

No. 20-15642

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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EDWARD LEE JONES, JR.,

*Plaintiff-Appellant,*

v.

SHAWNA SLADE, ET AL.

*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the District of Arizona  
No. 2:18-cv-02034-MTL-JZB  
The Honorable Judge Michael T. Liburdi

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**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND  
AMERICAN CIVIL LIBERTIES UNION OF ARIZONA IN SUPPORT OF  
PLAINTIFF-APPELLANT**

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Emerson Sykes  
Vera Eidelman  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
Tel.: (212) 549-2500  
esykes@aclu.org  
veidelman@aclu.org

Corene Kendrick  
American Civil Liberties Union  
Foundation  
39 Drumm Street  
San Francisco, CA 94111  
Tel.: (202) 393-4930  
ckendrick@aclu.org

*Additional Counsel Listed on Following Page*

*On the Brief:*

Victoria Lopez  
American Civil Liberties Union  
Foundation of Arizona  
P.O. Box 17148  
Phoenix, AZ 85011  
Tel.: (602) 650-1854  
vlopez@aclu-az.org

Daniel Mach  
Heather L. Weaver  
American Civil Liberties Union  
Foundation  
915 15<sup>th</sup> Street, NW  
Washington, DC 20005  
Tel.: (212) 675-2330  
hweaver@aclu.org  
dmach@aclu.org

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* American Civil Liberties Union and American Civil Liberties Union of Arizona state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: February 10, 2021

By: /s/ Emerson Sykes  
Emerson Sykes

*Counsel for Amici Curiae*

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## STATEMENT OF INTEREST<sup>1</sup>

The American Civil Liberties Union (“ACLU”) is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation’s civil rights laws. The American Civil Liberties Union of Arizona is a statewide, nonprofit, non-partisan organization with over 20,000 members and is the state affiliate of the national ACLU. The ACLU and its chapters and affiliates have appeared in numerous cases to defend the First Amendment rights of people in prison. This includes appearing as counsel in *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) and *Clement v. Calif. Dep’t of Corr.*, 364 F.3d 1148, 1150 (9th Cir. 2004), and as amici in *Holt v. Hobbs*, 574 U.S. 352 (2015) and *Prison Legal News v. Lehman*, 397 F.3d 692, 695 (9th Cir. 2005). As organizations committed to protecting the right to freedom of speech and religion, and promoting a fair and effective criminal legal system, amici have a strong interest in the proper resolution of this case.

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(c), amici certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The Plaintiff consents, and the Defendants do not object, to the filing of this amicus brief.



## **SUMMARY OF ARGUMENT**

For years, the Arizona Department of Corrections, Rehabilitation and Reentry (commonly, “ADC”) has enforced a series of facially unconstitutional policies governing books, music, and other media that—operating together—deny prisoners access to a wide range of works protected by the First Amendment, including political and religious materials that speak directly to the social condition of Black people in this country.

Plaintiff Edward Lee Jones, Jr., a practicing Muslim and Black man who is currently incarcerated in the Arizona State Prison Complex (“ASPC”) at Eyman, has experienced first-hand the substantial limitations that these policies place on prisoners’ access to certain types of literature and music: ADC officials have refused his requests to obtain six rap and R&B CDs and two religious books. According to ADC officials, the requested music and literature constitute contraband in violation of various provisions of ADC Departmental Order (“DO”) 914.07, which controls the content that people in Arizona prisons can receive, send, and possess. Specifically, ADC claims that two books—religious texts written by the founder of the Nation of Islam, Elijah Muhammad—impermissibly espouse “racist” ideas or advocate “religious oppression.” 2-ER73, 75; DO 914.07 § 1.2.8. ADC also claims that Mr. Jones’s six CDs—all recordings of rap or R&B music by Black artists—violate content policies because the lyrics are sexually explicit (DO 914.07 § 1.2.17),

violent (DO 914.07 § 1.2.16), gang- (DO 914.07 § 1.2.4), or drug-related (DO 914.07 § 1.2.7).<sup>2</sup>

But these content policies, which Defendants rely on to prohibit works by Black Muslim religious leaders and Black musicians, are unconstitutional on their face: There is no “valid, rational connection between the prison regulation[s] and the legitimate government interest[s] put forward to justify [them],” *Turner v. Safley*, 482 U.S. 78, 89 (1987) (citation and quotation marks omitted), or they are overbroad.

