

INTRODUCTION

The issue presented to this Court is whether Defendant Warden Sherman violated Mark Webster's First Amendment rights by suddenly changing the Lansdale Correctional Facility (LCF) publication regulation to withhold Webster's February, March, and April issues of *Sports Illustrated* and *CollegeJam*. This Court should deny Defendant Sherman's summary judgement motion for failing to prove that he acted constitutionally as a matter of law. Fed. R. Civ. P. 56(a).

Prison administrators may only impinge the First Amendment rights of prisoners under the limited criteria of the *Turner Factors*. See *Turner v. Safely*, 482 U.S. 78 (1987). The first, threshold factor conclusively weighs for Webster because his *Sports Illustrated* and *CollegeJam* magazines are essentially entertainment and do not pose a "common sense" threat to LCF security. See *Sisney v. Kaemingk*, 15 F.4th 1181 (8th Cir. 2021), cert. denied, No. 21-7105, 2022 WL 994414 (U.S. Apr. 4, 2022). Defendant Sherman's proffered evidentiary-supported rationale is undermined by logical inconsistency, as much NCAA coverage remains available to prisoners. See *Murchison v. Rogers*, 779 F.3d 882 (8th Cir. 2015). Further, Webster and his co-residents of Dorm S were minimally involved with prior sports-related issues during NFL season.

The remaining three *Turner* factors also demonstrate the unconstitutionality of Defendant Sherman's censorship. The blanket ban on sports magazines to individuals deprives Webster any alternative means of accessing non-mainstream, non-local coverage of NCAA basketball teams. LCF would face minimal administrative burdens by allowing Webster magazines that he has already received without issue for two years. Lastly, as a *de minimis* alternative, LCF could place limited copies of *Sports Illustrated* and *CollegeJam* in the East Unit Dayrooms, balancing institutional concerns of fairness and security while restoring Webster's abridged constitutional rights.

STATEMENT OF FACTS

Mark Webster is a young adult prisoner on a path to rehabilitation. After a difficult childhood, Webster struggled in college academically and socially. He started growing marijuana and was consequently sentenced to 30 months at Lansdale Correctional Facility (LCF), beginning February 3, 2020. R.12. Webster resides in LCF Dorm S, a 96-person dormitory for nonviolent prisoners, generally with no prior arrests. R.7. Webster has taken prison training sessions, college classes, and has received satisfactory reviews on his maintenance work. R.7. Due to good behavior, Webster is scheduled for early release. R.12.

Under advice from his counselor, Webster tries to maintain a healthy connection to his father and brother through a shared love of college basketball. R.12. Since he arrived at LCF Webster has received subscriptions to *Time*, *Sports Illustrated*, and *CollegeJam*. R.13. However, on February 14, 2022, Publication Review Officers suddenly informed Webster that his February, March, and April issues of *Sports Illustrated* and *CollegeJam* were withheld because they were “detrimental to the security, discipline, and good order of the institution.” R.13.

Warden Sherman instituted a policy banning all sports magazines addressed to individual inmates and removed magazines covering NCAA March Madness from recreational Dayrooms. R.8-9. The Warden’s ban was inspired by prisoner disputes and two physical altercations that occurred during the prior NFL playoff season. Prison staff observed inmates form groups supporting specific teams, primarily in LCF East Dorms R and T. Prisoners also shared publications and betted with each other. Webster was not involved with this activity. Id.

Warden Sherman instituted this new ban to reduce the number of blank brackets available to prisoners and to avoid similar disputes tied to the NCAA Division I men’s basketball tournament. R.8-9. Despite this goal, prisoners may still watch NCAA basketball on TVs in the

Dayrooms or their bunk. R.7, 9. Newspapers in the Dayrooms also include coverage of the tournament and blank brackets. Webster's brother plays for Longview, a non-mainstream, non-Kansas team. Coverage of Longview is not available on TV or in newspapers. R.12-13. Warden Sherman denied both Webster's appeals to receive his withheld magazines and a proposed alternative to cut out a rare, featured article about his brother's team in *CollegeJam*. The Warden cited concerns of resource limitations and fairness. R.13-14.

