Federal Bureau of Prisons – Docket No. BOP-1171-P
Comments to Proposed Rule:
Inmate Discipline Program: Disciplinary Segregation and Prohibited Act Code Changes

Submitted by:
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Introduction

On behalf of the American Civil Liberties Union (ACLU) and its 1.5 million members, supporters, and activists, and 53 affiliates, we present the following comments to the Federal Bureau of Prisons (BOP) in response to the "*Notice of Proposed Rulemaking on Inmate Discipline Program: Disciplinary Segregation and Prohibited Act Code Changes*," Docket No. BOP-1171-P, published in the Federal Register, Vol. 89, NO. 22 (Feb. 1, 2024).

The ACLU is dedicated to the principles of liberty, justice, and equality embodied in our nation's Constitution and civil rights laws, and to protecting the civil liberties of all people in the country. Consistent with that mission, the ACLU established the National Prison Project (NPP) in 1972 to protect the rights of incarcerated people, to improve conditions within carceral settings, and to address the laws and policies that make the U.S. the world leader in mass incarceration. For years, we have been at the forefront of the fight against mass incarceration's devastating impact on people ensnared in the criminal legal system, and its disproportionate effect on communities of color. The ACLU is also a national leader in protecting the First Amendment rights of all people – including incarcerated people – through litigation and policy advocacy.

The ACLU opposes the proposed rule changes. First, they are a complete overhaul and massive expansion of the Disciplinary Code, with significant implications for wide-ranging penalties. The Notice of Proposed Rulemaking does not attempt to refute these concerns, nor does it provide virtually any data or information to justify its

departures from the BOP's previous disciplinary policy, as is required under the Administrative Procedure Act and countless federal court decisions.[1]

Second, the proposed rule changes will also increase mass incarceration, by keeping people in prison for longer periods of time by increasing the number of infractions that can result in high or greatest-level severity violations. These disciplinary violations can make people ineligible for home confinement or early release under parole, compassionate release, clemency, or for residents of the District of Columbia, deny resentencing under the Second Look Amendment Act. In addition to the incalculable toll that increased incarceration takes on incarcerated people and their families, this will increase the financial costs to the federal government for incarcerating people pursuant to rules that serve no public interest and infringe on the First Amendment rights of both incarcerated people and those who wish to communicate with them.

Multiple Proposed Rule Changes Violate the First Amendment Rights of Incarcerated People and Those Who Wish to Communicate With Them.

The proposed rule prohibits a discrete category of political speech from reaching the public. The addition of new codes 194 and 294 would create a categorical ban on all social media use by incarcerated people for any purpose, including indirectly disseminating their speech on social media by third parties. BOP did not provide reasoning for proposing this particular ban, other than the justification of "general security" offered more broadly.

Prohibiting the use of social media – including by third parties on behalf of incarcerated people – violates the First Amendment rights of both incarcerated persons and their free-world correspondents. *See Canadian Coalition Against the Death Penalty v. Ryan*, 269 F.Supp.2d 1199, 1203 (D. Ariz. 2003) (permanently enjoining a state statute imposing discipline on Arizona prisoners for any Internet presence, including websites maintained by third parties on their behalf); *see also Clement v. Calif. Dep't of Corrs*., 364 F.3d 1148, 1152 (9th Cir. 2004) (upholding injunction against state prison regulation prohibiting incarcerated people from receiving mail containing material downloaded from the Internet); *Jordan v. Pugh*, 504 F.Supp.2d 1109, 1117-18 (D. Colo. 2007)

[1] *See* 5 U.S.C. § 706(2)(A); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124-25 (D.C. Cir. 2003) (holding that government agency action is arbitrary and capricious if it departs from agency precedent without explanation, and that when changing policies, agencies "must provide a reasoned analysis indicating that prior policies and standards are being changed, not casually ignored.") (cleaned up).

(enjoining BOP rule that imposed a blanket prohibition on incarcerated people from publishing under a byline or acting as reporters).

