State of California
Office of Administrative Law

In re: **Department of Corrections and Rehabilitation**	**NOTICE OF APPROVAL OF REGULATORY ACTION**
Regulatory Action:	**Government Code Section 11349.3**
Title 15, California Code of Regulations **Amend sections: 3173.2, 3174, and 3176**	**OAL Matter Number: 2024-0319-01**
	OAL Matter Type: Regular (S)

In this regular rulemaking, the Department of Corrections and Rehabilitation is amending regulations regarding searching and inspecting visitors, standards of dress for visitors, and denying a visitor access to an institution or facility.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 4/22/2024 pursuant to section 11343.4(b)(3) of the Government Code.

Date: April 22, 2024

Steven J. Escobar
Senior Attorney

Original: Jeffrey Macomber, Secretary
Copy: Sarah Pollock

For: Kenneth J. Pogue
Director

DocuSign Envelope ID: 3C260F7A-609D-[illegible]

STATE OF CALIFORNIA–OFFICE OF ADMINISTRATIVE LAW

NOTICE PUBLICATION/REGULATIONS SUBMISSION

REGULAR

STD. 400 (REV. 10/2019)

For use by Secretary of State only

OAL FILE NUMBERS	NOTICE FILE NUMBER	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
	Z-2023-0612-03	2024-0319-01S	

For use by Office of Administrative Law (OAL) only

OFFICE OF ADMIN. LAW
2024 MAR 19 PM 12:47

NOTICE | REGULATIONS

ENDORSED - FILED
in the office of the Secretary of State
of the State of California
APR 22 2024
2:05 PM

AGENCY WITH RULEMAKING AUTHORITY: California Department of Corrections and Rehabilitation

AGENCY FILE NUMBER (If any): 22-65

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE	TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE

3. NOTICE TYPE	4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
☐ Notice re Proposed Regulatory Action ☐ Other			

OAL USE ONLY	ACTION ON PROPOSED NOTICE	NOTICE REGISTER NUMBER	PUBLICATION DATE
	☐ Approved as Submitted ☐ Approved as Modified ☐ Disapproved/ Withdrawn	2023, 25-Z	6/23/23

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S): Visiting

1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S):

2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) **(Including title 26, if toxics related)**

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)

ADOPT:

AMEND: 3173.2, 3174, and 3176

TITLE(S): 15

REPEAL:

3. TYPE OF FILING

- ☒ Regular Rulemaking (Gov. Code §11346)
- ☐ Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.
- ☐ Emergency Readopt (Gov. Code, §11346.1(h))
- ☐ Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
- ☐ Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)
- ☐ File & Print
- ☐ Print Only
- ☐ Emergency (Gov. Code, §11346.1(b))
- ☐ Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)
- ☐ Other (Specify)

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)
1st 15-Day Re-Notice 10/16/23-10/31/23; 2nd 15-Day Re-Notice 1/25/24-2/9/24

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)
- ☐ Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))
- ☒ Effective on filing with Secretary of State
- ☐ §100 Changes Without Regulatory Effect
- ☐ Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY
- ☐ Department of Finance (Form STD. 399) (SAM §6660)
- ☐ Fair Political Practices Commission
- ☐ State Fire Marshal
- ☐ Other (Specify)

7. CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional)
Sarah Pollock	916 445-2308		sarah.pollock@cdcr.ca.gov

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

DocuSigned by:

SIGNATURE OF AGENCY HEAD OR DESIGNEE: Tammy Foss — DATE: 3/18/2024

TYPED NAME AND TITLE OF SIGNATORY: TAMMY FOSS, Undersecretary, CDCR

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

APR 22 2024

Office of Administrative Law

FINAL TEXT OF ADOPTED REGULATIONS

In the following text, strikethrough indicates deleted text; underline indicates added text.