**First**, ADC’s prohibition on racist content, DO 914.07 § 1.2.8, is facially unconstitutional and runs afoul of this Court’s precedent, because it bans publications based on the viewpoint expressed—a constitutional third rail—rather than the effect the publications will have on the functioning of the prison.

**Second**, ADC’s blanket prohibition on sexually explicit materials, which encompasses *any* depiction of nudity or sex in *any* media, is facially overbroad, as are ADC’s policies banning violent, gang- and drug-related content.

**Finally**, Mr. Jones’s experience illustrates what happens when facially unconstitutional policies like ADC’s go unchecked by government officials and

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<sup>2</sup> In total, ADC’s unauthorized content policy includes 20 separate categories of prohibited materials, covering a staggering range of publications. *See* Ariz. Dep’t of Corr., *Department Order 914.07*, [https://corrections.az.gov/sites/default/files/policies/900/0914\\_032519.pdf](https://corrections.az.gov/sites/default/files/policies/900/0914_032519.pdf)

courts: Incarcerated people are afforded less access—indeed, often no access—to viewpoints prison officials reject. Wielding the broad discretion accorded by these policies, ADC restricts Mr. Jones’s ability to obtain religious texts and musical works that address and reflect the Black American experience. ADC did not offer any proof that these materials “in fact implicate legitimate security concerns,” *Hargis v. Foster*, 312 F.3d 404, 410 (9th Cir. 2002), as is required, but rather censored them purely because of their messages and themes. Simply put, ADC does not have the authority to ban all music or books that speak to these issues. Indeed, such speech occupies “the highest rung of the hierarchy of First Amendment values and is entitled to special protection.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

## ARGUMENT

### **I. ADC’s Content Policies Are Facially Unconstitutional.**

The Supreme Court has recognized that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner*, 482 U.S. at 84. Incarcerated persons have rights under the First Amendment, which “protects the flow of information to prisoners.” *Crofton v. Roe*, 170 F.3d 957, 959 (9th Cir. 1999); *see also Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1151 (9th Cir. 2004) (per curiam) (holding that incarcerated persons’ First Amendment “right to receive information” includes the “right to receive publications.”). While “courts owe

‘substantial deference to the professional judgment of prison administrators,’” *Beard v. Bank*, 548 U.S. 521, 528 (2006) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)), prison administrators’ discretion is not unlimited. “Deference does not imply abandonment or abdication of judicial review.” *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

A policy banning content in prison is unconstitutional on its face unless prison officials can demonstrate that the censorship is “reasonably related to legitimate penological interests.” *Turner*, 482 U.S. at 89. To determine whether that requirement has been met, courts look to four factors. The first considers whether there is a “valid, rational connection between the prison regulation and the legitimate government interest put forward to justify it.” *Id.*<sup>3</sup> “[I]f a regulation is not rationally related to a legitimate and neutral governmental objective, a court need not reach the remaining three factors.” *Prison Legal News v. Lehman*, 397 F.3d 692, 699 (9th Cir. 2005).

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<sup>3</sup> The three other factors identified in *Turner* are “whether there are alternative means of exercising the right that remain open to prison inmates,” 482 U.S. at 90, “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally,” *id.*, and “whether the policy is an ‘exaggerated response’ to the jail’s concerns,” *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) (citation omitted). *See also O’Lone v. Estate of Shabazz*, 482 U.S. 342, 350–52 (1987) (elaborating on the *Turner* standard).

Prison censorship policies that sweep far beyond materials that might rationally be prohibited are “facially overbroad.” *Prison Legal News v. Ryan*, No. CV-15-02245-PHX-ROS, 2019 WL 1099882, at \*11 (D. Ariz. Mar. 8, 2019), *pending appeal*, Case No. 19-17449. So, too, a prison regulation is unconstitutional unless it includes sufficient clarity, procedural safeguards, and limitations on official discretion to avoid arbitrary enforcement. ADC’s policies regulating racist, sexually explicit, violent, gang-related, and drug-related content run afoul of these core First Amendment principles. Each is facially unconstitutional.