ARGUMENT

I. LCF unconstitutionally withheld three months of *Sports Illustrated* and *CollegeJam* from Mark Webster.

The Supreme Court crafted the four *Turner* factors to balance the protection of prisoners' constitutional rights with the practical difficulties of operating a prison. *See Turner*, 482 U.S. at 84. On the first threshold factor, 1) LCF failed to establish a valid, rational connection with a legitimate governmental interest when it withheld six issues of *Sports Illustrated* and *CollegeJam* from Webster. *Id.* at 89. Although summary judgement could be denied on these grounds alone, LCF's actions are also unconstitutional because 2) Webster was deprived alternative means of accessing non-mainstream, non-local basketball coverage, 3) releasing the magazines would not negatively impact other prisoners, personnel, or resources, and 4) LCF has a *de minimis* cost alternative to place limited copies of *Sports Illustrated* and *CollegeJam* in Dayrooms. *Id.*

A. LCF did not rationally withhold *Sports Illustrated* and *CollegeJam* to protect a legitimate governmental interest.

LCF prison administrators did not rationally withhold Webster's magazines because sports-related content is not inherently dangerous and was inconsistently censored. Prison officials may only withhold mailed publications from prisoners when the action is rationally connected to advancing prison interests, such as security, discipline, and good order. *See Thornburgh v. Abbott*, 490 U.S. 401, 406 (1989). If the rational connection to government interest is not "common sense," prisons bear the burden of proffering evidence to support the connection. *See e.g., Sisney*, 15 F.4th at 1191. Despite interpretive deference given to prison administrators, *Murphy v. Mo. Dep't of Corr.*, 814 F.2d 1252 (8th Cir. 1987), the relationship between a regulation and its legitimate penological objectives is destroyed when it involves significant inconsistencies amounting to a practical randomness, *see Murchison v. Rogers*, 779 F.3d 882, 890 (8th Cir. 2015); *see also Williams v. Brimeyer*, 116 F.3d 351, 354 (8th Cir. 1997).

i. LCF did not offer a "common sense" rational connection to a legitimate governmental interest

Sports Illustrated and *CollegeJam* are not magazines of "common sense" danger to LCF's security. In *Sisney*, the court distinguished pornographic comic book magazines from a Renaissance art book. *See Sisney*, 15 F.4th at 1191-93. Evidence of the prison's rationale was not required to withhold pornography, because that content clearly intended to cause sexual arousal and could inhibit the rehabilitation of convicted sexual offenders. *Id.* In contrast, the *Sisney* prison unconstitutionally withheld *Matisse, Picasso and Modern Art in Paris* because nude sculptures were not sexual. It was "simply an art book." *Id.* Summary judgement has been

similarly granted for a prisoner denied a government surplus catalog, while upholding a pornography ban. *Allen v. Higgins*, 902 F.2d 682 (8th Cir. 1990).

Sports Illustrated and *CollegeJam* provide entertainment value to prisoners much like art books in *Sisney*, therefore LCF must proffer some evidence to rationalize the connection between the ban and prison interests.

ii. LCF's proffered evidence supporting a rational connection is undermined by inconsistent censorship of NCAA-related content and lack of evidence justifying a blanket ban affecting Webster and Dorm S.

First, although prison administrators may proactively censor publications to prevent future harm without a direct link to cause and effect, the inconsistency shown by existence of like materials within the prison may undermine the rationale for censorship. *See Murchison*, 779 F.3d at 890. In *Murchison*, this level of inconsistency was not met when a single issue of *Newsweek* depicting gang violence was censored, despite other publications showing violence being permitted. *Id.* Yet at LCF there is not just anomalous access to a few items, but systemic access to NCAA content on television and in newspapers that include NCAA brackets. Such inconsistency undermines LCF's stated rationale to minimize accessible March Madness content.

Second, Warden Sherman indicates that Webster was uninvolved with problems during the NFL season, which mostly occurred in Dorms R and T of East Unit. This blanket ban across all dorms overbroadly censors Webster and nonviolent, first offender prisoners in Dorm S,

without proffered evidence required in the absence of a “common sense” rationale. *See Sisney*, 15 F.4th at 1191.

Because LCF provided neither a “common sense” nor a consistent, evidence-based rationale for withholding *Sports Illustrated* and *CollegeJam* from Webster to protect legitimate government interests, summary judgement should be denied on this threshold factor alone.

B. Webster lacks any alternative means of accessing college sports coverage of non-mainstream, non-local teams.

LCF’s blanket ban invalidly denied Webster any means of accessing non-mainstream NCAA coverage, including of his brother’s team, Longview College. An applied regulation is invalid when it eliminates all alternatives to exercise the asserted right. *See Nichols v. Nix*, 16 F.3d 1228 (8th Cir. 1994). Complete bans on specific publications, *see Murchison*, F.3d 779 at 887-88, and categories of publications, *see Dawson v. Scurr*, 986 F.2d 257, 261 (8th Cir. 1993), weigh against the availability of alternatives.

In *Murchison*, when reviewing the prison’s decision to censor a single issue of *Newsweek* for depicting of gang violence, the court held that reading about Mexican drug cartels in the prison library was a reasonable alternative. *See Murchison*, F.3d 779 at 887-88. Further, the Court indicated that a hypothetical blanket ban on *Newsweek* might have crossed the line of denying alternate means of accessing this specific material. *See Id.*; *See also Nichols*, 16 F.3d at 1228 (affirming declaratory judgment to a prisoner denied segregationist literature, who would have otherwise been deprived of any alternatives). A similar rule was defined in *Dawson*, which

upheld censorship of sexually explicit publications sent to individuals because there was no complete prohibition on such materials. *Dawson*, 986 F.2d at 261.