California Code of Regulations, Title 15, Division 3, Adult Institutions, Programs and Parole

Chapter 1. Rules and Regulations of Adult Operations and Programs

Subchapter 2. Inmate Resources

Article 7. Visiting

3173.2. Searches and Inspections.

[Subsection 3173.2(a) is amended to read:]

(a) Any person coming onto the property of an institution~~/~~ or facility shall be subject to inspection as necessary to ensure institution~~/~~ or facility security including prevention of the introduction of contraband. Inspections may include a search of the visitor's person, personal property and vehicle(s) when there is reasonable suspicion to believe the visitor ~~is~~ may be attempting to introduce or remove contraband or unauthorized items or substances into, or out of, the institution~~/~~ or facility.

[Subsections 3173.2(b) through 3173.2(c)(3)(F) are unchanged.]

[Subsection 3173.2(c)(3)(G) is amended to read:]

(G) All requests for unclothed~~/~~ or clothed body searches, the reason for the request, and specific facts on which the search is based shall be documented on CDCR Form 888 (Rev. ~~04/15~~ 01/24), Notice of Request for Search, which is incorporated by reference. This form shall include the subject's name, date, all information regarding the reason(s) for the search excluding any confidential information as referenced in section 3321, and the signature of the person authorizing or refusing ~~the~~ to be searched. Should the visitor refuse to be searched or in instances where drugs or contraband are discovered, a CDCR Form 887-B (~~01/03~~ Rev. 02/23), Notice of Visitor Warning/Termination/Suspension/Denial/Revocation, which is incorporated by reference, shall be completed. This form shall specify the reason(s) for the denial of visiting and time frames for which the denial~~/~~ or suspension are in effect.

[Subsections 3173.2(c)(4) through 3173.2(d)(6) are unchanged.]

[Subsection 3173.2(d)(7) is amended to read:]

(7) Unclothed body search: An unclothed body search is a security procedure that involves visual inspection of a person's body and body cavities with all of their clothing

removed and a thorough inspection of the person's clothing for the purpose of detecting contraband. The visitor's body will not be touched by staff during the unclothed body search. This procedure ~~may~~ shall be conducted with the visitor's consent and when there is a reasonable suspicion that the visitor ~~is~~ may be carrying contraband and when no less intrusive means are available to conduct the search.

[Subsections 3173.2(e) through 3173.2(i) are unchanged.]

[Subsection 3173.2(i)(1) is renumbered as (j), and is amended to read:]

(~~1~~j) The ~~inmate and the~~ visitor who refused to be searched shall be notified of the denied visit in writing, as described in section 3176~~(a)(3)~~(b).

[Subsection 3173.2(i)(2) is renumbered as 3173.2(j)(1), and is amended to read:]

(~~2~~1) Future visits may be conditioned upon the visitor's willingness to submit to a search prior to each visit for as long as institution~~/~~ or facility officials have reasonable suspicion to believe that the visitor ~~will~~ may be attempting to introduce contraband or unauthorized substances into the institution~~/~~ or facility.

Note: Authority cited: Section 5058, Penal Code. Reference: Sections 4573, 4573.5, 4576, 5054 and 6402, Penal Code.

Section 3174. Standards of Dress for Inmate Visitors.

[Subsections 3174(a) through 3174(b)(3) are unchanged, but are shown for reference purposes.]

(a) Visitors are expected to dress appropriately and maintain a standard of conduct during visiting that is not offensive to others. Consistent with the goal of making visiting a safe, positive, constructive time for families and staff, the following standards shall apply:
(1) Visitors shall remain fully clothed at all times in the visiting room.
(2) Appropriate attire includes undergarments; a dress or blouse/shirt with skirt/pants/ or shorts; and shoes or sandals.
(3) For security reasons, no brassiere will have metal underwires.
(b) Prohibited attire consists of:
(1) Clothing that resembles state-issued inmate clothing worn to visiting (blue denim or blue chambray shirts and blue denim pants);
(2) Clothing that resembles law enforcement or military-type clothing, including rain gear, when not legitimately worn by an individual on active duty or in an official capacity.
(3) Clothing or garments that:

[Subsection 3174(b)(3)(A) is amended to read:]

(A) Expose the breast~~/~~ or chest area, genitals or buttocks;

[Subsections 3174(b)(3)(B) through 3174(b)(3)(E) are unchanged, but are shown for reference purposes.]

