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Legislative & Correctional Issues Branch
Office of General Counsel
Bureau of Prisons
320 First St., NW
Washington, DC 20534

Re: Inmate Discipline Program: Disciplinary Segregation and Prohibited Act Code Changes, 89 Fed. Reg. 6455 (proposed February 1, 2024) (to be codified 28 C.F.R. pt. 541)

To whom it may concern,

Thank you for the opportunity to comment on the BOP's proposed code changes.

The Knight First Amendment Institute at Columbia University is a New York not-for-profit organization dedicated to the freedoms of speech and the press in the digital age. Our aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

We write today to express serious concerns with the Federal Bureau of Prisons' proposed Code 294. The BOP has proposed to adopt two new codes relating to social media use by those in the agency's custody—Code 194 and Code 294. The first would prohibit the use of social media "for the purpose of committing or aiding in the commission of a criminal act."[1] The second, in contrast, is not limited to the use of social media to facilitate criminal conduct. Instead, it would impose an outright ban on

[1] Inmate Discipline Program: Disciplinary Segregation & Prohibited Act Code Changes, 89 Fed. Reg. 6455, 6457 (proposed February 1, 2024) (to be codified 28 C.F.R. pt. 541).

"[a]ccessing, using, or maintaining social media," and even on "directing others to establish or maintain social media accounts."[2]

As we explain below, Code 294 would likely be unconstitutional if adopted by the BOP. It fails to account for the free speech interests in using social media for both incarcerated and nonincarcerated people. And its prohibition on *indirect* social media activity, in particular, raises serious First Amendment concerns.

First, Code 294 would impose substantial burdens on the free speech rights of individuals who are incarcerated and also on the public, which increasingly relies on social media to learn about the experiences of those in prison.

For the nearly 2 million people who are incarcerated in U.S. jails and prisons, maintaining connection with loved ones and communities is associated with better physical and mental health outcomes, reduced recidivism, and successful reentry into society.[3] Social media is increasingly becoming an important part of that connection. As one formerly incarcerated journalist recently recounted, using social media through his wife allowed him to pursue a writing career, stay in touch with his community, and give him hope of reintegration upon release.[4] Whistleblower Chelsea Manning tweeted during her incarceration to stay connected to the outside world.[5] Another prisoner, Alex Cook, sent artwork to his mother to post online, so that he could show his friends and family "that I'm doing something productive" while incarcerated, and help them feel closer to him despite his absence.[6]

In recent years, social media has also become an important vector for those incarcerated to contribute to public discourse, especially on the subjects of racial justice and abuse behind bars. For example, in 2022 an individual incarcerated in an Alabama prison sent Kastellio Vaughan's family a horrific photo depicting Vaughan's emaciated body

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[2] *Id.* at 6461.

[3] Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, Prison Pol'y Initiative (Dec. 21, 2021), https://perma.cc/TG9G-62JV; Joanna B. Folk et al., *Behind Bars but Connected to Family: Evidence for the Benefits of Family Contact During Incarceration*, 33 J. of Fam. Psych. 453, https://perma.cc/9VLG-5TJ7.

[4] Seth Ferranti, *Why Prisons Should Let Inmates Use Social Media*, VICE (June 18, 2016), https://perma.cc/ZUP7-UBGX.

[5] Dave Maass, *What if MLK's 'Letter from a Birmingham Jail' Had Been a Facebook Post?*, Elec. Frontier Found. (Apr. 16, 2015), https://perma.cc/DVD3-SS3N.

[6] Seth Ferranti, *How Prison Inmates Get on Facebook, Twitter, and Instagram*, VICE (Feb. 11, 2015), https://perma.cc/T8SC-V6KC.

with the message "Get Help." Vaughan had lost 75 pounds due to severe medical neglect following an emergency surgery performed by prison doctors. When his sister posted the picture on Facebook, it went viral and led to public outcry, forcing the prison to take swift action to address Vaughan's physical deterioration. An attorney for Vaughan's family acknowledged that, had the pictures not been received and shared on social media, "we might never have known about the neglect and Mr. Vaughan would have died before the public knew anything was happening."[7]

Vaughan's story is one of many illustrating the significant role social media plays in exposing the often grim realities of incarceration. Photos and videos taken by incarcerated people and shared via social media have shed light on the day-to-day realities of life in a prison cell;[8] exposed prison officials' lack of response to the spread of COVID-19 during the height of the pandemic;[9] and helped organize and publicize a nationwide strike against a corporate food service giant for neglecting incarcerated people's food needs.[10]

Of course, the technology of social media is new, but the importance of allowing those behind bars to participate in public discourse is not. Dr. Martin Luther King Jr. authored his famous "Letter from Birmingham Jail" on scraps of paper while imprisoned and gave those scraps to his attorneys to compile and circulate on the outside.[11] Today, as the Supreme Court has recognized, it is the social media platforms that "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[12] But, as the Electronic Frontier Foundation has noted, social media bans like Code 294 would

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[7] Suchy Kahlon & Dan Novack, *People in Prison Should Have Access to Digital Technology*, Law360 (Aug. 4, 2023), https://perma.cc/F4KW-ZCVR; *see also* Kendall Ross, *Family of Alabama Inmate Fears for His Life, Alleges Neglect by Prison Officials*, ABC News (Sep. 26, 2022), https://perma.cc/6MCS-JGQT.

[8] VICE News, *Prisoners Are Going Viral on TikTok*, YouTube (Nov. 12, 2020), https://www.youtube.com/watch?v=d53jCvZ38NQ.

[9] Keri Blakinger & Keegan Hamilton, *"I Begged Them to Let Me Die": How Federal Prisons Became Coronavirus Death Traps*, The Marshall Project (Jun. 18, 2020), https://perma.cc/9ASW-W75Q.

[10] Teresa Wiltz, *Should Social Media Be Banned in Prison?*, Stateline (Jan. 13, 2017), https://perma.cc/CEP2-8WRF.

[11] Jonathan Capehart, *How MLK's Famous Letter Was Smuggled Out of Jail: 'Voice of the Movement' Episode 3*, Wash. Post (Apr. 18, 2019), https://perma.cc/MMS3-XY3W.

[12] *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

have prohibited Dr. King from relying on social media to publish the letter that helped galvanize the civil rights movement.[13]

By cutting off this invaluable channel of communication, Code 294 would deprive those behind bars of the ability to connect with their communities and to share their stories, and it would prevent the public from hearing about life in prison and advocating for change.

Second, in light of these burdens on speech, Code 294's prohibition on "directing others to establish or maintain social media accounts" very likely violates the First Amendment.

Code 294 broadly prohibits people incarcerated in BOP facilities from using social media directly; it also prohibits them from using social media *indirectly*, by "directing others," like family members or friends, to post on social media platforms for them. Code 294's prohibition on "directing others" raises particularly serious First Amendment concerns because higher scrutiny applies to restrictions of outgoing communications, and because there are unlikely to be any security concerns grave enough to justify a prohibition on all indirect social media use.

Although the BOP has said very little about Code 294, the text accompanying the related Code 194 suggests that the BOP believes the proposed code is constitutional under the standard established by the Supreme Court in *Turner v. Safley*. *Turner* requires courts to consider, among other things, whether a restriction is reasonably related to a legitimate penological interest, whether it is an "exaggerated response" to the prison's stated goals, and whether people will have alternate ways to exercise their free speech rights.[14]

It is doubtful that *Turner* provides the right analytical framework for assessing Code 294's "directing others" prohibition. As the Supreme Court said in *Procunier v. Martinez*, restrictions on outgoing communications are subject to heightened scrutiny and are constitutional only if they further a substantial government interest and are no more restrictive than necessary to achieve that interest.[15] Directing others to post on social media involves outgoing communication, and so the stricter *Martinez* test likely applies.

Even under the more forgiving *Turner* test, however, the prohibition is likely unconstitutional, because social media offers unique expressive benefits otherwise unavailable to those incarcerated, and because

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[13] Maass, *supra* n.5.

[14] 89 Fed. Reg. 6455, 6457; *see also Turner v. Safley,* 482 U.S. 78, 89–91 (1987).

[15] 416 U.S. 396, 413 (1974); *accord Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989).

prohibiting all indirect social media use seems like an exaggerated response to any legitimate security concerns the BOP may have.

The BOP has pointed to individual communication and visitation as substitutes for social media use, but those forms of communication differ in kind from the expression and amplification available through social media.[16] As an initial matter, it is not clear how viable any alternatives are in the BOP's facilities. As we and others have chronicled, many ostensibly permitted forms of communication in prisons and jails across the country are effectively out of reach, as visiting hours have generally tightened since the COVID-19 pandemic and other options tend to be expensive and beset by technical problems.[17] But in any event, those forms of expression are not at all similar to the form of expression made possible by social media. Just as individual correspondence is not a substitute for publishing essays and books, one-to-one communication is not a substitute for the amplifying power of social media. Speaking to an individual over the phone or writing a letter likely would not have led to the public mobilization that saved Kastellio Vaughan's life, pushed federal prisons to address the spread of COVID-19, and drew attention to widespread malnourishment in prisons.

Equally troubling, the security concerns motivating Code 294 seem murky at best. Although there is little explanation in the text of the proposed code, the BOP's invocation of *Aguiar v. Recktenwald* suggests that it believes that the open communication facilitated by social media use threatens internal security and would require additional resources to monitor.[18] This reasoning is especially dubious as a justification to prohibit incarcerated people from directing others to post on their behalf. The BOP already monitors both incoming and outgoing communications, and it is difficult to see how a third party's decision to post something they've already lawfully received from someone incarcerated poses any new security threats. The BOP's preexisting monitoring also makes it unlikely that an individual could successfully use indirect social media access to thwart restrictions on whom they can directly communicate with. Code 294 is therefore unlikely to address

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[16] 89 Fed. Reg. 6455, 6457 (citing *Aguiar* v. *Recktenwald*, No. 3:13–2616, 2015 WL 5829727, at *9 (M.D. Pa. Sept. 30, 2015)).

[17] Rukiya Colvin, *Incarcerated Writers Struggle to be Heard—the Tech They Use Creates Additional Hurdles*, Prism (Dec. 20, 2023), https://perma.cc/U375-HEUU; Mike Wessler, *SMH: The Rapid & Unregulated Growth of E-Messaging in* Prisons, Prison Pol'y Initiative (Mar. 2023), https://perma.cc/JZ9J-QXS5; Peter Wagner & Wanda Bertram, *State of Phone Justice 2022: The Problem, the Progress, and What's Next*, Prison Pol'y Initiative (Dec. 2022), https://perma.cc/L7KJ-X43D; *see also* Compl. ¶ 40, *A.B.O. Comix v. County of San Mateo*, No. 23 Civ. 1075 (Super. Ct. of San Mateo Cnty. Mar. 9, 2023), https://perma.cc/JL28-5YDN.

[18] 89 Fed. Reg. 6455, 6457 (citing *Aguiar*, 2015 WL 5829727, at *9).

any legitimate security concerns. If anything, because social media use has increased transparency into troubling conditions behind bars, prohibiting it may make prisoners less safe.

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For these reasons, we urge the BOP not to adopt Code 294.

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