



July 25, 2022

VIA EMAIL ONLY

Mr. David Shinn, Director (dshinn@azcorrections.gov)
Mr. Brad Keogh, General Counsel (bkeogh@azcorrections.gov)
Arizona Department of Corrections, Rehabilitation, & Reentry
1601 W. Jefferson St.
Phoenix, AZ 85007

RE: ADCRR's Unconstitutional Restrictions on *The Nation*

Dear Director Shinn and Mr. Keogh:

We have learned that the Arizona Department of Corrections, Rehabilitation, and Reentry (ADCRR) and its Office of Publication Review (OPR) have withheld issues of *The Nation* magazine from incarcerated subscribers at least five times in the past 18 months, without explanation as to what content in the magazines ostensibly violates the department's mail policy. ADCRR must reinstate incarcerated subscribers' access to the withheld issues, as required by the First Amendment.¹

The Nation is an award-winning journal of news, analysis, and opinion that has published continuously since 1865. The ban on these issues of *The Nation* violates the First Amendment and does nothing to protect the safe and secure operation of correctional facilities. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (holding that “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”) (quoting *Turner v. Safley*, 482 U.S. 78, 84 (1987)). “Prisoners have a First Amendment right to receive information while incarcerated.” *Jones v. Slade*, 23 F.4th 1124, 1134 (9th Cir. 2022) (citing *Clement v. Cal. Dep’t of Corr.*, 364 F.3d 1148, 1151 (9th Cir. 2004)). Publishers and incarcerated people have First Amendment rights to communicate, subject only to limitations required by legitimate security concerns, *Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011), and if a correctional facility “fails to show that the regulation is rationally related to a legitimate penological objective, [courts] do not consider the other factors” of the *Turner* test and the policy is invalid. *Ashker v. Cal. Dep’t of Corrs. & Rehab.*, 350 F.3d 917, 922 (9th Cir. 2003).

¹ This letter does not constitute an appeal under DO 914.06, § 6.13 on behalf of the author, publisher, or any other person; nor is it an appeal on behalf of an incarcerated person pursuant to Department Order (DO) 914.08 § 1.2.

Moreover, the Exclusion Notices sent to *The Nation*'s publishers do not comport with the Fourteenth Amendment due process clause, in addition to violating the First Amendment, as they lack any specificity as to what the objectionable content may be in the particular issue. *Procurier v. Martinez*, 416 U.S. 396, 417-19 (1974) (*overruled on other grounds by Thornburg*, 490 U.S. at 413-14); *Prison Legal News v. Cook*, 238 F.3d 1145, 1152 (9th Cir. 2001); *Krug v. Lutz*, 329 F.3d 692, 697-98 (9th Cir. 2003); *see also Reno v. ACLU*, 521 U.S. 844, 871-72 (1997) (holding that the vagueness of a content-based regulation of speech "raises special First Amendment concerns because of its obvious chilling effect.")²

Finally, ADCRR's current appeal policy (Department Order (DO) 914.06 § 6.13) also violates both the Fourteenth Amendment due process clause and the First Amendment, because if a publisher or author appeals an OPR decision, they must agree that their publication, if allowed to go into the prison, will be redacted or altered. This is no right of appeal at all.

In the following pages, we discuss each banned issue of *The Nation* in turn.

April 5-12, 2021 Issue (Volume 312, Issue 7)

On April 8, 2021 OPR emailed *The Nation* at letters@thenation.com, stating that Volume 312, Issue 7 of the magazine (published April 5, 2021) violated DO 914 § 7.2.8 because it "Promotes Superiority of One Group Over Another, Racism, Degredation [sic]" and DO 914 § 7.2.6 ("Promote[s] Acts of Violence.") *See Ex. 1*.³ The notice did not indicate what the objectionable material may have been or point to the text within the magazine that was allegedly offensive. *Id.*⁴

² ADCRR's Exception Notices are also deficient because they do not identify to *The Nation* who the incarcerated subscriber is who did not receive their magazine, nor does it even identify which prison facility is prohibiting the magazine. Without such detail, *The Nation* is unable to contact the affected subscriber(s).

³ All exhibits are at <https://www.aclu.org/legal-document/adcrs-unconstitutional-restrictions-nation>.

⁴ *The Nation* did not appeal this decision, or any other Exclusion Notice detailed in this letter, because pursuant to ADCRR policy, by appealing, the magazine would then "consent to allowing OPR to redact any Unauthorized Content" or "to alter by redaction [its] publication." Ex. 1.