(B) By design, the manner worn, or due to the absence of, excessively allows the anatomical detail of body parts or midriff to be clearly viewed;
(C) Are sheer, transparent or excessively tight;
(D) Expose more than two inches above the knee, including slits when standing.
(E) Undergarments shall be worn beneath translucent clothing, under all circumstances.

[Subsection 3174(b)(4) is amended to read:]

(4) Clothing or accessories displaying ~~obscene~~ sexualized, violent, or offensive language, drawings or objects.

[Subsections 3174(b)(5) through 3174(b)(6) are unchanged.]

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code.

Section 3176. Denial, Restriction, Suspension, Termination or Revocation of Visits and Exclusion of a Person.

[Section 3176 initial paragraph is unchanged.]

[Subsection 3176(a) is amended to read:]

(a) The official in charge of visiting may deny an approved visitor access to an institution~~/~~ or facility, terminate, or restrict a visit in progress for the following reasons:

[Subsections 3176(a)(1) through 3176(a)(2) are unchanged.]

[Subsection 3176(a)(3) is amended to read:]

(3) The visitor refuses to submit to a search ~~and~~ or inspection of ~~his/her~~ their person, property, or vehicles ~~and property~~ brought onto the institution~~/~~ or facility grounds.

[Subsection 3176(a)(3)(A) is amended to read:]

(A) Visitors who refuse to submit to an unclothed body search, where ~~probable cause~~ reasonable suspicion exists, shall have their visiting privileges denied for that day. Future visits may be conditioned upon the visitor's willingness to submit to an unclothed body search prior to being allowed to visit. Such searches may be repeated on subsequent visits for as long as institution~~/~~ or facility officials have ~~probable cause~~ reasonable suspicion to believe ~~that~~ the visitor ~~will~~ may be attempting to introduce contraband, ~~or~~ unauthorized substances, or items into the institution~~/~~ or facility.

[Subsections 3176(a)(3)(B) through 3176(a)(10) are unchanged.]

[Subsection 3176(b) is amended to read:]

(b) Written notification on a CDCR Form 887-B (Rev. 02/23), Notice of Visitor Warning/Termination/Suspension/Denial/Revocation, which is incorporated by reference, shall be provided to the visitor when action is taken by the official in charge of visiting to deny, terminate or restrict a visit. The written notification shall contain information instructing the visitor how to appeal the action as outlined in section 3179.

[Subsections 3176(c) through 3176(d) are unchanged.]

Note: Authority cited: Section 5058, Penal Code. Reference: Section 5054, Penal Code.

STATE OF CALIFORNIA — DEPARTMENT OF CORRECTIONS AND REHABILITATION

NOTICE OF REQUEST FOR SEARCH

CDCR 888 (Rev. 01/24)

INSTITUTION CONDUCTING THE SEARCH

VISITOR NAME	NAME OF INMATE	CDCR #

Institution staff has cause to suspect that you might be carrying some form of contraband. Consistent with the posted notice at the entrance of this facility, we request your voluntary submission to a clothed/unclothed search of your person and any minor(s) accompanying you. The search may include your personal possessions and your vehicle.

All visitors have the right to refuse the search and forego the visit for a day. All visitors have the right to stop the search at any time and forego the visit for the day. If a minor is to be subjected to a clothed/unclothed search, only the parent or legal guardian may authorize the search and must be present during the search. Absent positive proof of relationship, (e.g., birth certificate, court order, notarized authorization by parent or legal guardian), a search of a minor will not be conducted and the minor's visit will not be allowed. A separate CDCR Form 888 is required for each minor.

A clothed body search is conducted if the visitor does not clear metal detectors/scanners, then after a clothed body search if additional attempts to clear the metal detectors/scanner fail, an unclothed body search would be requested. An unclothed body search is a security procedure that involves visual inspection of a person's body and body cavities with all of their clothing removed and a thorough inspection of the person's clothing for the purpose of detecting contraband. This procedure shall be conducted with the visitor's consent and when there is a reasonable suspicion that the visitor may be carrying contraband and when no less intrusive means are available to conduct the search. This search shall be conducted in a private setting and by staff members of the same gender as the adult or minor visitor. Exceptions to the gender of the staff member conducting the search will only be allowed for those identifying as transgender, intersex, or non-binary. A second staff member, of the same gender as the staff member conducting the search, will serve as the witness to the search.