**A. ADC’s ban on racist and political materials is facially unconstitutional.**

DO 914.07 § 1.2.8 prohibits “[c]ontent that is oriented toward and/or promotes racism and/or religious oppression and the superiority of one race/religion/political group over another, and/or the degradation of one/religion/political group over another, and/or the degradation of one race/religion/political group by another.” Defendants improperly relied on this policy to prohibit Mr. Jones from reading or receiving *The Fall of America* and *Message to the Blackman in America*.

In *Turner*, the Supreme Court emphasized that, in evaluating whether a prison policy satisfies the first threshold factor, it is “important to inquire whether [the] regulation[ ] restricting inmates’ First Amendment rights operated in a neutral

fashion, without regard to the content of the expression.” 482 U.S. at 90. This means that the regulation “must further an important or substantial governmental interest unrelated to the suppression of expression.” *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989). Courts have thus upheld content regulations in the prison context where they rest on the detrimental effects the content may have on prison administration. *See, e.g., id.* at 415–16 (“Where ... prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, the regulations are ‘neutral’ in the technical sense in which we meant and used that term in *Turner*.”); *see also, e.g., Bahrapour v. Lampert*, 356 F.3d 969, 976 (9th Cir. 2004) (holding that “categorical restrictions” on content in Oregon prison were neutral because they “target[ed] the effects of the particular types of materials, rather than simply prohibiting broad selections of innocuous materials”).

But ADC’s ban on racist and political content in Section 1.2.8 is not tethered to concerns about prison administration or any other important governmental interest. Rather, it targets materials based solely on the viewpoints expressed and effectively “invite[s] prison officials and employees to apply their own personal prejudices and opinions as standards for . . . censorship.” *See Martinez v. Procnier*, 416 U.S. 396, 415 (1974) (holding that a policy prohibiting prisoner correspondence expressing “inflammatory political, racial, religious or other views, and matter deemed defamatory or otherwise inappropriate” was unconstitutional), *overruled on*

*other grounds by Thornburgh*, 490 U.S. 401(1989). As reprehensible as some viewpoints may be, prison officials may not bar access to them merely because they may be offensive to others. *See, e.g., McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir. 1987) (holding that literature advocating racial purity “cannot be constitutionally banned as rationally related to rehabilitation” unless it also advocated violence or illegal activity); *Chirecol v. Phillips*, 169 F.3d 313, 316 (5th Cir. 1999) (holding that a total ban on Aryan National materials was too restrictive, but a policy limiting materials that are racially inflammatory or advocate violence would be valid); *Murphy v. Missouri*, 814 F.2d 1252, 1256–57 (8th Cir. 1987) (same).<sup>4</sup>

Indeed, even if some subset of the materials banned by Section 1.2.8 were properly regulable due to prison administration concerns, the policy would nevertheless be facially unconstitutional because it is overbroad. The policy would ban not only, for example, reprehensible racist screeds such as *Mein Kampf* (though ironically, that text is notably missing from ADC’s list of prohibited publications), but also books about—but not promoting—racist ideology such as Alessandra

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<sup>4</sup> *Cf. Matal v. Tam*, 137 S. Ct. 1744, 1749, (2017) (holding that a music group’s name “The Slants,” which can also be a racial slur, was protected by the First Amendment, because “[g]iving offense is a viewpoint” and the government is prohibited from discriminating on the basis of viewpoint); *see also Iancu v. Brunetti*, 139 S. Ct. 2294 (2019) (extending *Tam* to protect a fashion label whose name, FUCTION, is pronounced like a common profanity).

Minerbi's *The Illustrated History of the Nazis*.<sup>5</sup> The ADC's application of this policy makes this overreach clear. Somehow, for example, ADC has determined that *The Illustrated Bible Story by Story* intended for readers "young and old" also runs afoul of its policies regarding religious publications.<sup>6</sup> And ADC's prohibition on content "oriented toward ... the superiority ... of one political group over another" is presumably<sup>7</sup> the justification for banning multiple issues of *Newsweek*, the widely-circulated German news magazine *Der Spiegel*, and *The New Yorker*.<sup>8</sup> Whatever one thinks of these journalistic outlets, it is hard to imagine why a prison might rationally perceive them as a threat to the safety and security of the facility, and the unchecked discretion given to prison officials to ban them under Section 1.2.8 is just another reason the policy does not pass muster under the First Amendment.

