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VIA U.S. AND ELECTRONIC MAIL

January 22, 2018

Jane Gilchrist
General Counsel
North Carolina Department of Public Safety
4201 Mail Service Center
Raleigh, NC 27699-4201

RE: NC DPS Unconstitutional Ban on *The New Jim Crow*

Ms. Gilchrist:

The American Civil Liberties Union of North Carolina Legal Foundation (ACLU-NCLF) is dedicated to protecting and advancing the civil rights and liberties guaranteed by our state and federal constitutions, including those of individuals currently incarcerated in North Carolina. Our office recently received reports that Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* has been banned from state prisons. Media reporting¹ as well as the North Carolina Department of Public Safety (NC DPS) *Master List of Disapproved Publication* (sic)² indicate that this is the case. This letter highlights how this ban violates analogous federal and state constitutional protections as well as NC DPS policy on point and seeks the book's immediate restoration.

Banning *The New Jim Crow* Violates Prisoner Constitutional Rights and DPS Policy

The ban on *The New Jim Crow* violates the right to freedom of expression guaranteed by the First Amendment to the United States Constitution and Article I, Section 14 of the North Carolina Constitution³ as well as governing DPS policies.

¹ See, e.g., Jonah Engel Bromwich, *Why Are American Prisons So Afraid of this Book?*, New York Times, Jan. 18, 2018, available at <https://www.nytimes.com/2018/01/18/us/new-jim-crow-book-ban-prison.html>.

² NC DPS, *Master List of Disapproved Publication* (sic), pp. 10, available at http://www.bookstoprisoners.net/wp-content/uploads/2015/06/NC_complete_banned_list.pdf.

³ The protections offered by the federal and state constitutions on point are broadly overlapping. *Munn-Goins v. Bd. of Trustees of Bladen Cmty. Coll.*, 658 F.Supp.2d 713, 730 (E.D.N.C. 2009) ("The standards for free-speech claims under the North Carolina Constitution are substantially identical to those free-speech claims under the federal constitution."); see also *State Petersilie*, 334 N.C. 169, 184 (1993) ("Our State Constitution offers similar free speech protections [to those in the federal constitution] in Article I, Section 14."). Accordingly, these federal and state protections are discussed jointly.

The United States Supreme Court has made plain that “prison walls do not form a barrier separating prison inmates from the protections of the Constitution[.]”⁴ When touching upon the First Amendment rights of prisoners, “there must be a valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it.”⁵ “Thus, a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational[.]” or it constitutes “an exaggerated response to prison concerns.”⁶ Additionally, “the Court has frequently reaffirmed that speech on public issues occupies the highest rung of First Amendment values, and is entitled to special protection.”⁷

The NC DPS Division of Prisons *Policy and Procedure Manual* serves to further illuminate the line between a reasonable regulation and an impermissible restriction. The Division of Prisons, of course, “is required to maintain institution security for both inmates and staff members[.]”⁸ At the same time, a “publication may not be rejected solely because its content is religious, philosophical, political, social or sexual, or because its content is unpopular or repugnant.”⁹ Thus, facilities can bar how-to manuals about lock-picking¹⁰ but not materials reporting “actual news and events” or “appeal[ing] to a particular ethnic, racial, or religious group.”¹¹

The New Jim Crow is a seminal work on the topic of race and mass incarceration and, as such, it is entitled to the highest level of protection pursuant to the First Amendment. Racial bias in our criminal justice system in general and in our prisons and jails in particular is a topic of robust public debate, and often agreement, across the ideological spectrum.¹² This discussion does not stop at the prison gate.¹³ And, in the words of former NAACP president and CEO Benjamin Todd Jealous, “Alexander’s book offers a timely and original framework for understanding mass incarceration[.]”¹⁴ *The New Jim Crow*’s appearance on the *New York Times* bestseller list speaks both to its significant contribution to the public discourse and the resonance of its subject matter.

⁴ *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

⁵ *Turner*, 482 U.S. at 89 (internal quotation marks omitted).

⁶ *Id.* at 89-90 (internal quotation marks omitted).

⁷ *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

⁸ NC DPS Division of Prisons, *Policy and Procedure Manual*, Chapter D, section .0109(a).

⁹ *Id.*

¹⁰ *Id.* at Chapter D, section .0109(f)(B) (barring materials describing “escape techniques”).

¹¹ *Id.* at Chapter D, section .0109(a).

¹² See, e.g., Sen. Kamala Harris (D-California) and Sen. Rand Paul (R-Kentucky), *To Shrink Jails, Let’s Reform Bail*, *New York Times*, Jan. 17, 2017, available at <https://www.nytimes.com/2017/07/20/opinion/kamala-harris-and-rand-paul-lets-reform-bail.html> (“Meanwhile, black and Latino defendants are more likely to be detained before trial and less likely to be able to post bail compared with similarly situated white defendants.”).

¹³ *Why Are American Prisons So Afraid of this Book?*, supra n.1 (former prison administrator: “Frankly, most prison officials talk very openly about the overrepresentation of minorities.”).

¹⁴ <http://newjimcrow.com/praise-for-the-new-jim-crow>.