ADVANCED PERMISSION FOR THIS SEARCH (OFFICIAL ORDERING THE SEARCH) WAS SECURED FROM:

NAME	TITLE	DATE GRANTED
POSITION		TIME PERMISSION GRANTED

SPECIFIC REASON(S) FOR SEARCH AND COMMENTS

WATCH COMMANDER/VISITING LIEUTENANT SIGNATURE	DATE

GENDER IDENTIFICATION:
☐ Male ☐ Transgender
☐ Female ☐ Intersex ☐ Non-Binary

GENDER SEARCH PREFERENCE (Only for those that identify as Transgender, Intersex, or Non-Binary)
☐ Male
☐ Female

☐ I VOLUNTARILY AGREE to be searched
☐ Clothed ☐ Unclothed
Signature of Visitor — Date

☐ I VOLUNTARILY AUTHORIZE the search of minor
☐ Clothed ☐ Unclothed
Name of Minor — Age
Signature of Visitor (Parent or Legal Guardian) — Date
Relationship to Minor

☐ I REFUSE to be searched. I understand by refusing to be searched, I will be foregoing my visit today.
Signature of Visitor — Date

☐ I REFUSE TO AUTHORIZE the search of minor. I understand by refusing the search, the minor will be foregoing the visit today.
Name of Minor — Age
Signature of Visitor (Parent or Legal Guardian) — Date
Relationship to Minor

	NAME	POSITION
Staff Member Conducting Search		
Staff Member Witnessing Search		

SEARCH RESULTS: ☐ **POSITIVE** ☐ **NEGATIVE**

DESCRIPTION OF CONTRABAND

VISITOR IS: ☐ **PERMITTED** to visit inmate. ☐ **NOT PERMITTED** to visit inmate.

NAME (Staff Completing Form)	TITLE	DATE

DISTRIBUTION: **Original:** C-File (Visiting) **Copies:** Institution Head, ISU, Visitor

NOTICE OF VISITOR WARNING/TERMINATION/SUSPENSION/DENIAL/REVOCATION

TO: (Inmate's Name)	CDCR NUMBER	INSTITUTION	UNIT

REGARDING: (Name of Visitor)

VISITING VIOLATION

ACTION TAKEN (Check the box(es) that apply):

☐ Verbal Warning _____ DATE

☐ Written Warning _____ DATE

☐ Termination for the Day _____ DATE

☐ Other: _____ _____ DATE

DESCRIPTION OF VISITING VIOLATION INCIDENT:

REASON FOR ACTION TAKEN:

Action taken by _____ PRINT NAME OF OFFICIAL on _____ DATE

_____ SIGNATURE OF OFFICIAL

FINAL ACTION TAKEN (If applicable):

☐ One (1) Month Suspension

☐ Three (3) Month Suspension

☐ Six (6) Month Suspension

☐ Twelve (12) Month Suspension

☐ Twenty-four (24) Month Suspension

REASON FOR FINAL ACTION TAKEN:

_____ SIGNATURE OF DIRECTOR / WARDEN / DESIGNEE _____ DATE

The Termination/Suspension/Denial will expire:

on (DATE) _____ after which time you may continue to visit, provided you adhere to all rules and regulations related to visiting within the facility.

on (DATE) _____ after which time you may write a letter to the Warden requesting to have your visiting privileges reinstated. You must also submit a CDCR Form 106, Visiting Questionnaire.

Visitors may appeal any action taken above by following the established appeal process outlined in the California Code of Regulations, Title 15, Division 3, Section 3179, Complaints Relating to Visiting.

FINAL STATEMENT OF REASONS

The Initial Statement of Reasons (ISOR) is incorporated by reference.

