IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AVID BOOKSHOP LLC, *Plaintiff*, v. KEYBO TAYLOR, et al., *Defendants*.	Civil Action File No.: 1:24-cv-1135-MHC

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff Avid Bookshop LLC's Complaint more than adequately pleads that under *Turner v. Safely*, 482 U.S. 78 (1987), Defendants' Authorized Retailer Policy ("the Policy") violates Avid's First Amendment right to communicate with residents of the Gwinnett County Jail by categorically banning physical bookstores like Avid from shipping books to residents. Avid further cognizably pleads prior restraint, an unconstitutional permitting scheme, and excessive vagueness. Qualified immunity is not available because, assuming all alleged facts to be true, the Complaint sufficiently pleads violations of clearly established law.

INTRODUCTION

Access to books is vital to this country's more than 1.23 million incarcerated residents for purposes of education, spirituality, entertainment, and preparation for

re-entry to society.[1] And it is clearly established that book sellers like Avid have a First Amendment interest in communicating with residents of prisons and jails. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989). But according to a 2023 report authored by the national literacy nonprofit PEN America, restrictions on who can send books to prison and jail residents are sharply rising. In 2015, only 30% of prisons nationally surveyed imposed any "approved vendor" restrictions compared to 80% or more in 2023.[2] A paucity of evidence that books sent by physical bookstores pose any security risk calls into question the penological interest served by Defendants' Authorized Retailer Policy. Like many "approved vendor" restrictions, the Policy also provides no transparency about who is an Authorized Retailer or how to become one.[3] Avid therefore challenges the constitutionality of Defendants' Policy under the First and Fourteenth Amendments.

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[1] *See* Julia Carpenter, "What Can You Read in Prison?" *Esquire* (June 17, 2024) ("[b]ooks provide a lifeline to the incarcerated"), available at https://www.esquire.com/entertainment/books/a61099133/prison-books-libraries-explained/ (last visited June 24, 2024).

[2] *See* PEN America, "New PEN America Report: U.S. Prisons Ban Staggering Number of Books" (Oct. 25, 2023), available at: https://pen.org/press-release/new-pen-america-report-u-s-prisons-ban-staggering-numbers-of-books/ (last visited June 24, 2024). Full report available at: https://pen.org/press-release/new-pen-america-report-u-s-prisons-ban-staggering-numbers-of-books/.

[3] *See* Jack Karp, "Do Jail's 'Approved Vendor' Rules Keep Out Drugs, or Books?" *Law360* (May 31, 2024), available at https://www.law360.com/access-to-justice/articles/1841508/do-jails-approved-vendor-rules-keep-out-drugs-or-books- (last visited June 24, 2024).

STATEMENT OF FACTS

Avid is an independently-owned, community-based bookstore located in Athens, Georgia whose primary method of expression is selling and shipping books. Avid differentiates itself from large book vendors, such as Amazon, by selectively curating the titles it sells based on the editorial discretion of its staff. Doc. 1 (Complaint) at ¶¶ 1, 4-6, 32-22, 39. Avid staff members frequently make recommendations to customers about what book(s) to purchase. *Id*. at ¶¶ 4, 36. If a friend or family member wishes to send a book to a Gwinnett County Jail resident, Avid will make suggestions and act as a conduit for that customer's expressive choices by shipping the book(s) they choose to buy directly to the Jail resident. *Id*. at ¶¶ 37-38. In so doing, Avid uses the ideas and writings of others to form its own messages, which are unique expression that Avid has a protected interest in disseminating to the public, including to individuals in jail. *Id*. at ¶¶ 36-40.

Avid's Attempts to Mail Books to the Gwinnett County Jail

Avid made two attempts to mail books to the Gwinnett County Jail. *Id*. at ¶¶ 42-58. Both shipments were sent by Avid operations manager Luis Correa. *Id*. at ¶¶ 47, 55. Mr. Correa was the only person to handle the books in both shipments, and he took care to comply with the Jail's Authorized Retailer Policy, sending both packages containing only paperback books with packing slips and receipts

included, as the Policy requires. *Id*. at ¶¶ 48-50, 55. The Jail summarily rejected both packages, returning them with an indication that the books were "[n]ot sent from publisher/authorized retailer." *Id*. at ¶¶ 51, 58; Exhibit B, Exhibit C.