Media reports indicate that *The New Jim Crow* has been banned from North Carolina prisons as “likely to provoke confrontation between racial groups[.]”¹⁵ an assertion belied by reality and, therefore, insufficient to justify NC DPS’s censorship. While the hardly monolithic Texas prison system bars nearly 10,000 titles to prisoners in state custody,¹⁶ *The New Jim Crow* is conspicuously absent. In fact, it is on a separate list of affirmatively *approved* publications.¹⁷ New Jersey reversed a ban on the book at two of its prisons mere hours after receiving a request for its restoration; in the words of a spokesperson for the New Jersey Department of Corrections, “officials determined that the book should not have been banned, as evidenced by the fact that it is being utilized as a teaching tool for NJ-STEP [New Jersey Scholarship and Transformative Education in Prisons Consortium] students.”¹⁸ There is nothing incompatible about operating a safe prison and allowing publications such as *The New Jim Crow*. Instead, publications on mass incarceration simply underline a reality that prison officials and prisoners experience daily: communities of color are disproportionately incarcerated in North Carolina and the United States. Though less than a quarter of our state’s population, 52.02% of the current state prison population is Black.¹⁹ Evincing skepticism for North Carolina’s ban on *The New Jim Crow*, Roger Werholtz, who served as secretary of corrections in Kansas and as interim director of corrections in Colorado,

¹⁵ *Why Are American Prisons So Afraid of this Book?*, supra n.1. The provision in question allows the banning of publications that “depict, describe or advocate . . . violence against any ethnic, racial or religious group or which reasonably appears likely to provoke or to precipitate a violent confrontation between recipient or recipients or any other inmate in possession of same and a member of the target group.” *Policy and Procedure Manual*, supra note 8 at Chapter D, section .0109(f)(H). *The New Jim Crow* is “a much needed conversation” starter “about the wide-ranging social costs” associated with mass incarceration, not a bigoted call to violence. <http://newjimcrow.com/praise-for-the-new-jim-crow> (quoting *Newsweek* review of the book). Applying this standard in this fashion highlights both its hopeless subjectivity as well as its staggering overbreadth and would result in vast swaths of literature and non-fiction touching upon racism to fall prey to the censor. “The First Amendment prohibits the vesting of such unbridled discretion in a government official.” *Forsyth Cty., Ga. v. Nationalist Movement*, 505 U.S. 123, 133 (1992).

¹⁶ Matthew Haag, *Texas Prisons Ban 10,000 Books. No ‘Charlie Brown Christmas’ for Inmates*, *New York Times*, Dec. 7, 2017, available at <https://www.nytimes.com/2017/12/07/us/banned-books-texas-prisons.html>. As the title of the *New York Times* article implies, the scope of the book ban in Texas prisons is vastly overbroad. And, yet, it still does not include *The New Jim Crow*.

¹⁷ Lauren McGaughey, *Why Do Texas Prisons Ban ‘Freakonomics’ But Not Adolf Hitler’s ‘Mein Kampf’?*, *Dallas Morning News*, Nov. 27, 2017, available at <https://www.dallasnews.com/news/crime/2017/11/27/texas-prisons-ban-freakonomics-big-book-angels-adolf-hitlers-mein-kampf>.

¹⁸ Jonah Engel Bromwich & Benjamin Mueller, *Bank on Book About Mass Incarceration Lifted in New Jersey After A.C.L.U. Protest*, *New York Times*, January 8, 2018, available at <https://www.nytimes.com/2018/01/08/nyregion/new-jim-crow-nj-jails.html>.

¹⁹ A January 19, 2018, search of the NC DPS Offender Public Information online portal indicated North Carolina’s total prison population was 37,046, of which 19,273 were Black. *See also* NC DPS Research Bulletin, February 2017, pp. 2 (indicating a total state prison population at the end of 2016 of 36,462, of which 19,255, or 53%, was Black).

noted “[t]hat’s not anything you don’t see in the newspapers. Frankly, most prison officials talk very openly about the overrepresentation of minorities.”²⁰

As NC DPS itself recognizes, censoring prisoner access to publications that grapple with matters of public interest, such as *The New Jim Crow*, merits heightened scrutiny. The fact that other prison systems permit the book undermines the connection between the legitimate interest in safety and this exercise in censorship. Barring *The New Jim Crow* from our state’s prisons because it shines a light on a harsh reality confronted every day by Black prisoners in North Carolina is not only indefensible as a matter of constitutional rights, DPS policy, and logic but also cruelly ironic.

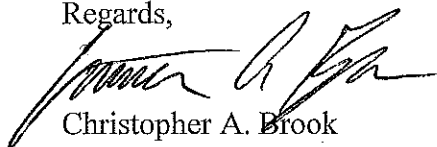
Conclusion

For the foregoing reasons, we seek the following:

- The immediate removal of *The New Jim Crow* from the NC DPS *Master List of Disapproved Publication* (sic).
- The immediate communication to state prison administrators that *The New Jim Crow* has been removed from the NC DPS *Master List of Disapproved Publication* (sic) and that henceforth this publication should not be censored.
- Pursuant to the North Carolina Public Records Act, all records and communications preserved in electronic or written form held by NC DPS and its employees pertaining to the *Master List of Disapproved Publication* (sic) in general and to the ban on *The New Jim Crow* in particular. Please comply with this request by February 22, 2018.
- A prompt DPS review of its *Master List of Disapproved Publication* (sic) to ensure its compliance with constitutional guarantees and internal policies. Even a cursory review of the list raises questions about a number of other publications currently banned, e.g. *Percy Jackson’s Greek Gods* by Rick Riordan, *How to Draw and Paint Birds* by Maury Asseng, and ESPN’s *College Basketball Encyclopedia*.²¹ Please update our office on the status of this review by February 22, 2018.

Thank you for your attention to this matter. If you have any questions, would like to discuss it further, or believe that any of the above information is incorrect, please feel free to contact our office. We look forward to working with you to ensure DPS fulfills its obligations to safeguard prisoners’ constitutional rights in our state.

Regards,



Christopher A. Brook
Legal Director
ACLU-NCLF

²⁰ *Why Are American Prisons So Afraid of this Book?*, supra n.1.

²¹ *Master List of Disapproved Publication* (sic), supra note 2, pp. 6-8.