UPDATES TO THE INITIAL STATEMENT OF REASONS:

On June 23, 2023, the Notice of Proposed Regulations for Visiting was published, which began the public comment period. The California Department of Corrections and Rehabilitation (CDCR or department) mailed the Notice of Change to Regulations (NCR) #23-05 to the individuals who had requested to be on the department's mailing list for regulation changes the same day. In addition, NCR #23-05 was posted on the department's website, and copies were posted in CDCR institutions. The department received 21 written comments during the initial public comment period, and those comments are included below under *Summaries and Responses to the Written Public Comments Received During the Initial Comment Period.* A public hearing was held on August 9, 2023. There were 10 commenters at the public hearing, and those comments are included below under *Summaries and Responses to the Verbal Public Comments Received During the Public Hearing Held August 9, 2023*.

After publication of the Notice of Proposed Regulations, it was determined that additional changes to the proposed regulations were necessary. The amendments to the originally proposed text and the reasons for these revisions are explained below under the heading *Notice of Change to Text as Originally Proposed – Re-Notice.* The Notice of Change to Text as Originally Proposed (Re-Notice) was distributed on October 16, 2023, to those who provided comments during the public comment period or expressed an interest in receiving notice of changes to the proposed regulations concerning Visiting, and was posted on the department's website the same day. The department accepted public comments from this date through October 31, 2023. The department received two comments during the Re-Notice comment period. These comments are included below under *Summaries and Responses to the 15-Day Re-Notice Comment Period.*

After publication of the 1st 15-Day Re-Notice, it was determined that additional changes were necessary to address clarity and consistency issues in the regulation text, CDCR Form 888, and ISOR. The changes were presented to the public by issuance of a 2nd 15-Day Re-Notice which also included an Addendum to the ISOR. The amendments to the originally proposed text and the reasons for these revisions are explained below under the heading *Notice of Change to Text as Originally Proposed – 2nd 15-Day Re-Notice.* The 2nd 15-Day Re-Notice was distributed on January 25, 2024, to those who provided comments during the public comment periods and was posted to the department's website the same day. The department accepted public comments from this date through February 9, 2024. One comment was received during this period. This comment is included below under *Summaries and Responses to the 2nd 15-Day Re-Notice Comment Period.*

After publication of the 2nd 15-Day Re-Notice, a non-substantive correction was made to section 3176(a)(3)(A) to underline "ing" in the word "attempting," as this was an inadvertent error.

The following language is added to further explain the purpose and necessity for revisions to the CDCR Form 888 (Rev. 01/24). The previous version of the CDCR Form 888 (Rev. 04/15) stated that "If a minor is searched, the parent or legal guardian *may* be present during the search." The language was revised to "If a minor is to be subjected to a clothed/unclothed search, only the parent or legal guardian may authorize the search and *must* be present during the search." The revision from "may" to "must" was made for correction purposes, due to the parent or legal guardian must be responsible for their minor.

DOCUMENTS INCORPORATED BY REFERENCE:

The CDCR Form 888 (Rev. 01/24), Notice of Request for Search, is incorporated by reference into these regulations.

The CDCR Form 887-B (Rev. 02/23), Notice of Visitor Warning/Termination/Suspension/Denial/Revocation, is incorporated by reference into these regulations.

These documents were made available to the public in the Notice of Change to Regulations and the 1st and 2nd Re-Notices. And, as stated in the Notice of Change to Regulations, all documents pertaining to the rulemaking file were available upon request.

The department uses over 1,500 regulatory forms, and because of this high volume it would be unduly cumbersome, expensive, and impractical to print all forms in the California Code of Regulations, Title 15. Therefore, department forms are incorporated by reference into the Title 15 where appropriate.

DETERMINATION:

The department has determined that no alternative considered would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the action proposed, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law, than the action proposed. This determination was reached by a consensus of the department's Division of Adult Institutions.

Except as set forth and discussed in the summary and response to the comments received, no other alternatives have been proposed or otherwise brought to the department's attention that would alter the department's decision.