LCF has crossed the line that prisons in *Murchison* and *Dawson* managed to avoid. First, Warden Sherman banned all of Webster's *Sports Illustrated* and *CollegeJam* issues for three months, without case-by-case review of content, unlike in *Murchison*. Second, this ban extended not only to individuals, but also to the Dayrooms, unlike in *Dawson*. Taken together with the lack of non-mainstream, non-local coverage in newspapers and on television, Webster has been deprived of any alternative means to access such content.

C. Releasing *Sports Illustrated* and *CollegeJam* to Webster would not burden prison resources nor impact other prisoners.

Giving Webster access to *Sports Illustrated* and *CollegeJam* is administratively simple for LCF and will unlikely cause disruptive dissemination. The third *Turner Factor* favors prisoner accommodations with minimal impact on inmates, personnel, and resources. *See Thornburgh*, 490 U.S. at 418. While “ripple effects” are interpreted with deference to prison administrators, *id.*, this standard is most often met by accommodations that alter prison operating procedures, *see Goodwin v. Turner*, 908 F.2d 1395 (8th Cir. 1990), or allow dissemination of explicitly dangerous content, *see Dean v. Bowersox*, 591 F. App'x 523 (8th Cir. 2015) (affirming lower court).

First, Webster's request might have been burdensome if LCF were to shift from a blanket publication ban to a never-before practiced publication review policy. *Simpson v. Cty. of Cape Girardeau*, 879 F.3d 273 (8th Cir. 2018) (finding case-by-case monitoring too burdensome a

shift from an all-but-postcard ban). LCF has already delivered *Sports Illustrated* and *CollegeJam* to Webster for two years, thus should have no such burdens.

Second, given Webster's positive record, he is unlikely to personally cause disruptions or distribute the magazines. However, even if Webster's magazines were somehow disseminated, *Sports Illustrated* and *CollegeJam* are substantially different than materials typically indicative of troublesome "ripple effects," which include the likes of pornography, *see Sisney*, 15 F.4th at 1191, manuals on how to make weapons, and publications depicting drug use, *see Dean*, 591 F. App'x at 523. Even in the context of prisoner disputes fueled by sport team rivalries, two additional issues of sports magazines per month will be unlikely to inspire violence requiring significant use of prison resources.

Due to this lack of administrative burden and unlikely nature of harmful dissemination, the Court should weigh this factor for the unconstitutionality of LCF's actions.

D. LCF has at least one *de minimis* alternative to withholding *CollegeJam* and *Sports Illustrated* from Webster.

Webster's magazines were improperly withheld because they could have been placed in the LCF East Unit Dayrooms with minimal administrative or operational burden. The existence of obvious, easy alternatives may be evidence that a regulation is not reasonable but is an exaggerated response. *See e.g., Sisney*, 15 F.4th at 1191. Acceptable *de minimis* alternatives should not present additional administrative difficulty or require resource allocation, such as for space or staff oversight. *See Dawson*, 986 F.2d at 261.

It is conceded that Webster's proposed alternative for LCF PROs to cut out the *CollegeJam* article about his brother is not *de minimis*, as it poses administrative inconvenience and fairness concerns. *Thornburgh*, 490 U.S. at 418-19. However, placing at least one copy of each monthly issue of *Sports Illustrated* and *CollegeJam* in the Dayrooms can be done without imposing administrative difficulty. A common objection to the alternative of placing individually withheld materials in a reading room is the cost of designating space and staff to monitoring it. *See Murchison*, F.3d 779 at 892-93. However, if such a room exists, restricting otherwise prohibited materials to such a space has been deemed valid. *See Dawson*, 986 F.2d at 261.

LCF's Dayrooms function similarly to low security reading rooms. Placing one copy of *Sports Illustrated* and *CollegeJam* in each Dayroom would not require new space or staff oversight, concerns raised in *Murchison*. Adding one or two NCAA brackets to the existing newspaper brackets in a space shared by 48 inmates is unlikely to suddenly produce a much more competitive and distracting culture. Plus, utilizing shared spaces would address Warden Sherman's concern about differential treatment towards Webster. If disputes remain likely in Dorms R and T, this policy could be limited to the Dorm S Dayrooms.

Because restoring *Sports Illustrated* and *CollegeJam* to the Dayrooms is a *de minimis*, alternative, this factor weighs against the constitutionality of Defendant Sherman's ban.

CONCLUSION

The Court should deny the Defendant's motion for summary judgment.