December 1, 2020

Via Email

Orlando Harper, Warden
Allegheny County Jail
950 Second Avenue
Pittsburgh, PA 15219

Allegheny County Jail Oversight Board
Allegheny County Jail
950 Second Avenue
Pittsburgh, PA 15219

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Re: Allegheny County Jail Ban on Purchase of Books by Incarcerated Persons

Dear Warden Harper and Members of the Jail Oversight Board:

The ACLU of Pennsylvania, Abolitionist Law Center, and Pennsylvania Institutional Law Project are writing to express our concerns regarding the Allegheny County Jail's recent decision to ban the purchase of books by incarcerated persons or others on their behalf. We understand that the Jail has justified this policy change based on concerns about contraband and has pointed to the availability of books on jail-issued tablets and the jail library as sufficient to meet the needs of persons in its custody. But the Jail's tablets offer a very limited selection—a mere 214 ebooks and 49 religious ebooks—and are not an adequate substitute for access to a wide selection of books of an individual's own choosing. The new policy barring people incarcerated at the Jail from purchasing books effectively denies more than 1500 people in the Jail from access to the overwhelming majority of books in existence, and prevents those of us who wish to communicate with them through books from doing so. This restriction violates the U.S. and Pennsylvania Constitutions, is arbitrary and irrational, and reflects stunningly poor policy choices.

The First Amendment encompasses the right to send and receive books

The First Amendment encompasses the right to send and receive books. As explained by the U.S. Court of Appeals for the Seventh Circuit: Freedom of speech is not merely freedom to speak; it is also freedom to read. Forbid a person to read and you shut him out of the marketplace of ideas and opinions that it is the purpose of the free-speech clause to protect. *King v. Federal Bureau of Prisons*, 415 F.3d 634, 637 (7th Cir. 2005) (citations omitted) (reversing dismissal of prisoner's claim that he was denied book in violation of First Amendment); *see also Keenan v. Hall*, 83 F.3 1083, 1093 n. 3 (9th Cir. 1996) (noting "the importance of reading in a civilized society.").

Inherent in this principle is the notion that freedom to read includes meaningful choice and access to a broad range of options. Moreover, in a variety of contexts, courts have repeatedly reaffirmed the common-sense notion that there are "recognized rehabilitative benefits to permitting prisoners to receive educational reading material and maintain contact with the world outside the prison gates." *Clement v. California Dept. of Corrections*, 220 F.Supp.2d 1098, 1109-10 (N.D. Cal. 2002.

Restrictions of the sort at issue here implicate both the First Amendment rights of those who are incarcerated as well as the families, friends and organizations who wish to communicate with them. *Procunier v. Martinez*, 416 U.S. 396, 408–09 (1974). The First Amendment protection against "unjustified governmental interference" with communication applies to both the sender and the intended recipient. *Id.* (citing *Lamont v. Postmaster General*, 381 U.S. 301 (1965)). In communication by letter, "the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him." *Id.* It is no different with books, the gifting of which has communicative intent and effect. The same principles apply to publishers, authors or organizations who want to share books, whether to educate, entertain, rehabilitate, or help individuals survive prison. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 408 (1989); *Montcalm Publishing Co. v.*
Beck, 80 F. 3d 105, 109 (4th Cir. 1996) (publishers' First Amendment rights are implicated where they are denied the right to direct their books to prison audiences).

The new restrictions violate the First Amendment

Although these rights may be more limited in the prison context than in free society, restrictions impinging upon constitutional rights will be upheld only if "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). To determine whether a regulation satisfies this standard, a court considers: (1) whether there is a valid, rational connection between the regulation and a legitimate government interest; (2) the availability of alternate means of exercising the right; (3) the impact accommodating the right would have upon prison resources; and (4) whether there are obvious, easy alternatives that accommodate the right at de minimis cost to valid penological interests. *Id.* at 89–91.