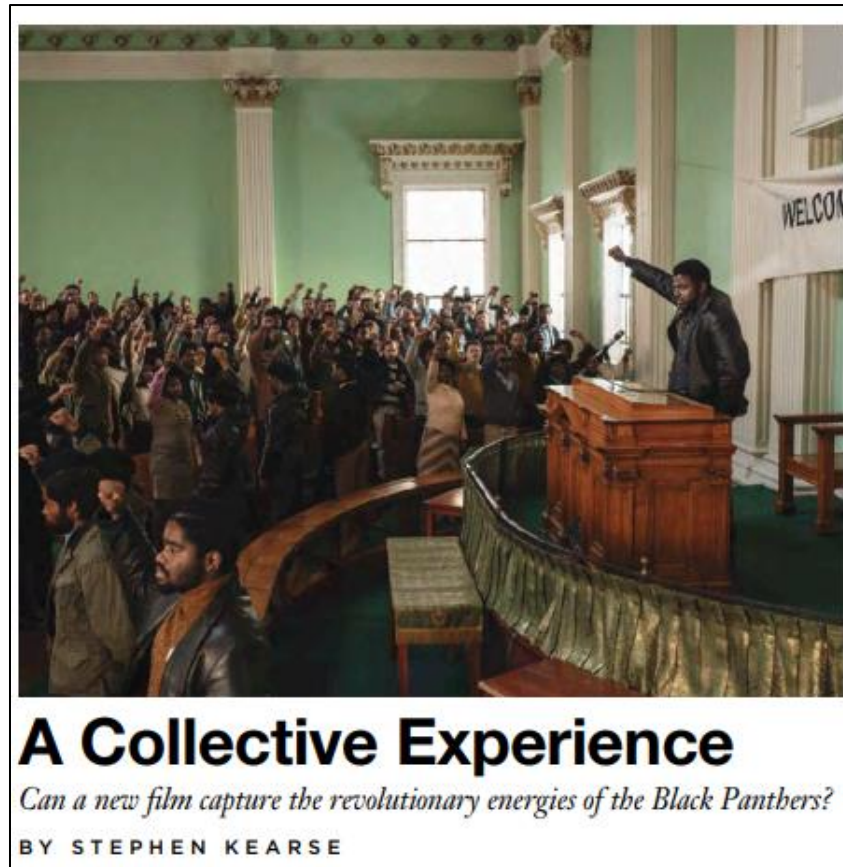
The relevant issue of *The Nation* had a cover story entitled “Black Immigrants Matter” with the subhead of “Tracking the detention and deportation machine’s disparate impact on Black migrants.” See Ex. 2. The simple statement that “Black Immigrants Matter” is *not* promoting the superiority of one group (Black immigrants) over any other, and more importantly, does not present a valid security risk to safe corrections operation.



As OPR did not indicate what was the objectionable item in the issue, we have reviewed the entire issue, in attempt to identify what might else be objectionable to ADCRR besides the “Black Immigrants Matter” story.

The only possible article we could identify (at pages 43-44) was a review of the Oscar Award-winning 2021 movie *Judas and the Black Messiah*. This movie dramatized the history of the FBI’s infiltration of the Illinois chapter of the Black Panther Party that led to the death of Fred Hampton and therefore it showed the racially motivated violence

against Mr. Hampton. The article was illustrated with a still photograph from the movie, when Fred Hampton is speaking to other members of the Black Panthers:



However, there is nothing in the movie review itself that promotes acts of violence, or that promotes racism, degradation, or the superiority of one race over another. The fact that the subject of the movie review is the Black Panther Party does not in and of itself mean that there is a violation of DO 914; and in fact, it is entirely possible that an incarcerated person would be able to watch the movie itself if it were broadcast on television stations available in the prisons.

The Ninth Circuit recently ruled that ADCRR’s apparent blanket practice of prohibiting rap music, and books written by Black authors such as the founder of the Nation of Islam, failed the *Turner* test, and noted that the district court had acknowledged that “a majority of ADC’s exclusions targeted black artists.”). *See Jones v. Slade*, 23 F.4th 1124, 1137-39 (9th Cir. 2022); *see also Turner*, 482 U.S. at 90 (holding that the appropriate analysis is “whether prison regulations restricting inmates’ First Amendment rights operated in a neutral fashion, without regard to the content of their expression.”).

June 28-July 5, 2021 Issue (Volume 312, Issue 13)

On July 6, 2021, OPR emailed an Exclusion Notice to letters@thenation.com stating that this issue contained unauthorized content. *See* Ex. 3. The stated reason for the exclusion was a violation of DO 914 § 7.2.8 (“Promotes Superiority of One Group Over Another, Racism, Degradation”). As before, the notice does not indicate what the objectionable material may have been or point to the text within the magazine that was offensive. Ex. 3. The magazine had a cover story of “Flipping Arizona: The unsung canvassers who turned the West’s biggest red state blue.” Ex. 4.