The Jail's Authorized Retailer Policy

The Jail's Authorized Retailer Policy states:

> Magazines/non-local newspaper subscriptions and books will be accepted as long as they are mailed directly from the publisher or authorized retailer. *We DO NOT accept packages from EBAY or Amazon independent sellers. Hardbound books (including pamphlets and booklets) will not be accepted. All packages received for inmates by US mail or UPS containing books, newspapers, or magazines must be PRE-PAID. They must have a packing slip or receipt stating what is in the package. Any packages that do not have these slips or contain contraband items will be returned at the sender's expense. Books and magazines must not exceed 8 - 11 inches in size, four pounds in weight, and must not exceed a quantity of four books and/or magazines in one shipment.

Id. at ¶ 64. The Jail has no policy or other guidance that identifies which book sellers have been designated Authorized Retailers, specifies any criteria or standards for designating Authorized Retailers, sets forth any process for applying to become an Authorized Retailer, nor provides any process for appealing being denied Authorized Retailer status. *Id*. at ¶¶ 16, 64-67.

As the Georgia Sheriffs' Association acknowledges, "[o]perational responsibility for county jails is the sole responsibility of the sheriff." *Id*. at ¶ 23. Defendant Taylor, Sheriff of Gwinnett County, is therefore responsible for

approving, maintaining, enforcing, and applying the Jail's policies, including the Authorized Retailer Policy. *Id*. at ¶ 24. Defendant Haynes, as the top-ranking official in the Jail Division, also enforces and applies Jail policies that Taylor approves and maintains, including the Authorized Retailer Policy. *Id*. at ¶ 27.

Avid's Causes of Action

Count I of Avid's Complaint asserts that the Authorized Retailer Policy violates the First Amendment under *Turner v. Safely*, 482 U.S. 78 (1987) in that it does not reasonably relate to a legitimate penological interest. *Id*. at ¶¶ 84-101. Count II asserts that the Policy functions as an unconstitutional prior restraint on Avid's First Amendment right to communicate with Jail residents because it prohibits the communication before it has occurred. *Id*. at ¶¶ 102-105. Count III pleads that the Policy operates as an unconstitutional permitting scheme by affording Jail officials arbitrary, unfettered discretion to pick and choose which book sellers may communicate with Jail residents. *Id*. at ¶¶ 106-111. Count IV asserts that the Policy is unconstitutionally vague in violation of the Fourteenth Amendment because it contains no criteria, standards, or process for deciding which book sellers are Authorized Retailers. *Id*. at ¶¶ 112-117. The Complaint asks the Court to declare the Policy unconstitutional and enjoin its enforcement, and seeks damages, attorneys' fees, and costs. *Id*. at 26.

STANDARD OF REVIEW

Defendants move to dismiss Counts I-IV of the Complaint under Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (quoting *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Detailed factual allegations" are unnecessary to meet the 12(b)(6) standard. *Id*. "All well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 (11th Cir. 1999).

ARGUMENT

I. Avid States a First Amendment Claim under *Turner v. Safley.*

Avid has a clearly established First Amendment interest in communicating with Jail residents through the mail.[4] To determine whether the Authorized Retailer

[4] *Thornburgh*, 490 U.S. at 407 ("[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'" (internal citations omitted)); *Guajardo v. Estelle*, 580 F.2d 748, 754 (5th Cir. 1978) ("general correspondence rules touch not only the rights of the prisoners to receive mail but the rights of persons not incarcerated to send mail to the prison"); *see also Crofton v. Roe*, 170 F.3d 957, 959 (9th Cir. 1999) ("it is well settled that the First Amendment protects the flow of information to prisoners"); *Montcalm Publ. Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996) ("The Supreme Court has clearly recognized a First Amendment interest in those who wish to communicate with prison inmates . . ..").

Policy unconstitutionally infringes on Avid's free-speech interest in sending books to Jail residents, the relevant inquiry is whether the Policy is "reasonably related to legitimate penological interests." *Thornburgh*, 490 U.S. at 409 (internal citation omitted). This question is answered by applying the following factors ("the *Turner* test"), all four of which must be satisfied for the Policy to be upheld: (1) there must be a valid, rational connection between the Policy and the legitimate penological interest it intends to advance, (2) Avid must have alternative means of exercising its First Amendment right to communicate with Jail residents, (3) accommodating Avid's constitutional right to communicate with residents by sending them books must adversely impact jail employees, other inmates, and/or the allocation of jail resources (also known as the "ripple effect"), and (4) there must be no "ready alternatives" to the Policy that will accommodate both Avid's First Amendment right and the Jail's legitimate penological interest without overburdening the Jail. *See Turner*, 482 U.S. at 89-91.

While Avid has the burden of showing the Policy is invalid under *Turner*, *see Overton v. Bazzetta*, 539 U.S. 126, 132 (2003), courts in the Eleventh Circuit recognize that the *Turner* test is a "fact-intensive inquiry" that, in most cases, "can only be resolved at the summary judgment stage or at trial." *Jarrard v. Moats*, No.

4:20-cv-2-MLB, 2021 WL 1192948, *7 (N.D. Ga. Mar. 30, 2021) (quoting *Garber v. Conway*, 2016 WL 11545539, at *4 n.3 (N.D. Ga. Apr. 19, 2016)).[5]

With respect to the first *Turner* factor, Avid asserts "[t]here is no logical connection between the Jail's security concerns and its decision to allow certain book sellers, such as Amazon and Barnes & Noble (which has physical bookstores open to the public), to become Authorized Retailers, while disallowing local brick-and-mortar bookstores like Avid from being so-designated." Doc. 1 at ¶ 93; *see also id.* ¶ 95 (noting "Jail's failure to produce any documents relating to incidents of contraband being found inside books mailed to the Jail") and ¶¶ 14, 80, 105.

These allegations govern the outcome of the first *Turner* factor at the Rule 12 stage. If Defendants disagree, they must, in a different posture, present non-hypothetical, non-conclusory *evidence* that books sent from physical bookstores are more likely to contain contraband than books sent from online sellers like

[5] *See also Bennett v. Langford*, No. 4:18-CV-0011-HLM-WEJ, 2018 WL 9538769, at *2 (N.D. Ga. Jan. 22, 2018) (referencing "the fact-intensive nature of the *Turner* test"); *Profit v. Rabon,* 2020 WL 687590, *4 (S.D. Fla. Jan. 9, 2018) (denying motion to dismiss and noting that "[t]he parties will instead need to develop a record before the Court can engage in the proper *Turner* inquiry"); *Althouse v. Palm Beach County Sheriff's Office*, No. 12–80135–CIV, 2012 WL 4458287, *2 (S.D. Fla. Sept. 21, 2012) ("[T]he Court concludes that whether a postcard-only policy is 'reasonably related to legitimate penological interests' is a question of fact that is not appropriate for resolution as a matter of law at the motion to dismiss stage.").

Amazon, that also necessarily ship books handled by humans from a physical location. *Id*. at ¶¶ 12, 66, 95. To date, Defendants merely offer conclusory statements by counsel that the Authorized Retailer Policy serves the legitimate penological interests of prison safety and security. Doc. 11-1 at 7-8. This is insufficient to defeat Avid's pleading with respect to the first *Turner* factor. *See Daker v. Warren*, 660 Fed. Appx. 737, 745 (11th Cir. 2016) (refusing to consider factual assertions made in defendant's brief about logical connection between challenged policy and security concerns because "statements of counsel in a[] . . . brief are not substitutes for evidence").

Even if evidence of actual security concerns were to exist regarding books sent from physical bookstores, Defendants must then show that their Authorized Retailer Policy as currently written and applied is a reasonable response to those concerns. Avid contends the Policy is an exaggerated response and that there is no rational reason for treating Avid's book shipments differently than Amazon's or Barnes & Noble's. Doc. 1 at ¶¶ 93-95, 101. Defendants' Motion ignores this portion of Avid's pleading. *See Cruz v. Hauck*, 475 F.2d 475, 477 (5th Cir. 1973) (noting in dicta that "[t]he . . . contention . . . that items of contraband could be secreted within the covers of the books is seemingly answered [by having] the inmate's possession of reading materials . . . be preceded by a careful examination

to detect contraband") (cited favorably in *Daker*, 660 Fed. Appx. at 745). Thus, Defendants can show no grounds for dismissing Count I under *Turner*'s first factor.