Based on our review of how courts have applied the Turner factors in other cases and our understanding of the Jail's policy, we do not believe that restrictions of this breadth and depth on access to books can withstand constitutional scrutiny. The rules severely and impermissibly infringe upon prisoners' First Amendment right to read books and on the rights of third parties—families, friends, organizations, and the like—to reach prisoner audiences. *See, e.g., Crofton v. Roe*, 170 F.3d 957 (9th Cir.1999) (categorical ban on gift orders of books and other publications violated First Amendment). Among regulations affecting access to publications, "[r]egulations to be viewed with caution include those which categorically prohibit access to a broad range of materials." *Ashker v. Schwarzenegger*, 2006 WL 648725, 4 (N.D. Cal. 2006) (citations omitted) (finding ban on hardcover books for prisoners in special housing unit unconstitutional), aff'd 339 Fed.Appx. 751 (9th Cir. 2009). Courts have thus more closely scrutinized book restrictions when they swallow up large swaths of reading material, *see, e.g., Ashker v. California Dep't of Corrections*, 224 F.Supp.2d 1253 (N.D. Cal. 2002) (vendor label rule that caused plaintiff denials of access to books failed to satisfy *Turner v. Safley*); *Keenan v. Hall*, 83 F.3d 1083 (9th Cir. 1996) (reversing grant of summary judgment and emphasizing likelihood of success on remand of prisoner's claim that publisher-only rule for publications other than hardcover books violated First Amendment); *Spellman v. Hopper*, 95 F.Supp.2d 1267 (M.D. Ala. 1999) (rejecting as unconstitutional ban on subscription magazines and newspapers for individuals on administrative segregation status), as well as when they cause particular titles to be entirely unavailable. *See, e.g., Kikumura v. Turner*, 28 F.3d 592 (7th Cir. 1994) (reversing grant of summary judgment in First

Amendment challenge to practice of prohibiting prisoners from receipt of any foreign language book); *Figel v. Overton*, 121 Fed. Appx. 642, 645-46 (6th Cir. 2005) (reinstating challenge to denial of book because sending organization was not approved vendor was arbitrary and violation of First Amendment). The new restrictions are irrational, arbitrary and an exaggerated response to security concerns.

The Allegheny County Jail, of course, already forbids receipt of books from any source other than BarnesandNoble.com and ChristianBooks.com. Ostensibly, the purpose of the new categorical prohibition on all third-party orders of books is to keep out contraband that might be hidden in books even when sent from bona fide booksellers. This response is so broad and so excessive relative to any actual risk that it is irrational. *Cf. Jones v. Brown*, 461 F.3d 353, 361 (3rd Cir. 2006) ("[W]hile it was true that legal mail conceivably might contain such plans [to escape] and the opening of it might conceivably thwart those plans, the risk allegedly addressed was too insubstantial to justify incursion on First Amendment interests.").

In all but the rarest of cases, attempts to send books or obtain books are innocuous, genuine attempts at making available books that are otherwise actually or practically unavailable to people in your custody. Nearly none of them will contain contraband. Indeed, for large institutional sellers like Barnes and Noble, which sells literally millions of books per year, there would be no feasible way for someone outside the prison to know which employees would handle any particular order for a particular prisoner such that they could be induced to introduce contraband into the book or package. For reasons such as these, courts confronted with categorical prohibitions on gift books have rejected them on First Amendment grounds. *See Crofton v. Roe*, 170 F.3d 957 (9th Cir.1999) (categorical ban on gift orders of books and other publications violated First Amendment); *Jacklovich v. Simmons*, 392 F.3d 420 (10th Cir. 2004) (reversing grant of summary judgment in case involving categorical ban on gift publications). Likewise, prohibiting prisoners from ordering books from any source is equally arbitrary. In the most simplistic sense, eliminating opportunities for communications and goods from outside prison walls, whether from vendors, families, or staff, can be said to decrease opportunities for contraband to be introduced. But this kind of formalistic argument is not sufficient. *See, e.g.*, *Beard v. Banks*, 548 U.S. 521, 535 (2006) ("*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective."). To the extent there is some tiny fraction of cases in which attempts are made to imitate legitimate sellers, we caution the Jail against making policy based on the rare and exceptional case. *Cf. Prison Legal News v. County of Ventura*, 2014 WL 2736103, 5 (C.D. Cal. 2014) (concluding that rather than "rational" relationship between postcard-only policy and reducing contraband, policy smacked of "arbitrariness and irrationality" because concerns were largely theoretical and "no inspection system is foolproof").