We again reviewed this issue in an attempt to identify what might have been objectionable and promoted racism or degradation, since the notice did not provide that information. We do not believe the cover story was objectionable, unless the reviewer decided that it somehow promoted the superiority of the Democratic Party over the Republican Party.

On page 6, there is an excerpt of an article published in 1921 about how a white mob destroyed Black neighborhoods and killed Black people in Tulsa that year. But an article providing a description of a racially-motivated historical event does not promote racial hatred nor present a valid security risk to safe corrections operation. Indeed, by this logic, ADCRR could prohibit history books or magazines discussing the Holocaust, most wars, the civil rights struggle, Jim Crow, slavery, and the genocide of Native Americans.

BACK ISSUES / 1921


Tulsa's "Stories of Horror"

IN 1921, *THE NATION* SENT JOURNALIST WALTER WHITE, the future executive secretary of the NAACP, to Tulsa, Okla., to report on the May 31–June 1 massacre of an estimated 300 Black residents. White came back with one of the most important accounts of what happened a century ago. This short excerpt, describing the violence of the white mob in the city's thriving Greenwood neighborhood, known as "Black Wall Street," still makes for searing reading:

Around five o'clock Wednesday morning the mob, now numbering more than 10,000, made a mass attack on Little Africa. Machine-guns were brought into use; eight aeroplanes were employed to spy on the movements of the Negroes and according to some were used in bombing the colored section. All that was lacking to make the scene a replica of modern "Christian" warfare was poison gas. The colored men and women fought gamely in defense of their homes, but the odds were too great. According to the statements of onlookers, men in uniform, either home guards or ex-service men or both, carried cans of oil into Little Africa, and, after looting the homes, set fire to them. Many are the stories of horror told to me—not by colored people—but by white residents. One was that of an aged colored couple, saying their evening prayers before retiring in their little home on Greenwood Avenue. A mob broke into the house, shot both of the old people in the backs of their heads, blowing their brains out and spattering them over the bed, pillaged the home, and then set fire to it.

Another was that of the death of Dr. A.C. Jackson, a colored physician. Dr. Jackson was worth \$100,000; had been described by the Mayo brothers as "the most able Negro surgeon in America"; was respected by white and colored people alike, and was in every sense a good citizen. A mob attacked Dr. Jackson's home. He fought in defense of it, his wife and children and himself. An officer of the home guards who knew Dr. Jackson came up at that time and assured him that if he would surrender he would be protected. This Dr. Jackson did. The officer sent him under guard to Convention Hall, where colored people were being placed for protection. En route to the hall, disarmed, Dr. Jackson was shot and killed in cold blood. The officer who had assured Dr. Jackson of protection stated to me, "Dr. Jackson was an able, clean-cut man. He did only what any red-blooded man would have done under similar circumstances in defending his home. Dr. Jackson was murdered by white ruffians." **N**

You can read Walter White's article "Tulsa, 1921" in full at thenation.com/tulsa.



There is an article at pages 24-31 entitled “Racism in Wall Street’s Ranks” that discusses race, but the fact that the article discusses employment discrimination based on race does not promote the superiority of one race over the other. *See* Ex. 4 at 24-31.

The issue also includes a review at pages 40-44 of a four-part HBO documentary series entitled *Exterminate All The Brutes*, about the colonialization of the United States, Haiti, and Africa, and the experiences of Native Americans and Africans at the hands of European settlers.⁵ While the subject matter of the documentary series is disturbing, as it discusses the history and racism of European colonialism around the world, there is nothing in the movie review itself that in any way calls for violence or racial superiority. As with the discussion of the Tulsa massacre, the fact that the article describes a racially-motivated historical event does not present a valid security or penological risk to safe corrections operation. *See id.* at 40-44. Reporting on racism is not promoting racism.

Finally, the issue included a poem by B. Batchelor titled “Discourse on Why Inmates Exit Prison Worse Than When They Came In” (*see id.* at 44), about compassion for incarcerated people, but again, this poem does not incite violence or discuss race.

July 26-Aug. 2, 2021 Issue (Volume 313, Issue 2)

On August 2, 2021, OPR emailed an Exclusion Notice to letters@thenation.com stating that this issue contained unauthorized content. *See* Ex. 5. The stated reason for the exclusion was a violation of DO 914 § 7.2.17 (“Encourage Sexual or Hostile Behaviors”). As a threshold matter, the Ninth Circuit recently held that Section 7.2.17 violates the First Amendment on its face. *See Prison Legal News v. Ryan*, Appeal No. 19-17449, Slip Op. at 18-19 (9th Cir. July 8, 2022).