The second *Turner* factor asks whether there are alternate means for the party challenging the jail regulation to exercise its constitutional rights. *See Prison Legal News v. Sec'y, Fla. Dep't of Corr.*, 890 F.3d 954, 972 (11th Cir. 2018). Here there are not. *Contra* ECF 11-1 at 8-9. Avid's main mode of communication is providing physical books to people and it has a protected First Amendment interest in doing so with respect to Gwinnett County Jail residents. Doc. 1 ¶¶ 32, 39. Avid typically does not communicate with Jail residents apart from shipping them books. *See id*. at ¶¶ 42-58 (describing how Jail residents' friends and family members communicate with Avid, and then Avid tries to mail books to the residents). Defendants' categorically barring Avid from sending books to Jail residents strips Avid of its core mode of communication with them. *Id*. ¶ 97.[6] Defendants' proposal that Avid instead suggest books to Jail residents via email or

[6] Avid's interest in sending books to Jail residents does not depend on residents having requested the books. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1049 (9th Cir. 2011) (plaintiff had First Amendment interest in distributing unsolicited copies of his publication to residents of county jails); *see also Martin v. City of Struthers,* 319 U.S. 141, 143, 148–49 (1943) (striking down as unconstitutional an ordinance that made it unlawful to go door-to-door to distribute unsolicited printed materials).

phone would involve an entirely different type of communication. This would likely require overcoming numerous barriers and would place the onus of procuring the physical recommended book on the resident--all while depriving Avid of its primary method of expression. Thus, Avid's somehow making oral or written book recommendations to Jail residents in no way substitutes for the separate and distinct communicative act of actually sending books to the residents.

It is also not a reasonable substitute, as Defendants suggest, for Avid to order books from publishers to be shipped to Jail residents. First, as an industry practice, Avid (and the vast majority of booksellers including Amazon) do not arrange for publishers to directly ship to customers in this manner. Second, this would eliminate Avid's communication with Jail residents altogether, reducing Avid to communicating only with the publisher to arrange the shipment. Third, this would require Avid to disclose to third-party publishers the Jail residents' identities and the fact that they are incarcerated, which presents privacy concerns. *Id*. at ¶¶ 77-78. Fourth, Avid cannot vouch for the accuracy and quality of materials that are shipped directly by a publisher, which is important because, in Avid's experience, publishers frequently ship either the wrong book or a damaged version. *Id*. at ¶ 79.

E-books are likewise not a reasonable substitute for allowing Avid to ship books to Jail residents. Newer titles are often not available as e-books, and Avid's

collection includes limited print runs and other materials that never make it into e-book form. *Id*. ¶ 81. Plus, an integral part of Avid's communication to Jail residents is sending books that a friend or family member has exercised his or her own expressive right to select. That expressive communication, including the aspect of giving the resident a gift, is completely lost if the Jail resident must access the title for themselves (assuming, that is, that they even know about the title and that it is available from the Jail's e-book provider). *Id*. at ¶¶ 82-83. In sum, there are not viable alternatives to mailing physical books to Jail residents that would still allow Avid to exercise its core mode of communication. Defendants' Motion therefore provides no grounds for dismissal of Count I under the second *Turner* factor.

Under the third *Turner* factor, Avid pleads that accommodating its First Amendment right to mail books to Jail residents "will not have a detrimental impact on the Jail's employees or on other individuals at the Jail who still must open and screen all book shipments coming into the Jail, regardless of the identity of the publisher or retailer who sent the shipment." *Id*. ¶ 98. Defendants make a "slippery slope" argument that accommodating Avid would mean they have to accommodate brick-and-mortar booksellers from anywhere in the country and it would eventually become a burden to inspect multiple "stores internal controls and operations policies." Doc. 11-1 at 9. This is a purely hypothetical problem. There is

no evidence that a laundry list of physical booksellers are lining up to ship books to the Gwinnett County Jail. *See Hrdlicka v. Reniff*, 631 F.3d 1044, 1053 (9th Cir. 2011) (rejecting, for lack of evidence, defendants' "slippery slope" argument that distributing one unsolicited publication to jail residents "would set an unworkable precedent [that] could obligate the Jail to accept any other publications that appeared on the doorstep"). Nor have Defendants provided any evidence that they do anything at all to vet the "internal controls and operations policies" of their Authorized Retailers. At most, it is an issue of fact for discovery whether accommodating Avid's right to communicate would cause the Jail to expend significant additional resources. *See id*. at 1054 (finding questions of fact as to whether delivery of unsolicited publication to residents would require additional resources). Thus, there is no basis to dismiss Count I under the third *Turner* factor.

Defendants barely engage with the fourth factor of readily-available alternatives, claiming only that Avid may not "second-guess" their Authorized Retailer Policy. Doc. 11-1 at 10. Avid has sufficiently pled alternatives to the Policy that would satisfy the Jail's security objectives with minimal burden to the Jail, such as requiring that physical bookstores ship new books that have only been handled by store staff and requiring that a bookstore print out a compliance form from the County's website, sign it, and include it with any book shipment sent to

the Jail or otherwise the shipment will be returned. Doc. 1 at ¶¶ 96, 99. Each shipment would be inspected upon arrival at the Jail (as, presumably, all packages that come to the Jail already are). If contraband were ever found, the Jail would be justified in refusing to accept future shipments from that bookstore. *See Turner*, 482 U.S. at 91 (if an alternative exists that "fully accommodates the [plaintiff's] rights at de minimis cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard").

In sum, Avid need only show that Defendants' Authorized Retailer Policy fails one of the *Turner* factors to prove the Policy is invalid under the First Amendment. Avid has thoroughly pled that the Policy fails all four. Conclusory, bare bones representations by defense counsel cannot defeat Avid's specifically-articulated allegations, all of which must be accepted as true at this stage.

Finally, Defendants contend that their Authorized Retailer Policy passes constitutional muster because, in their view, more-restrictive "publishers-only" policies have been upheld in other circuits. *See* Doc. 11-1 at 5-7.[7] None of these cases involved a First Amendment challenge to a ban on physical bookstores

[7] Citing *Hurd v. Williams*, 755 F.2d 306 (3d Cir. 1985); *Ward v. Washtenaw Cnty Sheriff's Dept*, 881 F.2d 325 (6th Cir. 1989); *Cotton v. Lockheart*, 620 F.2d 670 (8th Cir. 1980); *Jones v. Salt Lake County*, 503 F.3d 1147 (10th Cir. 2007); *Bethel v. Jenkins*, 988 F.3d 931 (6th Cir. 2021).

sending books to prisoners, which is the central issue here and, as far as we are aware, an issue of first impression. Plus, all but one of Defendants' cases was decided on summary judgment, after discovery concluded — not on the pleadings.

Specifically, *Hurd*, 755 F.2d at 307 (publishers only), *Ward*, 881 F.2d at 327 (publishers and ***book clubs*** only), and *Cotton*, 620 F.2d at 671 (publishers only) each involved a challenge by a *pro se* prisoner who wanted to receive printed materials from friends or family members. None involved a bookstore claiming it had been unconstitutionally excluded by the "publishers-only" rule.[8] In *Jones*, the challenged policy only allowed paperback books if obtained from the jail library or a publisher, but one of the available alternatives was that inmates could "receive donated books from the local Barnes & Noble bookstore" – i.e., a physical bookstore. 503 F.3d at 1159. And in *Bethel*, the policy prohibited inmates from receiving packages, including books, ordered by third parties (like friends and family members) from unapproved vendors, but orders from unapproved vendors were still allowed on a case-by-case basis so long as they were initiated by the inmate and approved by correctional staff. *See* 988 F.3d at 935. Hence, neither *Jones* nor *Bethel* presented the core issue present in the instant case of whether a

[8] Additionally, none of these three policies required the publisher or book club to first be "authorized" or "approved" by the jail. Hence, they raised none of the unfettered discretion and vagueness concerns presented by the instant Policy.

blanket ban on a physical bookstore mailing books to inmates, with no possibility of case-by-case approval, violates the First Amendment.

This distinction is crucial because, per *Bell v. Wolfish*, 441 U.S. 520 (1979), bookstores generally fall in the same category as publishers. *See id*. at 550 ("We conclude that a prohibition against receipt of hardback books unless mailed directly from publishers, book clubs, or ***bookstores*** does not violate the First Amendment rights of [prison] inmates.") (emphasis added). *Accord Kines v. Day*, 754 F.2d 28, 29 (1st Cir. 1985) (holding that rule providing that "[a]n inmate may receive . . . publications only from the publisher, from a book club, ***from a bookstore*** or news store" did not facially violate the First Amendment) (emphasis added). A blanket ban on a bookstore mailing books to residents is therefore an entirely different, and more constitutionally suspect, situation than a prohibition on friends, family members, or random vendors sending materials to residents.

As for the procedural distinction, all but one of Defendants' out-of-circuit cases involved summary-judgment rulings, after discovery had developed the record with respect to the *Turner* factors. Thus, Defendants' cases do not support that dismissal is appropriate at the pleading stage. *See Jarrard*, 2021 WL 1192948 at *7 (observing that the *Turner* Test is a "fact-intensive inquiry" that, in most cases, "can only be resolved at the summary judgment stage or at trial."). Notably,

in *Hurd*, the court expressed "concern about what may be the prison's overreaction" and lamented that the *pro se* plaintiff had not requested leave to undertake further discovery, including possibly securing expert testimony, to rebut the prison warden's testimony about the alleged security risk. *See* 755 F.2d at 309 ("We leave open the possibility that the record in another case may raise sufficient question that the security risk in [softbound] materials has been exaggerated as to require a plenary trial on the issue."). Avid too should have the opportunity to challenge, with expert testimony if necessary, any evidence – as opposed to attorneys' statements in a brief – that Defendants might eventually proffer regarding the alleged reasonable relationship between their Policy and a legitimate security concern.

II. Plaintiffs State Cognizable Claims of First Amendment Infringement, Prior Restraint, Unconstitutional Permitting, and Vagueness, None of Which Entitle Defendants to Qualified Immunity.

Qualified immunity "protects government officials performing discretionary functions . . . from liability if their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994). A right is clearly established where judicial decisions clearly apply to a wide variety of factual circumstances, or precedents involve materially similar

facts. *Vinyard v. Wilson*, 311 F.3d 1340, 1350-51 (11th Cir. 2002); *see also Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1278 (11th Cir. 2004) ("[W]e do not just compare the facts of an instant case to prior cases to determine if a right is 'clearly established;' we also assess whether the facts of the instant case fall within statements of general principle from our precedents."). Moreover, "[b]inding case law in this Circuit holds that the 'relevant legal landscape'—including even cases from outside our Circuit . . . —are informative in a court's determination of whether a particular constitutional right is clearly established." *Waldron v. Spicher*, 954 F.3d 1297, 1307 (11th Cir. 2020). Finally, qualified immunity only operates to bar recovery of money damages. The defense does not resolve § 1983 actions against individuals "where injunctive relief is sought instead of or in addition to damages." *Pearson v. Callahan*, 555 U.S. 223, 243 (2009). Here, Avid seeks, not only damages, but also to enjoin enforcement of the Policy. *See* Doc. 1 at 26. Under no circumstances would qualified immunity be dispositive of the entire Complaint.

Avid does not dispute that Defendants act within their discretionary authority in operating the Jail, including maintaining and enforcing the Authorized Retailer Policy. Thus, the salient question is whether, in so doing, Defendants have violated one or more clearly established constitutional rights. Here, the law is

clearly established that Avid has a First Amendment interest in communicating with Jail residents by mailing them books, and that Defendants' Policy barring them from doing so is only valid if it satisfies the *Turner* test. *See* Section I, *supra*. Accepting all facts alleged in the Complaint as true, Avid has sufficiently pled that the Policy is invalid under *Turner*. *See id*. Alternatively, there are at least questions of fact warranting discovery as to whether the Policy fails under *Turner*. *See id*. Thus, dismissal of Avid's damages claim on qualified immunity grounds is improper with respect to Count I of the Complaint. *See Daker v. Warren*, 660 Fed. Appx. 737, 746 (11th Cir. 2016) (reversing summary judgment for defendants based on qualified immunity because of "material issues of fact as to whether there is a logical connection between [a prison's] total ban on hardcover books and the security interests asserted by [law enforcement]" under the *Turner* test); *Emad v. Dodge County*, 71 F.4th 649, 653-54 (7th Cir. 2023) (denying qualified immunity in part based on questions of fact about whether the *Turner* test was satisfied).

With respect to Count II, it is also well established that requiring the Jail's approval before allowing an outsider to send mail to an inmate – which the Jail's Authorized Retailer Policy indisputably does – is a form of prior restraint. *Guajardo v. Estelle*, 580 F.2d 748, 754-55 (5th Cir. 1978) (analyzing as a prior restraint a corrections department rule requiring prior approval to correspond with

an inmate).[9] Additionally, the Authorized Retailer Policy operates as a prior restraint by categorically excluding physical bookstores like Avid from becoming Authorized Retailers, barring them from obtaining the equivalent of a license to mail books to Jail residents. *See Wright v. City of St. Petersburg, Fla.*, 833 F.3d 1291, 1299 (11th Cir. 2016) (requiring a license in order to be allowed to exercise one's First Amendment freedoms is a type of prior restraint); *see also Barrett v. Walker County School District*, 872 F.3d 1209, 1223 (11th Cir. 2017) (recognizing that policy governing public comment at school board meetings was "not formally a licensing or permitting scheme," but was nonetheless a prior restraint "because it prevent[ed] members of the public from speaking . . . unless they comply with the [p]olicy's requirements"; noting that permitting and licensing ordinances "are classic examples of prior restraints, but the category is not rigid"). The same is true here. "A prior restraint on expression exists" because Jail officials "can deny [Avid] access to [the] forum for expression before the expression occurs." *Id*.

Prior restraints "are generally decried because they tend to chill first amendment freedom of expression." *Guajardo*, 580 F.2d at 755. For the same

[9] Decisions by the Fifth Circuit issued before October 1, 1981 are binding as precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc).

reasons discussed above with respect to Count I, no legitimate penological interest justifies this prior restraint under *Turner*. Or, if being generous to Defendants, there are at least questions of fact as to whether *Turner* is satisfied.[10] Qualified immunity on Count II must therefore be denied.[11]

As described above, and pled in Count III, the Authorized Retailer Policy operates as a licensing or permitting scheme in a non-public forum that affords Defendants unfettered discretion to decide which booksellers will be allowed to ship books to Jail residents. Unfettered discretion exists because the Policy contains no criteria, standards, or process for determining which booksellers will be "authorized" to communicate with Jail residents. *See* Doc. 1 at ¶¶ 16-19. It is clearly established that "[a] grant of unrestrained discretion to an official

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[10] *Guajardo* analyzed a prior-restraint prison mail policy under the then-operative "least restrictive means" standard for evaluating prison regulations that was articulated in *Procunier v. Martinez*, 416 U.S. 396 (1974). *See* 580 F.2d at 753-55. The Supreme Court subsequently rejected the *Martinez* standard, replacing it with the *Turner* test. *Thornburgh*, 490 U.S. at 413. Thus, *Turner*, not *Martinez*, would govern this Court's analysis of Avid's prior-restraint claim.

[11] Defendants incorrectly suggest that *Thornburgh* rejected the idea that a prior-restraint claim could arise in the prison context. Doc. 11-1 at 11. The mail regulations challenged in *Thornburgh* did not require pre-approval and were not argued to be a prior restraint. *See* 490 U.S. at 404 (noting that the challenged regulations "generally permit an inmate to subscribe to, or to receive, a publication without prior approval"). Rather, the Thornburgh regulations "authorize[d] prison officials to reject incoming publications found to be detrimental to institutional security" once they arrived. *See* 490 U.S. at 403, 406.

responsible for monitoring and regulating First Amendment activities is facially unconstitutional." *Atlanta J. & Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298, 1310 (11th Cir. 2003) (applying unfettered-discretion doctrine in a non-public forum). Defendants argue that unfettered discretion claims cannot arise in the prison context. Doc. 11-1 at 10-11. To the contrary, "there is broad agreement" among the Circuits "that even in . . . nonpublic forums, investing governmental officials with boundless discretion over access to the forum violates the First Amendment." *Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 386 (4th Cir. 2006) (citing decisions from Seventh, Eighth, Tenth, and Eleventh Circuits); *see also Bourgeois v. Peters*, 387 F.3d 1303, 1317 (11th Cir. 2004) ("[a]lthough this [unbridled discretion] doctrine originated with [licensing] cases[,] . . . it has subsequently been held to apply to a wider range of burdens on expression").

Defendants also cite *Jones v. Salt Lake City* (10th Cir. 2007) which declined to apply unfettered-discretion doctrine to a prison mail regulation banning sexually explicit material and "technical publications." *See* 503 F.3d at 1155. This rule, unlike Defendants' Authorized Retailer Policy, did not involve jail officials picking and choosing between book retailers in the manner of granting or denying a license or permit. *Jones* is therefore neither instructive nor binding.

Finally, Defendants cite *Hakim v. Hicks*, 223 F.3d 1244, 1247 (11th Cir. 2000) for the proposition that "[a] prison regulation, even though it infringes the inmate's constitutional rights, is an actionable constitutional violation only if the regulation is unreasonable." Doc. 11-1 at 11. Setting aside that Avid is not an inmate, it is "unreasonable" for prison officials to exercise completely un-cabined, and therefore arbitrary and potentially viewpoint-discriminatory, discretion in deciding which book sellers may ship books to Jail residents and which may not. Doc. 1 at ¶¶ 115-116. *See Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951) ("in the absence of narrowly drawn, reasonable and definite standards for the officials to follow . . . [a restriction is invalid when] [n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power . . ..").

Given how closely the Authorized Retailer Policy parallels an unfettered-discretion permit or licensing scheme, and given the broad range of contexts in which unfettered-discretion doctrine has been applied, Defendants had more than sufficient notice that the absence of any criteria, standards, or process for determining which booksellers will be "authorized" subjects Defendants to liability. *See Keating v. City of Miami*, 598 F.3d 753, 766 (11th Cir. 2010) ("Although our research has located no cases that illustrate a factually identical violation of the First Amendment, prior cases clearly establishing the constitutional

violation . . . need not be 'materially similar' to the present circumstances so long as the right is 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" (cleaned up)). Defendants are therefore not entitled to qualified immunity on Count III.

The absence of any criteria, standards, or process in the Authorized Retailer Policy also gives rise to a Fourteenth Amendment vagueness claim (Count IV). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . A vague law impermissibly delegates basic policy matters to [government officials] for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972). While prison and jail regulations may not have to be as well-defined as is required in other circumstances, "[d]ue process undoubtedly requires certain minimal standards of specificity in prison regulations." *Meyers v. Aldredge*, 492 F.2d 296, 310 (3d Cir. 1974). *See Reynolds v. Quiros*, 25 F.4th 72, 98-99 (2d Cir. 2022) (affirming district court's finding that corrections rule both satisfied the *Turner* test, and separately, was not unconstitutionally vague); *Amatel v. Reno*, 156 F.3d 192, 203 (D.C. Cir. 1998) (recognizing that plaintiff's vagueness challenge to prison mail policy may have "independent force" from the *Turner* analysis).

Defendants argue that the word "authorized" is specific enough for a person of ordinary intelligence to understand its meaning. Doc. 11-1 at 12. However, the meaning of "authorized" depends on there being some criteria for what is authorized and what is not – otherwise, "authorized" connotes nothing more than arbitrary and random approval or disapproval. The latter is the situation presented by Defendants' Authorized Retailer Policy. Doc. 1 at ¶ 19, 112-117. *See Prison Legal News v. Babeu*, 933 F. Supp. 2d 1188, 1201-1202 (D. Ariz. 2013) (holding that vagueness claim was not moot because, where defendants provided no criteria or guidance "to outside parties on how to become an approved publisher or distributor," then "there is the possibility if not likelihood that the jail is resolving such matters on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application"). Hence, Defendants are likewise not entitled to qualified immunity on Count IV.

CONCLUSION

Taking all facts alleged in Avid's Complaint to be true, Counts I-IV sufficiently state claims for Defendants' violation of clearly established law. Defendants' Motion to Dismiss must be denied.

Respectfully submitted this this 2nd day of July, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the within and foregoing has been prepared in compliance with Local Rule 5.1(B) in 14-point Times New Roman type face.

This 2nd day of July, 2024.

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CERTIFICATE OF SERVICE

I certify that I filed the forgoing with the Court's CM/ECF System, which will send electronic notification to all counsel of record.

This 2nd day of July, 2024.

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