The district court failed to analyze the facial validity of Section 1.2.8, instead relying on the stated purpose of the entirety of DO 914.07 as sufficient to satisfy the first *Turner* factor for all provisions of that policy. In one cursory sentence, the district court summarily held "the policy is neutral on its face—there is nothing to indicate that the aim of the policy is to suppress speech." 1-ER12. But this Court has

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<sup>5</sup> Jimmy Jenkins, *More Than 5,000 Publications Banned in Arizona Prisons*, KJZZ.org (Oct. 8, 2019), <https://kjzz.org/content/1213811/more-5000-publications-banned-arizona-prisons>

<sup>6</sup> *Id.*

<sup>7</sup> ADC's list of banned publications contains only the title and the date banned.

<sup>8</sup> *Id.*



held that prison officials may not rely upon “reflexive, rote assertions” to justify infringing on incarcerated persons’ constitutional rights. *Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001), *cert. denied* 537 U.S. 812 (2002) (citation omitted). The district court erred by not requiring any evidence of a legitimate penological goal beyond one sentence in the preamble of the DO. It ignored the text of Section 1.2.8, which is entirely untethered from any impact on prison administration.

**B. ADC’s bans on sexually explicit materials are facially unconstitutional.**

ADC’s policy banning publications in any medium that contain nudity or sexual content is facially overbroad in violation of the First Amendment. DO 914.07 addresses sexually explicit content in two sections relevant to this case. Section 1.2.17 prohibits content that “could reasonably be anticipated to, could reasonably result in, is or appears to be intended to cause or encourage sexual excitement or arousal or hostile behaviors,” or “that depicts sexually suggestive settings, poses or attire.”<sup>9</sup> In addition, Section 1.2.2.3 prohibits “[p]ublications that depict any of the following acts and behaviors in either visual, audio, or written form . . . [s]exual intercourse, vaginal or anal, fellatio, cunnilingus, bestiality or sodomy.”

Importantly, ADC glossary requires the prison to censor “sexually explicit materials” in any possible medium—“[a]ny publication, drawing, photograph, film,

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<sup>9</sup> DO 914.07, *supra* note 2

negative, motion picture, figure, object, novelty device, recording, transcription, or any book, leaflet, catalog, pamphlet, magazine, booklet or other item.”<sup>10</sup> And, contrary to what one might expect from the phrase “sexually explicit” itself, it is defined not as prurient or even pornographic material, but rather as anything “pictorially or textually depict[ing] nudity of either gender, or homosexual, heterosexual, or auto-erotic sex acts.”<sup>11</sup>

In this case, as with Section 1.2.8, the district court failed to evaluate the constitutionality of Sections 1.2.2.3 or 1.2.17 on their faces and did not consider the expansive glossary definition of “sexually explicit materials” at all. This was in error.<sup>12</sup>

Recently, a different Arizona district court judge assessed these same provisions and held that they are unconstitutional. The court recognized that the policy’s capacious definition of sexually explicit materials “effectively reads ‘explicit’ out of the policy.” *Prison Legal News v. Ryan*, 2019 WL 1099882 at \*11.

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<sup>10</sup>Ariz. Dep’t of Corr., *Glossary of Terms*, [https://corrections.az.gov/sites/default/files/policies/glossary\\_of\\_terms.pdf](https://corrections.az.gov/sites/default/files/policies/glossary_of_terms.pdf)

<sup>11</sup> *Id.*

<sup>12</sup> In a footnote in this case, the district court referenced *Prison Legal News v. Ryan*, but declined to analyze the constitutionality of Section 1.2.17, reasoning that it was not “dispositive of this case” as no content in question had been excluded based only on this provision. 1-ER8. To the contrary, because ADC relied on multiple provisions to ban materials, the court is obligated to look at each provision to determine its validity.

