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VIA POSTAL AND ELECTRONIC MAIL

January 8, 2018

Commissioner Gary M. Lanigan
New Jersey Department of Corrections
Whittlesey Road, P.O. Box 863
Trenton, NJ 08625

RE: New Jersey Prisons' Unconstitutional Ban on *The New Jim Crow*

Dear Commissioner Lanigan:

It has come to our attention that certain New Jersey Department of Corrections (“DOC”) facilities have banned Michelle Alexander’s seminal book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.

The New Jim Crow is an important work on the endemic racial bias of prison systems in the United States.¹ New Jersey has the single worst Black-white racial disparity in incarceration in the country. For the state burdened with this systemic injustice to prohibit prisoners from reading a book about race and mass incarceration is grossly ironic, misguided, and harmful. It is also unconstitutional.

As discussed further below, the ban on *The New Jim Crow* violates the First Amendment. It also violates the DOC’s own regulations. No section of the New Jersey Administrative Code justifies censorship of *The New Jim Crow*.² It is one thing to prevent incarcerated people from reading how-to manuals about lock picking; it is something altogether different to deny people access to a book that “offers a timely and original framework for understanding mass incarceration. . . .”³

After receiving reports that the book had been banned by certain DOC facilities in practice, the American Civil Liberties Union of New Jersey (“ACLU-NJ”) filed an Open Public Records Act (“OPRA”) request, seeking information related to the DOC’s treatment of *The New Jim Crow*.⁴

¹ *The New Jim Crow* has appeared on the *New York Times* bestseller list and has been called the “secular bible of a new social movement” by Cornel West and other commentators.

² See N.J.A.C. § 10A:18-4.9(a).

³ Book blurb from Benjamin Todd Jealous, former president and CEO of the NAACP, <http://newjimcrow.com/praise-for-the-new-jim-crow>.

⁴ The OPRA request was assigned Request ID No. 14780. On November 29, 2017, the DOC returned a partial response to the ACLU-NJ OPRA request.

The DOC's response indicated that New Jersey State Prison and Southern State Correctional Facility banned the book as a matter of policy.

This is not the norm. By way of comparison, in December 2017, *The New York Times* [reported](#) on Texas' ban of nearly 10,000 titles to people in state custody.⁵ Despite the myriad problems with that list, *The New Jim Crow* is conspicuously absent. In fact, it was on a [separate list](#) of affirmatively *approved* publications.⁶

The DOC – and every player in the criminal justice system, from police officers and prosecutors to judges and legislators – must take affirmative steps to reduce our state's shameful racial disparities. The ban on *The New Jim Crow* does precisely the opposite and is a step backwards instead. In its worst light, it looks like an attempt to keep impacted people uninformed about the history of the very injustice that defines their daily lives.

This letter outlines why banning *The New Jim Crow* is not only unconstitutional but is also flawed policy, especially given the context of New Jersey's racial disparities in incarceration. We request that the DOC take action to correct its unconstitutional policy and practice, as outlined below.

I. New Jersey's Gross Racial Disparities in Incarceration

To be sure, New Jersey has made strides in decreasing its incarcerated population over the last two decades.⁷ While the decrease in sheer numbers is significant, as the ACLU-NJ has recently examined in [A Vision to End Mass Incarceration in New Jersey](#), New Jersey still has significant work to do.⁸

The ACLU-NJ firmly believes that decarceration efforts cannot be successful unless they also address systemic racism, and on this front New Jersey has been a disappointing outlier: New Jersey incarcerates its Black residents at a rate more than *12 times* higher than white residents.⁹ New Jersey's more than 12-to-1 ratio represents the worst Black-white racial disparity in incarceration in the United States. In fact, it is more than twice the national average of over 5-to-1 (which is itself already deeply problematic). Further, New Jersey's Latino-white racial

⁵ Matthew Haag, *Texas Prisons Ban 10,000 Books. No 'Charlie Brown Christmas' for Inmates* (Dec. 7, 2017), <https://www.nytimes.com/2017/12/07/us/banned-books-texas-prisons.html>.

⁶ Dallas Morning News, *Texas Prison Approved Book Spreadsheet* (2017), <https://interactives.dallasnews.com/data-store/2017/texas-prison-approved-books.xlsx>.

⁷ In 1999, the DOC held an all-time high of 31,493 people behind bars (including in prisons, youth complexes, and halfway houses/re-entry institutions). By 2013, that figure was down to 23,123. By 2017, it reached 19,619, an almost 40 percent reduction from 1999 numbers.

⁸ ACLU-NJ, *A Vision to End Mass Incarceration in New Jersey* (Dec. 2017), <https://www.aclu-nj.org/index.php?CID=1251>.

⁹ Data from 2014 show 94 white people and a staggering 1,140 Black people incarcerated for every 100,000 in the population.

disparity is 2.19-to-1, compared to a national average of 1.4-to-1. Thus, although Black and Latino people make up only about 44 percent of New Jersey's population, approximately 76.5 percent of the incarcerated population in New Jersey are Black or Latino people.

