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May 7, 2013

VIA FACSIMILE AND EMAIL

California Department of Corrections and Rehabilitation
Regulation and Policy Management Branch (RPMB)
P.O. Box 942883
Sacramento, CA 94283-0001
Fax: (916) 324-6075
RPMB@cdcr.ca.gov

Re: Notice of Change to Regulations
American Indigenous Prisoners' Religious Liberty

To Whom It May Concern:

On behalf of the American Civil Liberties Union of California, I submit the following comments in response to the Notice of Proposed Regulations and proposed amendments to Sections 3000, 3190, 3213, and 3334 of the California Code of Regulations (CCR), Title 15, Crime Prevention and Corrections, to incorporate into the CCR provisions concerning Inmate Religious Property, published on March 15, 2013. The materials omitted from the proposed regulation, including the kinnikinnick, sacred pipe, sacred pipe bag, buffalo or deer skull, antlers, drums, leather, non-metallic dipper and non-metallic bucket, are fundamental religious items for American indigenous communities.

The regulations should be rejected for two reasons. First, they almost certainly violate federal law. The state is legally obligated to accommodate these religious requirements unless it can show that restricting or banning them is the least restrictive means of satisfying a compelling government interest. The proposed regulations cannot satisfy that standard because they do not advance a compelling interest. Thus, if they are adopted, CDCR will likely be embroiled in litigation that it will lose. Second, they interfere with inmates' religious practice, thereby increasing both the risk of negative behaviors among prisoners and the rate of recidivism.

The Proposed Regulations Almost Certainly Violate Federal Law

The Religious Land Use and Institutionalized Persons Act (RLUIPA) prohibits the state from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the state can prove that the burden "(1) is in furtherance of a

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compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a); *Greene v. Solano County Jail*, 513 F.3d 982, 988-89 (9th Cir. 2008). The court must "interpret[] RLUIPA[] to ensure[] *broad protection* of religious exercise, to the *maximum extent permitted*." *Khatib v. County of Orange*, 639 F.3d 898, 905 (9th Cir. 2011) (emphasis added). Courts recognize that RLUIPA affords confined persons "greater protection of religious exercise than what the Constitution itself affords." *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006); *see also Shakur v. Schiro*, 514 F.3d 878, 888 (9th Cir. 2008) (RLUIPA subjects government actions to a "stricter standard of review" than under the Free Exercise Clause).

As the United States Supreme Court held in *Cutter v. Wilkinson*, "RLUIPA is the latest of long-running congressional efforts to accord religious exercise *heightened protection* from government-imposed burdens…" 544 U.S. 709, 714 (2005) (emphasis added). In *Cutter*, the Court summarized testimony elicited at congressional hearings, during which numerous witnesses informed Congress that unnecessary barriers often impeded or prohibited religious exercises by prisoners. Among the examples cited by the Court were refusals to provide "items needed by Native Americans," which were "frequently treated with contempt and were confiscated, damaged, or discarded" by prison officials. *Id.* at 716 n.5. The Supreme Court recognized that RLUIPA is intended to protect institutionalized persons "who are unable to freely attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of religion," and upheld RLUIPA as valid legislation that applies to state-run institutions. *Id.* at 721.

The proposed amendment appears to restrict access to the American indigenous religious items, and this will undoubtedly constitute a substantial burden on the religious exercise of American indigenous inmates under RLUIPA. RLUIPA defines religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). Nonetheless, there is ample evidence that these items are often essential to American indigenous spiritual beliefs, including the sweat lodge ceremonies that CDCR has previously recognized as sacred to American indigenous communities. *See* CDCR Operations Manual Section 101060.9.

The items excluded by CDCR's proposed amended regulations are part of traditional American indigenous practices that are imperative to their rehabilitation and survival. Letter from Frances G. Charles, Tribal Chairwoman, Lower Elwha Tribe, to S. James Anya, UN Special Rapporteur on the Rights of Indigenous Peoples (Apr. 29, 2013). These items are critical for American indigenous inmates to participate fully in their faith. "The sweat bath ceremony is such a central part of the religious beliefs and rites of tribes that it is inconceivable that an Indian could practice his religious life in the traditional Indian way without having access to a sweat lodge." Arlene B. Hirschfelder & Paulette Morin, The Encyclopedia of Native American Religions 287 (1992). The kinnikinnick is used in sweat lodge ceremonies to complement or substitute for tobacco in ceremonial pipes. Animal hides, bones, teeth, drums and sticks, rattles and traditional medicines are also known components of traditional indigenous religious practices. The proposed religious property matrix excludes altogether the possession of multiple

sacred traditional items, both generally and for their use in connection with the sweat lodge ceremony, which constitutes a substantial burden on inmates' exercise of religion. *See Greene*, 513 F.3d at 988 ("an outright ban on a particular religious exercise is a substantial burden on that exercise.").

Additionally, although proposed Section 3000 defines "Religious Item" to mean "any bag, cross, medallion, totem, pipe, or other item in which the possessor places religious or spiritual significance," the proposed religious property matrix excludes pipes. The inconsistency between the text of proposed Section 3000 and the religious property matrix will result in confusion that is contrary to the stated purpose of the amendments to "minimize[e] discrepancies of what is allowable religious personal property items within institutions" and to "reduc[e] potential inmate litigation." Notice – RPM at 3.

We can ascertain no compelling interest for the state to deny American indigenous inmates the opportunity to acquire these religious items. We understand that "prison security is a compelling interest." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). However, these items present no apparent security risk. The CDCR Operations Manual Section 101060.9 recognized that the area for the American Indian Sweat Lodge is to be considered sacred, and Section 101060.9.1 previously permitted inmates to acquire from an approved vendor the kinnikinnick, sacred pipe, sacred pipe bag, buffalo or deer skull, antlers, non-metallic dipper and non-metallic bucket for Sweat Lodge ceremonies, all of which are now excluded from the proposed list.

The Statement of Benefits associated with the proposed amendments presents no compelling interest in denying inmates the opportunity to use these religious items. Notice – RPM at 3. The "Specific Benefits Anticipated by the Proposed Regulations" section of the Notice of Proposed Regulations says CDCR's expected benefits include "minimizing discrepancies of what is allowable religious personal property items within institutions, providing statewide standardization of religious personal property items, reducing potential inmate litigation, compliance with existing court mandates, and supporting inmates' right to freedom of religion."

These justifications are neither persuasive nor compelling. The discrepancy between the Operations Manual, which permitted some of the excluded items, and the proposed Religious Property Matrix, which excludes them, will contribute to confusion about what is allowable religious property. The substantial burden that will result from the exclusion of these items will likely only result in increased inmate litigation. Further, no existing court mandate requires the statewide exclusion of access to the American indigenous religious items at issue. Finally, statewide standardization of religious personal property items gives rise to no compelling interest justifying the exclusion of items essential to sacred American indigenous spiritual activities. As courts have recognized, the Religious Freedom Restoration Act of 1993, which imposes the same level of scrutiny as RLUIPA, *see* 42 U.S.C. § 2000bb-1 (2000), "plainly contemplates that courts would recognize exceptions – that is how the law works." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal*, 546 U.S. 418, 434 (2006).

Although the Initial Statement of Reasons dated March 5, 2013, says "the purpose of these regulations is to . . . ensur[e] security and safety in the institutions," in the Ninth Circuit, vague reference to security concerns cannot satisfy the exacting standard on religious restrictions created by RLUIPA. "[N]o longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison. *RLUIPA requires more.*" *Greene,* 513 F.3d at 989-90 (emphasis added). *See also Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990) ("Prison authorities cannot rely on general or conclusory assertions to support their policies."). The excluded American indigenous items present no apparent security risk, and there is no evidence that CDCR has considered and rejected less restrictive measures.