It held that “[a] policy that prohibits all written and visual depictions of sex, and even prohibits content that *may* cause or encourage sexual arousal, is facially overbroad.” *Id.* The court also highlighted that ADC’s prohibition—the same one that was presented to the district court in Mr. Jones’s case—would reach everything from “articles about the Me Too movement” to “Maya Angelou’s *I Know Why the Caged Bird Sings*” to “a *New Yorker* review of a scholarly biography of Sigmund Freud” to “a Mayo Clinic newsletter that contained a medical illustration of a hernia” to “self-portraits by former President George W. Bush.” *Id.* Given this overbreadth, the court determined that “[n]o reasonable trier of fact would conclude that such broad censorship is rationally related to furthering ADC’s penological interests.” *Id.*

While this Court upheld a Maricopa County jail policy prohibiting “sexually explicit materials” in *Mauro v. Arpaio*, 188 F.3d 1054 (9th Cir 1999), the policy at issue there is easily distinguishable. That policy was limited to *images* depicting nudity. As this Court recognized in reaching its holding, “sexually explicit articles [and] photographs of clothed females” were permitted. *Id.* at 1061. Other circuits have similarly allowed restrictions on nude *images* where written alternatives were still allowed. *See Amatel v. Reno*, 156 F.3d 192 (D.C. Cir. 1998) (holding that a policy banning nude and sexually explicit photos, but allowing explicit reading material, was constitutional); *Dawson v. Scurr*, 984 F.2d 257 (8th Cir. 1993) (upholding policy that banned publications featuring depictions of certain specified

acts, but allowed prisoners to access other explicit materials in designated areas). In contrast, ADC's broad policy bans sexually explicit messages in *any* medium.

Despite the deferential nature of the *Turner* inquiry, a policy as broad as ADC's prohibition on sexually explicit materials—covering all sexual content and nudity in any form—cannot pass constitutional muster.

**C. ADC's bans on violent, gang-related, and drug-related materials are facially unconstitutional.**

In denying Mr. Jones's requested musical materials, ADC also cited Section 1.2.4, which prohibits “[d]epictions and descriptions of street gangs” and related paraphernalia, “including but not limited to, codes, signs, symbols, photographs, drawings training material, and catalogs”; Section 1.2.7, which prohibits “[d]epictions or descriptions, or promotion of drug paraphernalia or instructions from the brewing of alcoholic beverages or the manufacture or cultivation of drugs, narcotics or poison”; and Section 1.2.16, which prohibits “[p]ictures, depictions or illustrations that promote acts of violence.” These provisions are also facially overbroad and thus unconstitutional.

The provisions, by their plain language and in practice, ban vast numbers of publications in *any media* without any rational benefit to prison safety or administration. Just as sexually explicit reading materials do not implicate the same concerns as sexually explicit images that might offend guards and other passersby,

*Mauro*, 188 F.3d at 1061–62, ADC may not rationally ban all references to drugs, violence, or gangs in any media, especially since incarcerated people are required to listen to music using headphones—the lyrics cannot disturb other people in the facility. 2-ER164. Not all “depictions” or “descriptions” of violence, gangs, or drugs implicate prison safety or administration. Indeed, many musical and other artistic works addressing these topics make clear the pain and hardship that the narrators have suffered due to the reality of violence, gangs, and drugs, ultimately painting a portrait of a lifestyle that many will not wish to undertake.

## **II. This Case Illustrates How ADC’s Facially Unconstitutional Policies Can Result in Less Access to Disfavored Viewpoints, Including Works Exploring Black American Life.**

All the materials to which Mr. Jones was denied access have one thing in common: They center on the Black American social condition, whether from a religious, political, or cultural perspective.

For example, *Message to the Blackman in America* and *Fall of America* by Elijah Muhammad are foundational texts for the Nation of Islam, the faith followed by Mr. Jones. Both books were written in the early 1970s in the wake of the civil-rights movement and address pressing questions about the efficacy and desirability of racial integration—core political (and in this context, religious) speech. Muhammad’s rhetoric is fiery, and his starkly racialized worldview, referring to white people as “devils,” is inconsonant with contemporary progressive and

inclusive social norms, but there is no evidence that the books advocate violence or otherwise threaten the prison system's functioning.