As the ACLU-NJ and others have extensively documented, these ratios and percentages play out in terms of human lives. The gross racial disparities in New Jersey's prison system are reflected in, and directly impact, the lived experiences of communities of color – from targeting by police in day-to-day activities to rates of arrest and prosecution, through each stage of the criminal justice system. The disparities also play out in the form of collateral consequences, which block tens of thousands of New Jerseyans from accessing the voting booth, jury service, public benefits, housing and employment opportunities, and literally thousands of other rights and benefits. These consequences disproportionately burden family members and communities of color, who have already borne the challenges of separation from loved ones and the emotional and financial costs of incarceration.

The New Jim Crow addresses each of these issues, beginning with the origin of the so-called War on Drugs as a “system[] of racialized social control.” Throughout the book, Michelle Alexander argues that people of color are not only *locked up* by the criminal justice system, but that they are also *locked out* of civic participation and the full exercise of their freedoms by being labeled “felons” and “drug offenders,” relegated to “a permanent underclass.” On its face, New Jersey's 12-to-1 disparity makes it hard to dispute Alexander's claim that mass incarceration is hardly colorblind.

Addressing these gross racial disparities has been a key component of Governor-elect Murphy's criminal justice goals and his commitment to decarceration, efforts which the ACLU-NJ commends. They are all the more reason for the DOC to urgently rescind the ban on *The New Jim Crow* as a priority in the new year and new administration.

II. Violation of First Amendment Right to Free Speech

The ban on *The New Jim Crow* violates the right to free speech enshrined in the First Amendment to the U.S. Constitution, and the correlative protection of Article 1, paragraph 6 of the New Jersey Constitution.

In addressing prisoners' First Amendment rights, the U.S. Supreme Court has repeatedly clarified that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,’ nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the ‘inside’.”¹⁰ Because *The New Jim Crow* addresses corrections policy and other social and political issues of public concern, it “occupies

¹⁰ *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)).

the highest rung of the hierarchy of First Amendment values and is entitled to special protection.”¹¹

The banning of a particular book such as *The New Jim Crow* – as compared, for example, to a ban on hardcovers – represents content-based censorship on publications. Such censorship is lawful only upon a showing that the prohibition is “reasonably related to legitimate penological interests.”¹² Moreover, “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,”¹³ or is an “exaggerated response” to prison concerns in light of available alternatives.¹⁴ The DOC cannot show that the policy to ban *The New Jim Crow* is reasonably related to a legitimate penological interest.

While the Administrative Code allows prisons to ban publications that contain information on the subject of drugs, it can only do so when the information “is detrimental to the secure and orderly operation” of the prison.¹⁵ That cannot apply to a general discussion or critique of the War on Drugs. Unless the DOC wishes to pretend it can only maintain security and order by depriving prisoners of educational, political, and historical information related to their very situation of incarceration, it cannot be said that this information harms the security or orderly operation of prisons.¹⁶ While *The New Jim Crow* is certainly disturbing and thought-provoking, it is so because of the shocking truth it reveals – the truth New Jersey’s 12-to-1 racial disparity proves – not because it in any way incites violence, disorder, or similar behavior.¹⁷ Accordingly, in banning *The New Jim Crow*, DOC facilities appear to have also violated their own regulations under the New Jersey Administrative Code.

III. Conclusion

The New Jim Crow chronicles how people of color are shut out of society by mass incarceration. The DOC ban on *The New Jim Crow* shuts out New Jersey prisoners even further, and it does so unconstitutionally. That the very prisoners who experience the worst racial disparity in incarceration in the country should be prohibited from reading a book whose precise purpose is to examine and educate about that disparity adds insult to injury. The DOC should immediately correct this shameful policy and restore access to Michelle Alexander’s important book.

In light of the foregoing, the ACLU-NJ requests that the DOC provide written confirmation of the following:

¹¹ *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations marks omitted).

¹² *Thornburgh*, 490 U.S. at 409; *Turner*, 482 U.S. at 89.

¹³ *Turner*, 482 U.S. at 89-90

¹⁴ *Id.* at 89-91; *Thornburgh*, 490 U.S. at 414-18.

¹⁵ N.J.A.C. § 10A:18-4.9(a)(2)(iii).

¹⁶ *Id.* See also N.J.A.C. § 10A:18-4.9(a)(2)(iv).

¹⁷ N.J.A.C. § 10A:18-4.9(a)(5) prohibits publications that can be considered to “incite violence, or destructive or disruptive behavior.”

- 1) Confirmation that *The New Jim Crow* will be immediately removed from any lists of banned publications, including specifically at New Jersey State Prison and Southern State Correctional Facility.
- 2) Confirmation that the DOC has advised administrators at each DOC facility that *The New Jim Crow* should not be censored or otherwise rejected in practice, whether based on a preselected banned publications list or on an *ad hoc* basis.
- 3) Confirmation that the DOC has or will imminently review each facility's policy and practice with respect to banned publications more broadly.

Given the clarity of the law, and the particular aptness of Michelle Alexander's book in light of New Jersey's racial disparities, we are hopeful that this matter can be amicably resolved. We ask that you advise us by January 24, 2018 of the DOC's position. Please feel free to contact Tess Borden at 973-854-1733 or tborden@aclu-nj.org if you wish to discuss this matter further.

Sincerely,



Tess Borden
Staff Attorney



Alexander Shalom
Senior Supervising Attorney

cc: Melinda Haley, Director of Regulatory and Legal Affairs