The notice did not indicate what ADCRR construed as the objectionable material. The relevant issue’s cover story was “This Way to Utopia: Dreams of a Better World.” Ex. 6. The cover drawing included numerous cartoon characters, including an image of two people in the bottom right corner, fully dressed, and kissing one other:

⁵ The series takes its title from a famous line in Joseph Conrad’s book *Heart of Darkness*. Ex. 4 at 41. The book is not on a 2019 list of publications banned by ADCRR. *See* <https://www.documentcloud.org/documents/6523694-Banned-Publications-From-Arizona-Department-of.html>; *see also* Jimmy Jenkins, *More than 5,000 publications banned in Arizona prisons*, Ariz. Republic (Oct. 28, 2019), at <https://www.azcentral.com/story/news/local/phoenix/2019/10/28/arizona-department-corrections-bans-over-5-000-individual-publications-state-prisons/2460441001/>.



The only remotely content that might be deemed as “sexual” was a photo on Page 11 of a fully clothed 93-year-old Cuban American drag queen.



Clearly, neither image presents a security risk to correctional operations.

June 13-20, 2022 Issue (Vol. 314, Issue 12)

On June 28, 2022, OPR emailed an Exclusion Notice to letters@thenation.com stating that this issue contained unauthorized content. *See* Ex. 7. The stated reason for the exclusion was a violation of DO 914 § 7.2.8 (“Promotes Superiority of One Group Over Another, Racism, Degradation”). As before, the notice did not indicate what the objectionable material may have been, or point to the text within the magazine that was offensive. *Ex. 7.* Again, we reviewed the issue to try to identify what the reviewer may have thought violated the policy. The cover story of this issue was a profile of former Maine Governor Paul LePage, “who called himself ‘Trump before Trump.’” *Ex. 8.* The cover image includes several past direct quotes from Governor LePage, including racist statements that he has made. This includes statements of, “You shoot at the enemy. You try to identify the enemy . . . people of color or people of Hispanic origin[;]” “Let me tell you something: Black people come up the highway and they kill Mainers[;]” and in reference to the NAACP, “Tell them to kiss my butt.” *See* Ex. 8:



This image is repeated at the beginning of the article on page 14, which is about Mr. LePage “trying to soften his image on issues like immigration to appeal to a broader audience,” as he runs for governor of Maine again. *Id.* at 15. While his past statements are racist, they were made by a prominent politician, and *The Nation* was not in any way endorsing these statements, but instead reporting what he said.

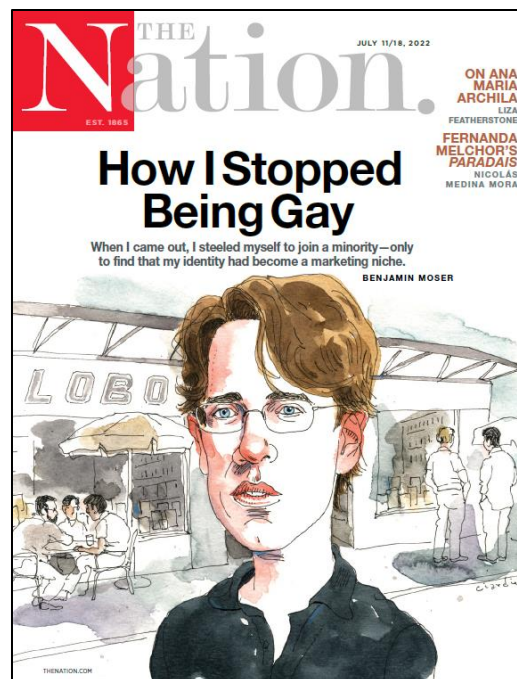
The issue also includes an editorial on page 4, entitled “Grieving in Buffalo,” which describes the recent mass shooting at a grocery store in a Black neighborhood in Buffalo, New York. The editorial mentions the racially-motivated nature of the shooting, and other incidents in history of mass terror against Black people. The pull quote states, “If we want to prevent future tragedies, we need to begin addressing white supremacy at its source.” Ex. 8 at 4. It is unclear if this statement is viewed by OPR’s reviewers as somehow promoting one race over the other. The issue also included a political cartoon at page 10 that referenced the Buffalo massacre and the fact that the gunman believed in the white supremacist “great replacement” conspiracy theory:



But again, *The Nation* was not promoting this “great replacement” theory; indeed, the cartoon notes that the theory is promoted on FOX News (and accordingly, if incarcerated people watch FOX News on their televisions, they will see and hear FOX News pundits promoting the theory). There is no legitimate penological reason to prohibit the magazine due to its reporting on current events. Again, reporting on racism is not promoting racism.

