movant has a likelihood of success on appeal; (2) whether the movant will suffer irreparable harm absent a stay; (3) the harm to other

interested parties; and (4) where the public interest lies. *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991). We review whether the movant is likely to succeed on the merits de novo, but review the district court's ultimate decision to issue a preliminary injunction for an abuse of discretion. *City of Pontiac Retired Emps. Ass'n v. Schimmel*, No. 12-2087, 2014 WL 1758913, at *2 (6th Cir. May 5, 2014) (en banc) (per curiam).

Livingston first argues that it has a likelihood of success on appeal because the district court treated the complaint as if an inmate had brought the claim, rather than the ACLU. The Supreme Court, however, has recognized that "[b]oth parties to the correspondence have an interest in securing [the communication], and censorship of the communication between them necessarily impinges on the interest of each." *Procunier v. Martinez*, 416 U.S. 396, 408 (1974), *rev'd in part on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

Second, Livingston argues that the district court erred in concluding that the ACLU's letters were "legal mail." "A prisoner's right to receive mail is protected by the First Amendment . . ." *Sallier v. Brooks*, 343 F.3d 868, 873 (6th Cir. 2003). Nonetheless, a prison may impose restrictions on that right reasonably related to security or a legitimate penological interest. *Id.* If the incoming mail is "legal mail," we have afforded greater protection to the prisoner's First Amendment rights. *Id.* at 874. Whether this accommodation is required is dependent upon whether the mail is "legal mail," which is a question of law. *Id.* at 873. "Not all mail that a prisoner receives from a legal source will implicate constitutionally protected legal mail rights." *Id.* at 874. We have never squarely addressed whether mail from the ACLU is "legal mail." But, on balance, our precedent suggests that it would be, provided that it is from a licensed attorney and designated as privileged information. The envelopes in this case contained clear statements that they were from a licensed Michigan attorney and that they were legal mail.

Livingston also asserts that it will potentially be irreparably harmed because legal mail is subject to additional intake procedures that require "greater expenditures of time and manpower

for intake, security examination and delivery." The mere potential for harm is not irreparable. Moreover, Livingston already must open all legal mail from private attorneys and courts; therefore, it has an internal process already constructed through which it filters all such mail. Thus, opening mail from the ACLU in the presence of the inmates does not appear to be a substantial burden. *See Muhammad v. Pitcher*, 35 F.3d 1081, 1085 (6th Cir. 1994) (concluding that, in the absence of any evidence to the contrary, requiring Michigan prisons to open all mail from the state Attorney General in the presence of inmate recipients was a *de minimis* burden).

The remaining factors also weigh against a stay. "In the context of a First Amendment claim, the balancing of the[] factors is skewed toward an emphasis on the first factor" because the remaining factors hinge on that factor. *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 690 (6th Cir. 2014). This is because "it is well-settled that loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Id.* (internal quotation marks and citation omitted). Similarly, "[t]he determination of where the public interest lies [ ] is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because it is always in the public interest to prevent the violation of a party's constitutional rights." *Id*. (internal quotation marks and citation omitted).

The motion to stay is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk