ACLU CALIFORNIA ACTION

P.O. Box 630
1017 L Street
Sacramento 95814

Tel: (916) 442-1036

April 3, 2024

Josh Jugum
California Department of Corrections and Rehabilitation
Regulation and Policy Management Branch
P.O. Box 942883
Sacramento, CA 94283-0001

VIA Electronic Mail: rpmb@cdcr.ca.gov

Re: Notice of Proposed Rulemaking: Title 15, Division 3, Chapter 1, regarding Community-Based Reentry Programs (NCR 24-02)

Dear Josh Jugum and Department Staff:

ACLU California Action and the ACLU Foundations of Northern California, Southern California, and San Diego & Imperial Counties write to offer comments in response to the California Department of Corrections and Rehabilitation's ("the Department") above Notice of Proposed Rulemaking.

The ACLU Foundations of Northern California, Southern California, and San Diego & Imperial Counties are affiliates of the national American Civil Liberties Union. ACLU California Action is a separate nonprofit entity that works in close coordination with the California ACLU affiliates on statewide legislative and policy priorities. Over the past 100 years, ACLU California Action and the California ACLU affiliates (collectively "ACLU") have advanced civil rights in California through, among other things, extensive impact litigation rooted in constitutional and statutory guarantees of equality and liberty, and sponsorship or support of numerous pieces of legislation aimed at preventing and eradicating discrimination. Today, the ACLU's work focuses on protecting civil rights and civil liberties, advancing equity, justice, and freedom, and dismantling systems rooted in oppression and discrimination.

The extensive package of proposed regulations touches on many issues of interest to the ACLU, but this comment letter focuses primarily on the domains of racial and immigrant justice. While the proposed regulations are a step in the right direction, they do not comply with the law they seek to implement, the California Values Act, a law that was enacted over six years ago, they fail to address other illegal practices at the Department, and they ignore the harm done to the people in the Department's custody as a result of its violation of state law. The proposed rulemaking process offered the Department an opportunity to enact regulations that would end the Department's long-standing use of discriminatory classifications that facilitate the deportation of Californians. However, they do nothing to end the Department's illegal collusion with Immigration and Customs Enforcement ("ICE"). The ACLU requests that the Department modify the regulations accordingly.

I. The Department must adjust the proposed regulations to properly implement the full scope of the California Values Act.

The California Values Act, which went into effect on January 1, 2018, prohibits the Department from restricting access to educational or rehabilitative programming, or credit-earning opportunities, on the sole basis of "citizenship or immigration status," which includes, but is not limited to, a hold request issued by immigration authorities. Gov't Code § 7284.10(b)(1). It also prohibits the Department from considering "citizenship and immigration status" when determining a person's custodial classification level, which includes, but is not limited to, a hold request issued by immigration authorities. Gov't Code § 7284.10(b)(2).

The Department states that it seeks to bring regulations in line with current law and, as such, amends subsection 3375.2(a)(4) to read: "Inmates with a detainer inquiry or active hold based solely on their immigration status shall not be precluded from placement in any department program or service…." The Department proposes similar language in subsections 3078.3(c)(4) and 3078.3(e)(4) as it relates to placement in the Male Community Reentry Program ("MCRP") and Female Community Reentry Program ("FCRP"), respectively. Furthermore, the Department repeals subsection 3078.3(a)(7) to remove "active or potential [ICE] holds, warrants, or detainers" as exclusionary factors for placement in an Alternative Custody Program.

The Department's proposed regulations fail to contemplate the full scope of the Values Act. In enacting the Values Act, the legislature clearly intended to prohibit "citizenship or immigration status" from being a factor in the denial of access to credit-earning opportunities or rehabilitative programming. A "detainer inquiry or active hold based solely on [ ] immigration status" is merely one potential indicator of citizenship or immigration status. To comply with the Values Act, the Department must clarify that other indicators of citizenship or immigration status can play no role in determining who may access rehabilitative programming or credit-earning opportunities or in classification determinations. This includes, for example, place of birth.

For decades, the Department has had a practice of classifying all individuals it believes were born outside of the United States as "foreign born" and placing what it calls a "Potential Immigration Hold" on them, a term that has no meaning under federal immigration law. It frequently makes these identifications based on perceived race or ethnicity. The Department then treats those "foreign born" individuals as ineligible for lower classification levels and programming, including the MCRP and the Custody to Community Transitional Reentry Program (which the new regulations would rename the FCRP). This internal classification system based on actual or perceived place of birth, which generally happens at intake, routinely misclassifies people and deprives them of years of programming that carry many benefits, including accelerated good time credits that result in earlier release from prison.

The Department also regularly misclassifies people who were born *in the United States* as "foreign born," apparently based on their race and ethnicity. It also regularly classifies naturalized U.S. citizens as "foreign born" even when they submit proof of their citizenship to the Department. Last year, the ACLU of Northern California unearthed records illuminating the Department's routine practice of barring such U.S. citizens from access to credit-earning opportunities and rehabilitative programming based on this foreign birth criteria, leading to

statewide coverage in major newspapers and an apology from the President of the California Correctional Peace Officers Association.

The Department's use of an individual's perceived or actual place of birth, race, or ethnicity to classify them functions as a proxy for citizenship and immigration status, which is a practice prohibited under the state constitution, statutory prohibitions against unlawful discrimination, and the Values Act. The Department subjects those with a Potential Immigration Hold to discriminatory treatment intended to facilitate their transfers to ICE custody. The Potential Immigration Hold classification results in treatment equivalent to ICE having requested an actual hold. Notably, actual holds—meaning those issued by ICE—are contemplated and addressed in the changes the Department is proposing, Potential Immigration Hold classifications are completely ignored. As the regulations currently stand, this means that people in the Department's custody with a Potential Immigration Hold will continue to be denied opportunities that are available to other incarcerated people merely because of their actual or perceived place of birth, race, or ethnicity—illegal placeholders for citizenship and immigration status. We urge the Department to adjust its proposed regulations to include the full scope of the protections in the Values Act.

II. The Department must address the harm it has caused to the people in its custody during the course of its violation of state law protections.

The Department asserts that its mission is, "To facilitate the successful reintegration of the individuals in our care back to their communities equipped with the tools to be drug-free, healthy, and employable members of society by providing education, treatment, rehabilitative, and restorative justice programs, all in a safe and humane environment." By denying community reentry opportunities and otherwise limiting credit-earning and programming opportunities based on Potential Immigration Holds, the Department undermines its stated rehabilitative mission.

The Department's unlawful practices have deprived numerous incarcerated people of access to programming, credit-earning opportunities, and other benefits for which those people should have been eligible, in light of the Values Act and anti-discrimination law. Over six years ago, the legislature excluded the Department from many of the requirements that other state and local law enforcement agencies must follow under the Values Act, but it explicitly prohibited the Department from denying people in its custody housing and programming benefits on the basis of citizenship or immigration status. The Department has clearly failed to meet that requirement over the last six years, illegally barring otherwise eligible people access to in-prison benefits. We urge the Department to include a streamlined and thorough process for retroactive credit restoration for each person whom the Department has misclassified due to citizenship or immigration status and who remains in the Department's custody.

III. We urge the Department to implement the following recommendations.

We have three related recommendations:

First, the Department must amend its proposed regulations to include the full scope of the Values Act. To ensure that the Department fully complies with state law and that there is no space for ambiguity among line staff, the ACLU recommends that the Department adopt a rule that clarifies that citizenship, immigration status, place of birth, and any other factor that might

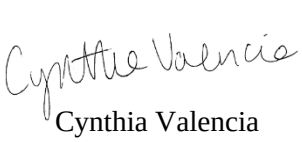
be perceived to bear on immigration or citizenship status can play no role in determining access to programming, credit earning opportunities, or classification placement.

Second, the Department must end its use of "Potential Immigration Holds." The practice is voluntary, intrinsically discriminatory, and violates the state constitution, anti-discriminatory laws, and the Values Act. The use of proxies for citizenship or immigration status, such as perceived or actual place of birth, ethnicity, or race regularly results in the illegal misclassification of people in its custody. We urge the Department to publish regulations that prohibit the use of "Potential Immigration Holds" and related discriminatory processes.

Third, to address the harm the Department has caused, and continues to cause, in the course of its violation of the Values Act over the last six years, the Department must introduce and quickly initiate a process through which it provides retroactive credit restoration to everyone that it has misclassified on the basis of citizenship or immigration status and who remains in its custody.

The Values Act was put in place by the legislature to prohibit the very type of misclassification practices that the Department has engaged in for decades. Despite the law's clear directive, the Department has failed to properly implement the law, which has had real consequences at both the beginning and end of a person's time in prison. Those who have been misclassified upon entering CDCR custody have been forced to forego programming opportunities that would have legally shortened their sentence and allowed them to return to their communities earlier. On the other side, there are those whose misclassification led the Department to illegally transfer them into ICE's custody upon the conclusion of their criminal sentence. To prevent the Department's discriminatory classification practices, which violate constitutional protections and state law and open the Department to liability, the Department must end its collusion with ICE.

Respectfully submitted,



Cynthia Valencia
Legislative Advocate
ACLU California Action

Sean Riordan
Senior Staff Attorney
ACLU Foundation of Northern California

Maria Romani
Immigrants' Rights Program Director
ACLU Foundation of Northern California