July 11-18, 2022 Issue (Vol. 315, Issue 1)

On July 18, 2022, OPR emailed an Exclusion Notice to letters@thenation.com stating that this issue contained unauthorized content. *See* Ex. 9. The stated reason for the exclusion was a violation of DO 914 § 7.2.17 (“Encourage Sexual or Hostile Behaviors”). As noted above, the Ninth Circuit held on July 8, 2022 that Section 7.2.17 violates the First Amendment on its face. *See Prison Legal News v. Ryan*, Appeal No. 19-17449, Slip Op. at 18-19 (9th Cir. July 8, 2022). It appears that ADCRR mailroom staff have not been apprised of this ruling. Clearly, a rule held unconstitutional by the Ninth Circuit on July 8 cannot justify the July 18 decision to exclude this issue.

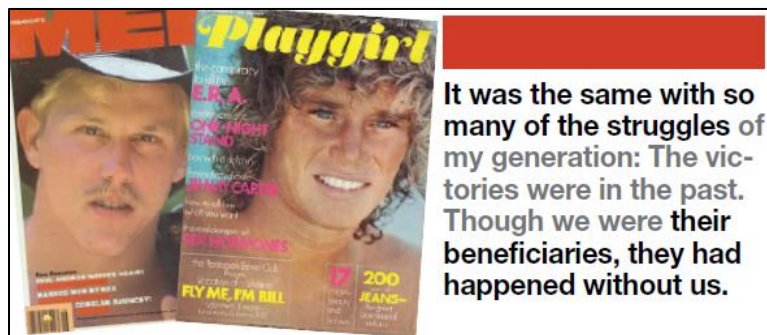


As with the other Exclusion Notices, the notice did not indicate what the objectionable material may have been, or point to the text within the issue that was offensive. Ex. 9. Again, we reviewed the issue to try to identify what the mailroom reviewer may have thought violated the policy. Ex. 10. The cover story, “How I Stopped Being Gay,” was a first-person account by a Pulitzer Prize-winning author about his

experience of coming out of the closet in the 1990s in Texas, and how in subsequent years he discovered his ambivalence with the mainstreaming and commercialization of the LGBT community. The article does not include any sort of graphic or violent descriptions of sex. The article is illustrated by a picture from the 1979 Gay Pride march in Houston, Texas; while some men are shirtless or wearing cowboy hats, there is nothing that “encourages” sexual behavior other than the celebration of Pride.



There also is an illustration of the cover of two magazines from the same era, and a pull quote of a man prosecuted in the 1980s by Dallas vice officers:



**“We aren’t worried
about guns in Texas.
But you can’t sell a
concealed dildo.”**

—Larry Lingle

Mr. David Shinn & Mr. Brad Keogh
RE: *The Nation*
July 25, 2022

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We request that ADCRR provide written confirmation of the following:

1. That uncensored copies of these five magazines have been promptly provided to the intended recipients;
2. That ADCRR has advised all mailroom staff and administrators at each facility in writing that news publications such as *The Nation* may not be banned simply because they are reporting acts of current or historic racism;
3. That ADCRR has advised all mailroom staff and administrators at each facility in writing that DO 914 § 7.2.17 (“Encourage Sexual or Hostile Behaviors”) is no longer a valid reason to withhold a publication, in light of the Ninth Circuit’s recent ruling that Section 7.2.17 violates the First Amendment on its face;⁶
4. That ADCRR has reviewed or will review each facility’s policy and practice with respect to banned publications to ensure continued respect for the First Amendment rights of incarcerated persons and those in the outside world who wish to communicate with them.

We hope this matter can be quickly resolved. We ask that you advise us of your position within 14 days of this letter so we can determine if additional action is necessary. Please contact us at dfathi@aclu.org and ckendrick@aclu.org to discuss this further.

Sincerely yours,



Corene T. Kendrick
David C. Fathi
ACLU National Prison Project

Emerson Sykes
ACLU Speech, Privacy, & Technology Project

Jared Keenan
Benjamin Rundall
ACLU of Arizona

⁶ See *Prison Legal News v. Ryan*, Appeal No. 19-17449, Slip Op. at 18-19 (9th Cir. July 8, 2022).

Mr. David Shinn & Mr. Brad Keogh
RE: *The Nation*
July 25, 2022

cc: Don Guttenplan, Editor, *The Nation*
Bhaskar Sunkara, President, *The Nation*
Haesun Kim, Copy Editor, *The Nation*