The proposed rule changes violate the First Amendment rights of incarcerated people as well as the rights of third parties disseminating the speech of people in BOP custody. They do nothing to protect the "safe and secure operation" of BOP 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)). Incarcerated people retain First Amendment rights unless they are "inconsistent with [a person's] status as a prisoner or with the legitimate penological objectives of the correctional system." *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 129 (1977) (quoting *Pell v. Procunier*, 417 U.S. 817, 822 (1974)). Prison systems cannot impose restrictions on incarcerated people's free speech rights when the regulations "represent[] an exaggerated response" to penological concerns. *Turner*, 482 U.S. at 87. The Supreme Court set forth a four-factor test in *Turner* to determine whether a prison policy serves and is rationally related to legitimate penological objectives:

> (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open to the inmates to exercise the right; (3) the impact that accommodating the asserted right will have on other guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials.

Prison Legal News v. Cook, 238 F.3d 1145, 1149 (9th Cir. 2001) (citing *Turner*, 482 U.S. at 89-91); *see also Armstrong v. Davis*, 275 F.3d 849, 874 (9th Cir. 2001) (holding that "prison authorities cannot avoid court scrutiny under *Turner* by reflexive, rote assertions."); *Calif. First Amend. Coalition v. Woodford*, 299 F.3d 868, 882 (9th Cir. 2002) (holding that speculative fears of safety and security are insufficient to impose restrictions on the First Amendment rights of incarcerated people and the public, and that prison officials "must at a minimum supply some evidence that such potential problems are real, not imagined.").

Such a ban would also suppress the dissemination of information by outsiders – including the ACLU – about conditions in BOP prisons to the public, Congress, and other government officials. Social media is a commonly-used platform to raise awareness of issues in our nation's carceral facilities, and this blanket prohibition, as written, chills the free speech rights of persons and organizations such as the ACLU that shine a spotlight

on conditions in federal prisons. *See Jordan*, 504 F.Supp.2d at 1118 (striking down BOP's blanket ban on publishing articles with a byline, in part because of the regulation's chilling effect: "the only way for any inmate to be certain to avoid punishment is to not submit an article to the news media for publication."). Courts have found that bans on incarcerated people communicating via written letters to publicize conditions in prisons are unconstitutional. *See Nolan v. Fitzpatrick*, 451 F.2d 545, 547-48 (1st Cir. 1971) (holding that "the condition of our prisons is an important matter of public policy as to which prisoners are, with their wardens, peculiarly interested and peculiarly knowledgeable. The argument that the prisoner has the right to communicate his grievances to the press and, through the press, to the public is thus buttressed by the invisibility of prisons to the press and the public: the prisoners' right to speak is enhanced by the right of the public to hear."). The fact that the communications here are provided electronically does not save the proposed rule changes from violating the Constitution.

Advocacy groups such as the ACLU have a right to communicate with incarcerated people and to publicize the conditions inside. The Supreme Court in 1978 made clear that "[f]or the ACLU … 'litigation is not a technique of resolving private differences'; it is 'a form of political expression' and 'political association.'" *In re Primus*, 436 U.S. 412, 427-28 (1978) (quoting *NAACP v. Button*, 371 U.S. 415, 429 (1963). In holding that the First Amendment protects "advocating lawful means of vindicating legal rights," the Supreme Court explicitly noted that ACLU's protected activities include both litigation and "communicating useful information to the public." *Id.* at 430; *see Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("As a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards.") (internal marks omitted). Attorney speech protections are especially strong when attorneys are "engaged not in solicitation of clients or advertising for his practice, as in our precedents from which some [Justices] would discern a standard of diminished First Amendment protection," but rather their words "were directed at public officials and their conduct in office." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033-34 (1991). The Court held that "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Id*.; *see also Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it" is only permissible "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.")

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BOP also proposes to revise the definition of "circulating a petition," to be equivalent to "encouraging others to refuse to work, or participate in a work stoppage." The revised definition would "prohibit participating or promoting others to participate with two or more persons in unauthorized behavior, whether planned or un-planned (including but not limited to, unauthorized work stoppage or refusal to work or eat, group demonstrations, sit-ins, *creating or circulating a petition*, …)." (emphasis added)

This is overly broad, vague, and unjustified. Circulating a petition, in and of itself, seeks to highlight and resolve problems in a nonviolent and peaceful fashion. Many courts have found incarcerated persons' petitions to be protected speech under the First Amendment. *See, e.g., Bridges v. Russell*, 757 F.3d 1155, 1156-57 (11th Cir. 1985); *Haymes v. Montayne*, 547 F.2d 188, 191 (2d Cir. 1976); *Stoval v. Bennett*, 471 F.Supp. 1286, 1290 (M.D. Ala. 1979).

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BOP proposes to increase the severity level for "using abusive or obscene language" from a Low Level violation (404) to a new Moderate Level code (337). The sole rationale offered for this modification is BOP's proposal "to eliminate the Low Severity Level prohibited act code (400) series entirely." It is clear, however, that when compared to other 300 series violations, such as lying to staff, violating conditions of furloughs or community programs, or forging documents, this elevation would vastly overstate the significance of uttering an obscenity.

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BOP also proposes to assimilate the charge of "feigning an illness" to an existing rule violation code (Code 313) that addresses "lying or providing a false statement to a staff member." Again, this is a vague and overly broad restriction upon incarcerated people and is contrary to the public interest. Incarcerated people should be encouraged to seek medical attention when they believe they are ill, both for their own protection and for the health and safety of other incarcerated people and prison staff. BOP should not be discouraging people from seeking medical attention for fear that health care staff's failure or inability to diagnose an illness would result in disciplinary sanctions. It is not uncommon for people in the free world to report feeling ill and to be told by health care providers that there is nothing physically wrong with them. Moreover, because there are certain mental health disorders (for example, conversion disorder), where people sincerely (but incorrectly) believe that they have illnesses, disciplining people for "feigning an illness" could amount to punishing them due to their mental health

disability, violating their rights under the Rehabilitation Act. In sum, there is no sufficient justification offered to support including "feigning illness" as part of "lying or providing a false statement to a staff member."

The Proposed Rule's Limited Steps to Restrict Disciplinary Segregation are Positive but Insufficient.

The ACLU commends the BOP for taking urgent, necessary steps to limit the duration of disciplinary segregation. This is a much needed and long overdue reform, responding to the overwhelming evidence that BOP's use of solitary confinement causes devastating and deadly harm, worsens safety for all incarcerated people and staff, and is inflicted disproportionately on Black and Brown people and LGBTQ people.[2] But disciplinary segregation is only a small portion of the solitary confinement imposed on people in BOP custody. BOP statistics reveal that the overwhelming majority of people kept in restricted housing units are in administrative detention rather than disciplinary segregation.[3] By whatever name, these are forms of solitary confinement, and we urge the BOP to immediately reduce the numbers of people subjected to administrative detention, disciplinary segregation, and all other forms of solitary confinement, with the goal of eliminating the practice altogether.

While in some cases the eligibility for disciplinary segregation will be limited under these many proposed rule changes, the global harm and risk of subjecting incarcerated people to more severe punishment is great. As detailed above, the policy changes proposed in this Notice should not be adopted, and will almost certainly subject the Bureau to litigation.

We are available to answer any questions that you may have about the foregoing.

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[2] *See, e.g.*, Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, Crime and Justice, 47, 365-416 (2018); Keramet Reiter, et al., *Psychological Distress in Solitary Confinement: Symptoms, Severity, and Prevalence in the United States, 2017-2018*, Amer. J. of Public Health, 110, 556-562 (2020); C. Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, Crime & Delinquency, 49, 124-156 (2003); Peter Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, in Michael Tonry (Ed.), Crime and Justice, Vol. 34. Chicago: Univ. of Chicago Press (2006), at pp. 441-528.

[3] https://www.bop.gov/about/statistics/statistics_inmate_shu.jsp