Nevertheless, wielding the broad discretion afforded by the policy,<sup>13</sup> ADC banned Mr. Jones from accessing these works under Section 1.2.8, despite the fact that he sought them for purposes of religious study and celebration during Ramadan.<sup>14</sup> This decision was not rationally related to a legitimate penological

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<sup>13</sup> That this discretion is unconstitutional is further evinced by the other religious texts permitted by ADC, including those that feature outright calls to violence. In the Book of Deuteronomy, for instance, Moses commands the Israelites that if a person has worshipped untrue gods, “bring forth that man or that woman, which have committed the wicked thing, unto thy gates . . . stone them with stones, till they die.” *Deuteronomy* 17:5 (King James). The Qur’an similarly provides that “[t]he punishment of those who wage war against Allah and His Messenger . . . is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land.” Abdullah Yusuf Ali, *The Holy Qur’an: Text, Translation and Commentary* 5:33 (1st ed. 1934). These texts arguably contain at least as much “religiously oppressive” content as the Nation of Islam books in question. Indeed, even when the views expressed in a text are indisputably “racist and separatist . . . religious literature may not be banned on that ground alone.” *Williams v. Brimeyer*, 116 F.3d 351, 354 (8th Cir. 1997).

<sup>14</sup> The district court incorrectly determined that depriving Mr. Jones of access to these religious texts did not substantially burden his religious exercise. *See, e.g., Harris v. Escamilla*, No. 17-15230, 2018 WL 2355123, at \*1 (9th Cir. May 24, 2018) (officer’s desecration of prisoner’s Qur’an, so that prisoner was unable to read his required ten daily verses was a substantial burden on prisoner’s religious exercise); *Blankenship v. Setzer*, 681 Fed. App’x. 274, 277 (4th Cir. 2017) (the “deprivation of a Bible for longer than a period of 24 hours” worked substantial burden on a prisoner who believed he must read and study the Bible daily because it “forced him to modify his behavior and violate his religious beliefs”); *Washington v. Klem*, 497 F.3d 272, 282 (3d Cir. 2007) (limitation on number of books prisoner could retain substantially burdened his religious exercise because it “severely inhibit[ed] his ability to read four new books per day,” as required by his religious beliefs); *cf.*

interest, and the “logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary.” *See Turner*, 482 U.S. at 89–90.

The CDs to which Mr. Jones was denied access also address racial and socio-economic themes and experiences. The music covers all facets of Black life: love, loss, joy, and the harsh realities of poverty and racial exclusion in America. In denying Mr. Jones access to rap and R&B CDs, ADC again wielded the discretion inherent in the facially unconstitutional provisions of DO 914.07 discussed above. These musical works unquestionably fall under the First Amendment’s protective umbrella. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“[M]usic, as a form of expression and communication, is protected by the First Amendment.”). And the First Amendment’s protections apply to music irrespective of the genre. Rap music—like many art forms—often involves profanity and language that might offend some listeners, but those elements do not render the albums in question unprotected by the Constitution. As Justice Marshall quipped in *Ward*, “[n]ew music always sounds loud to old ears.” 491 U.S. at 810 n.7 (Marshall, J., dissenting).

To the extent any of the requested CDs include sexual, violent, gang-related, or drug-related content, that content must be understood in the context of its genre, where such imagery is part of the idiom. Like the famous “outlaw country” of Johnny

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*Sutton v. Rasheed*, 323 F.3d 236, 257 (3d Cir. 2003) (noting that a Christian “could [not] practice his religion,” if “deprived of access to the Bible”).

Cash and Waylon Jennings, or Alice Cooper’s “shock rock,” rap often features tropes and conventions centering on a protagonist engaged in criminal activity. Cash’s murderous vagabond character who “shot a man in Reno just to watch him die,”<sup>15</sup> and Cooper’s “crazy little child” who gets shot by sheriffs in the course of an armed robbery,<sup>16</sup> are akin to the rapper E-40’s stylized gangster hero in “The D-Boy Diary Book I.” Notably, neither Cash nor Cooper appears on ADC’s list of banned publications, while at least three of E-40’s albums—including one ordered by Mr. Jones— have been blacklisted.<sup>17</sup> This is at least partly due to prison officials’ misperception of rap music as inherently threatening. This perception misunderstands the genre, where “[t]he intention of the narrator of the [rap music] [y]arn is to tell outrageous stories that stretch and shatter credibility, overblown accounts about characters expressed in superlatives . . . . We listen incredulously, not believing a single word . . . [to] one outrageous lie after another.” Andrea Dennis, *Poetic (In)Justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 Colum. J.L. & Arts 1, 23 (2007).

Prohibiting prisoners from accessing music that merely mentions sex, gangs, drugs, or violence does not further any legitimate penological interest. That a prison

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<sup>15</sup> See Johnny Cash, *Folsom Prison Blues* (Sun 1955).

<sup>16</sup> See Alice Cooper, *Crazy Little Child* (Warner Bros. 1973).

<sup>17</sup> Jenkins, *supra* note 5.



has a penological interest in preventing sexual assault and harassment, violence, criminal gang activity, and drug use is undisputed, of course. But ADC has not presented any evidence that an incarcerated person privately listening to music on these topics (only on one's own headphones, as required by policy) leads to violence, gang-related activity, drug use, or sexual harassment within the prison as a general matter. Nor has ADC proffered any evidence that specifically singling out and prohibiting incarcerated persons from listening to rap music, which addresses the social issues and sometimes harsh realities that many Black artists and incarcerated people alike have experienced first-hand—poverty, violence, gangs, drugs, and sex—is necessary to address any ostensible safety and security concerns.<sup>18</sup>

Tens of millions of people have listened to these artists and albums without incident, and there is no reason to think that Mr. Jones will be any different. “Untitled Unmastered” by Pulitzer Prize winner Kendrick Lamar,<sup>19</sup> for example, was a weekly *Billboard* #1 selling rap album in the United States and abroad, and the #5

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<sup>18</sup> The district court failed to consider Mr. Jones's proffered evidence in opposition to summary judgment that ADC's policy, as applied, disproportionately targeted Black artists more than any other ethnic group and that a majority of the music excluded in recent years was by Black artists. See 2-ER49, 55, 102, 162, 167, 172. Defendants failed to provide any evidence to the contrary. For this reason alone, the Court should vacate and remand for the district court to review the triable issue of material fact.

<sup>19</sup> *The 2018 Pulitzer Prize Winner in Music*, Pulitzer.org, <https://www.pulitzer.org/winners/kendrick-lamar>.

best-selling rap album of 2016.<sup>20</sup> And The Weeknd, another artist whose album Mr. Jones requested but was banned by ADC, performed at Super Bowl LV.<sup>21</sup> The music Mr. Jones has been denied is far from the dangerous contraband ADC characterizes it as being—these artists and albums are widely enjoyed and can even be found at the heart of the American mainstream.

Mr. Jones’s experience demonstrates the danger of allowing facially unconstitutional policies like ADC’s to be applied and enforced on a daily basis with unchecked officer discretion. They can be used to single out core religious texts and effectively ban entire musical genres—all of which, in this case, are associated with the Black American experience.

## CONCLUSION

Amici respectfully request that this Court hold facially invalid ADC policies DO 914.07 §§ 1.2.8 (racist and political degradation), 1.2.2.3 (sex acts), 1.2.17 (potentially exciting material), and §§ 1.2.17, 1.2.4 (gangs), 1.2.7 (drugs), and 1.2.16 (violence). This Court should remand this case to the district court for proceedings in conformity with such decision.

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<sup>20</sup> *Chart History “Untitled Unmastered” Kendrick Lamar*, Billboard, <https://www.billboard.com/music/kendrick-lamar/chart-history/BLP/song/967111>.

<sup>21</sup> *Super Bowl LV Halftime Show*, National Football League, <https://www.nfl.com/videos/the-weeknd-s-full-pepsi-super-bowl-lv-halftime-show>.

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Respectfully submitted,

/s/ Emerson Sykes

Emerson Sykes  
Vera Eidelman  
American Civil Liberties Union  
Foundation  
125 Broad Street, 18<sup>th</sup> Floor  
New York, NY 10004  
Tel.: (212) 549-2500  
esykes@aclu.org  
veidelman@aclu.org

Corene Kendrick  
American Civil Liberties Union  
Foundation  
39 Drumm Street  
San Francisco, CA 94111  
Tel.: (202) 393-4930  
ckendrick@aclu.org

Victoria Lopez  
American Civil Liberties Union  
Foundation of Arizona  
P.O. Box 17148  
Phoenix, AZ 85011  
Tel.: (602) 650-1854  
vlopez@aclu-az.org

Daniel Mach  
Heather L. Weaver  
American Civil Liberties Union  
Foundation  
915 15<sup>th</sup> Street, NW  
Washington, DC 20005  
Tel.: (212) 675-2339  
hweaver@aclu.org  
dmach@aclu.org

*Counsel for Amici Curiae*

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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