ACLU Georgia

P.O. Box 77208, Atlanta, GA 30357
770.303.8111|ktucker@acluga.org

January 22, 2020

Neil Warren
Cobb County Sheriff
185 Roswell Street
Marietta, GA 30090
Neil.Warren@cobbcounty.org

VIA EMAIL & CERTIFIED MAIL

Re: Alleged Order Banning the Marietta Daily Journal at Cobb County Detention Center

Dear Sheriff Warren:

The ACLU of Georgia writes to you regarding a complaint we received about an alleged new policy banning the Marietta Daily Journal in the Cobb County Detention Center. The complaint alleges that on January 12, 2020, deputies at the Detention Center were ordered to discard Marietta Daily Journal newspapers "to prevent inmates AND staff from seeing the article about the jail." We are writing to learn whether the Sheriff's Office has changed its former practice of receiving and disseminating the Marietta Daily Journal at the Detention Center and instituted a new policy banning access to the newspaper. If so, we respectfully request your Office's justification for the ban.

A new policy banning the Marietta Daily Journal, especially if created in response to bad publicity, raises significant First Amendment concerns. This ban, if in effect, prohibits detained people's access to the newspaper of their choice and prevents those who wish to communicate with them through this outlet from doing so. If true, and without a lawful justification for the ban, this new policy potentially violates the First Amendment of the U.S. Constitution.

As discussed below: 1) the First Amendment prohibits viewpoint discrimination and encompasses the right of people detained in jail to receive the newspapers of their choice; 2) the First Amendment also encompasses the right of third parties to share publications with people detained in jail; and 3) the new policy, if true, potentially violates the First Amendment.

I. The First Amendment Prohibits Viewpoint Discrimination

First, deputies at the Detention Center cannot reject a publication simply because the Sheriff's Office disagrees with that publication's political viewpoints. The Supreme Court of the

United States has established that people who are detained have the First Amendment right to read a wide range of publications in order to effectively participate in the marketplace of ideas. Jail officials may not restrict this right merely because they disagree with the content or views expressed in those publications. *See Turner v. Safley*, 482 U.S. 78, 90 (1987) (explaining that "regulations restricting inmates' First Amendment rights" must operate "in a neutral fashion, without regard to the content of the expression.").

Democracy depends upon a "free marketplace of ideas," and this is just as valid in prison or jail as in the community at large. "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. Fed. Bureau of Prisons*, 415 F.3d 634, 637 (7th Cir. 2005) (citations omitted) (reversing dismissal of incarcerated person's claim that he was denied a book in violation of the First Amendment). Inherent in this principle is the notion that freedom to read includes meaningful choice and access to a broad range of options. *See Grady v. Daniels*, 2017 WL 3392553, at *9 (M.D. Ala. June 20, 2017) (recognizing plaintiff's "First Amendment right to receive and read a range of publications so that he is not shut out of the marketplace of ideas and opinions" (citations omitted)); *Spellman v. Hopper*, 95 F. Supp. 2d 1267, 1271 (M.D. Ala. 1999) (finding that detained people "have a First Amendment right to receive magazines and newspapers through the mail.").

II. The First Amendment Encompasses the Right to Send Publications

Second, a ban of the sort at issue here implicates both the First Amendment rights of those who are detained as well as those organizations who wish to communicate with them, including through newspapers like the Marietta Daily Journal. As noted by the Supreme Court, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner*, 482 U.S. at 84, "nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the inside," *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). Courts have expressly recognized that third parties have the First Amendment right to share publications with those who are in jail, whether to educate, entertain, rehabilitate, or help individuals survive incarceration. *E.g.*, *Thornburgh*, 490 U.S. at 408 (finding "there is no question that publishers who wish to communicate with those who, through subscription, willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."); *Prison Legal News v. Chapman*, 44 F. Supp. 3d 1289, 1301–03 (M.D. Ga. 2014) (finding that the county jail's publications ban violated the periodical publishers' First Amendment right to communicate with detained and incarcerated people); *Montcalm Publ'g 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).

A policy banning a particular newspaper or publication must provide notice to the sender of the rejection and an opportunity to appeal. If the Cobb County Detention Center has banned the Marietta Daily Journal, it is unclear whether the publisher has been notified of the rejection and given an opportunity to appeal. These procedural safeguards are constitutionally required. *See, e.g., Jacklovich v. Simmons*, 392 F.3d 420, 433-34 (10th Cir. 2004) (recognizing that "publishers have a right to procedural due process when publications are rejected."); *Montcalm*

Publishing Co. v. Beck, 80 F.3d 105, 109 (4th Cir. 1996) (holding that "publishers are entitled to notice and an opportunity to be heard when their publications are disapproved for receipt by inmate subscribers.").

III. The New Policy, If in Effect, Potentially Violates the First Amendment

Discrimination against speech because of its message is a "blatant" violation of the First Amendment. *Rosenberger v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) ("[T]he prohibition against viewpoint discrimination is firmly embedded in first amendment analysis."). The Cobb County Sheriff's Office may not regulate speech "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

Restrictions impinging upon the constitutional rights of people detained in jail or prison will be upheld only if "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. To the extent the Detention Center's ban prohibits a detained person's access to the newspaper of his or her choice, without lawful justification, it is unconstitutional. Courts have consistently struck down bans on newspapers. *See, e.g.*, *Spellman v. Hopper*, 95 F. Supp. 2d 1267, 1271 (M.D. Ala. 1999) (finding that detained people "have a First Amendment right to receive magazines and newspapers through the mail."); *Green v. Ferrell*, 801 F.2d 765, 772 (5th Cir. 1986) (concluding "the jail's prohibition on newspapers violates the first amendment.").

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The Sheriff's Office's new policy banning the Marietta Daily Journal from the Cobb County Detention Center, if in effect, is inconsistent with the United States Constitution. We urge you to rescind it immediately.

Thank you for your consideration. We look forward to your response and are happy to have additional discussions on the matter if necessary.

Sincerely,

Kosha S. Tucker
Staff Attorney
American Civil Liberties Union Foundation of Georgia