Under the new rules, the only way people in the Jail can access books is via tablet or the Jail's library. The selection of books available on the tablets is extremely limited, and incarcerated persons have reported that the tablets must be used standing by the cell door to access the wifi. The challenges individuals face in accessing what is available in the jail library or through Overdrive on the tablets also fails to come close to compensating for this extraordinary loss of access to the broader world of books. Nor is access to a library book or e-library book—which is time-limited, must be returned, and can't be marked-up—equivalent to possessing it.

Any arguable security benefit is offset by the new risks the rules create. Depriving incarcerated persons of opportunities to read and limiting their ability to do so is fundamentally at odds with the rehabilitative ideal. Education is widely recognized as one of the most powerful deterrents of institutional misconduct and recidivism, as are familial and other community connections. The latter have been severely curtailed due to the COVID-19 pandemic, making it even more important that individuals incarcerated in the Jail have access to a wide range of books during this time.

There are easy alternatives to the Jail's book purchase ban that have minimal impact on prison resources. If a prison regulation fails to satisfy the first Turner factor, as we believe is the case here, no additional analysis required. *See, e.g.*, *Hrdlicka v. Reniff*, 631 F.3d 1044, 1051 (9th Cir. 2011) ("The first Turner factor is a sine qua non: If the prison fails to show that the regulation is rationally related to a legitimate penological objective, we do not consider the other factors.") (citation and quotations omitted). But even assuming for the sake of argument that some rational relationship exists between the ban on books and legitimate penological interests, the new restrictions fail Turner's remaining considerations.

Because of their breadth and the lack of alternatives, the policy vastly reduces book availability by making most books nearly impossible to obtain. When book restrictions have been upheld, courts have given great weight to the availability of alternative means of obtaining a range of books, as well as whether the restrictions were temporary in nature. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 551-52 (1979) (emphasizing that ruling decided "narrow" question of constitutionality of rule prohibiting receipt of hardback books unless they came from any bookstore, book club or publisher, noting all other books were permitted and stays at the jail in question were limited to fewer than 60 days). Courts have also been clear that "alternatives" in this context must be genuine substitutes for the content of the prohibited material. *See, e.g.*, *Ashker v. Schwarzenegger*, 2006 WL 648725, 5 (N.D. Cal. 2006) (in concluding that prohibition on hardcover books was unconstitutional, observing that "While Defendant states that millions of books are available in paperback, Defendant does not refute that, as noted in declarations submitted by Plaintiffs and other inmates, many books are not available in paperback, especially educational, legal and resource books."); *see also Koger v. Dart*, 114 F.Supp.3d 572, 580-81 (N.D. Ill. 2015) (in finding prohibition of newspapers violative of First Amendment, noting that books and correspondence were not properly characterized as "alternative" to newspapers due to distinctions in nature and type of content).

The new restrictions reduce access by individuals incarcerated in Allegheny County on an extraordinarily significant scale—from the millions of books available through BarnesandNoble.com and ChristianBooks.com to a few hundred books available on the tablets. Most critically, the new rules leave family or community members wishing to communicate through books—to send a loved one a book about grief after the passing of a family member, to send a self-help book to repair a relationship, or to share the experience of reading a novel together, or any other number of ways in which people communicate and associate through books—without any alternative at all.

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The Jail's senseless and harsh new restriction on books is utterly inconsistent with the First Amendment and reflects poor policy. The policy renders Allegheny County an outlier in corrections systems in the degree to which it limits access to books and the ability to provide incarcerated persons with books. Given the critical importance of these issues, we urge you to immediately rescind the policy. Please respond by **Monday, December 7, 2020.** If you have any questions or would like to talk in the meantime, please contact Sara Rose by email at srose@aclupa.org or by phone at (412) 681-7736 x328. We look forward to hearing from you by the appointed date.

Sincerely,

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