The Ninth Circuit has concluded that "the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005). Other states, and the Bureau of Prisons, have written policies specifically allowing inmates to possess these items. *See, e.g.,* U.S. Department of Justice, Federal Bureau of Prisons, Program Statement CPD/RSB P5360.09 (permitting access to pipe), *available at* <http://www.bop.gov/DataSource/execute/dsPolicyLoc> (last visited May 6, 2013); Alabama Religious Programs Services (permitting American indigenous inmates access to antlers, claws, gourds, prayer pipes, kinnikinnick, tobacco, drums and a rattle), *available at* <http://www.doc.state.al.us/docs/AdminRegs/AR333.pdf> (last visited May 6, 2013); Colorado Religious Programs, Services, Clergy, Faith Group Representatives, and Practices (permitting antlers, buffalo/cow skull, ceremonial pipe, ceremonial pipe bag, drum sticks, drums, firewood, prayer ties, rattles, up to 30 lava rocks, water, water bucket, water dipper) *available at* <http://www.doc.state.co.us/sites/default/files/ar/0800_01_03152011.pdf> (last visited May 6, 2013); Washington Department of Corrections Allowable Individual Religious Items 560.200 Attachment 1 (permitting hand drum and beater, kinnikinnick, and pipe with cloth or leather bag); *Fowler v. Crawford*, 534 F.3d 931, 933 (8th Cir. 2008) (noting that American indigenous inmates at Missouri's Jefferson City Correctional Center, a maximum security prison, were permitted a "sacred bundle" that contained "a prayer pipe, sage, cedar, sweet grass, tobacco, a medicine bag, and prayer feathers"); *Newberg v. Geo Group, Inc.*, No. 2:09-cv-625, 2011 U.S. Dist. LEXIS 68955 at *4-5 (M.D. Fla. June 27, 2011) (holding plaintiff's claims were moot because of new policy permitting American indigenous residents of Florida Commitment facility to smudge, perform other American indigenous rites and ceremonies, cleanse with smoke from kinnikinnick, and obtain prayer pipes and other ceremonial items). The existence of numerous other correctional systems that permit Native American inmates to possess the very items that California is proposing to ban will make it almost impossible for California to demonstrate that the ban is narrowly tailored to satisfy a compelling interest.

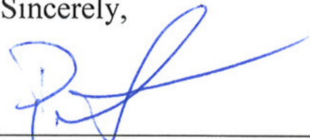
The Proposed Regulations are a Bad Idea and Will Lead to More Unrest in CDCR Facilities and Increased Recidivism

Allowing inmates to engage in religious exercise reduces violence and other negative behaviors by incarcerated individuals. *See* Kent R. Kerley, Todd L. Matthews & Troy C.

Blanchard, "Religiosity, Religious Participation, and Negative Behaviors," 44 Journal for the Scientific Study of Religion 443, 455 (2005) ("[O]ur study demonstrates that religion can reduce the incidence of negative behavior, even in an exceptionally negative context such as a prison facility."). Moreover, allowing inmates to exercise their religion while they are incarcerated promotes the goal of rehabilitation, which is an essential part of CDCR's mission. *See* CDCR Vision, Mission, Values, and Goals, *available at* <http://www.cdcr.ca.gov/About_CDCR/vision-mission-values.html> (last visited May 6, 2013). As one federal court has stated: "Congress has determined that encouraging greater protection of religious worship within prisons promotes the general welfare, and we find it to be beyond serious dispute that this protection furthers society's larger goal of rehabilitating inmates as well as simply respecting individual religious worship." *Murphy v. Missouri Dep't of Corrections*, 372 F.3d 979, 987-88 (8th Cir. 2004). Accordingly, CDCR's goals of both jail security and inmate rehabilitation will be better served by rejecting the proposed regulations.

The proposed amendments needlessly deprive prisoners of access to vital religious accommodations. CDCR should promulgate a final rule, consistent with RLUIPA's heightened protection for institutionalized people from government-imposed burdens, with revisions sufficient to address the concerns discussed above.

Sincerely,



Peter J. Eliasberg
Legal Director
ACLU Foundation of Southern California
1313 West 8th Street
Los Angeles, CA 90017

Alan L. Schlosser
Legal Director
ACLU Foundation of Northern California
39 Drumm Street
San Francisco, CA 94111

David Blair-Loy
Legal Director
ACLU Foundation of San Diego and Imperial Counties
Post Office Box 87131
San Diego, CA 92138