LOCAL MANDATES:

This action imposes no mandates on local agencies or school districts, or a mandate which requires reimbursement of costs or savings pursuant to Government Code Sections 17500 - 17630.

NOTICE OF CHANGE TO TEXT AS ORIGINALLY PROPOSED – RE-NOTICE:

Subsection 3173.2(c)(3)(G) was amended to provide a new revision date for the CDCR Form 888, due to revisions to the form.

Subsection 3173.2(d)(7) was amended to provide clarification that the visitor's body will not be touched during the unclothed body search.

Subsection 3176(b) was amended to include the name and revision date of the CDCR Form 887-B, and to provide language incorporating the form by reference, for clarification purposes.

Revisions to CDCR Form 888, Notice of Request for Search:

After further review, the department determined that additional revisions to the CDCR Form 888 were necessary for clarity and corrective purposes. Revisions to the CDCR Form 888 included the following:

- In the third paragraph, last sentence, which read "This search shall be conducted in a private setting and by staff members of the same sex as the adult or minor visitor" the word "sex" was replaced with "gender" for more appropriate wording used in today's culture.
- In the language next to the check box for refusing the search of a minor, which stated "I understand by refusing the search, we will be foregoing the visit today" language was revised to state "I understand by refusing the search, the minor will be foregoing the visit today." This revision allowed for the adult visitor to continue visiting should they have someone to care for the minor, and should they clear the search process.

Due to an inadvertent error, the prior versions (Rev. 04/15 and Rev. 01/03) of the CDCR Forms 888 and 887-B were not included in the initial Notice to the Public. These forms, which were deleted due to the forms being revised, were included in the 15-Day Re-Notice for reference purposes to compare the previous versions with the new versions.

For reference purposes, both the new CDCR Forms 888 and 887-B were enclosed in the 15-Day Re-Notice, however there were no changes to the CDCR Form 887-B. The previously noticed CDCR Form 888 (Rev. 03/23) was enclosed for reference purposes to compare the previously noticed version (Rev. 03/23) with the new proposed version (Rev. 09/23).

NOTICE OF CHANGE TO TEXT AS ORIGINALLY PROPOSED – 2ND 15-DAY RE-NOTICE:

Subsection 3173.2(a) was amended to provide consistency with the section. Revisions made in the initial Notice of Change to Regulations changed the wording in subsection

3173.2(d)(7) from "*is* carrying contraband … to *may be* carrying contraband" for clarification purposes. After the 1st 15-Day Re-Notice, the department determined it was necessary to amend other subsections for consistency with the "*may be*" language used in subsection 3173.2(d)(7). In addition, to better explain why the wording was revised from "is" to "may be," the language was revised because "may be" better reflects the standard for reasonable suspicion. The standard articulated in *Terry v. Ohio* for reasonable suspicion was a reasonable conclusion that criminal activity "may be afoot." (Terry v. Ohio (1968) 392 U.S. 1, 30.)

Subsection 3173.2(c)(3)(G) was amended to provide a new revision date for the CDCR Form 888, due to revisions to the form. Additionally, new language was added to this subsection to add a reference to section 3321, to clarify what information shall constitute "confidential information."

Subsection 3173.2(d)(7) was amended to add the words "by staff" to the previous revision, which added language specifying that "The visitor's body will not be touched during the unclothed body search." This revision will clarify that the visitor's body will not be touched by staff during the unclothed body search.

Subsection 3173.2(j) was amended to provide additional clarity to the sentence, to clarify what the visitor shall be notified in writing of. The words "of the denied visit" clarify that the visitor is notified in writing of the denied visit.

Subsection 3173.2(j)(1) was amended for consistency with changes made within the section to replace the language "*is*" with "*may be.*" This revision was necessary for consistency with the revisions made in the initial Notice of Change to Regulations to subsection 3173.2(d)(7), and to better reflect the standard for reasonable suspicion. The standard articulated in *Terry v. Ohio* for reasonable suspicion was a reasonable conclusion that criminal activity "may be afoot." (Terry v. Ohio (1968) 392 U.S. 1, 30.).

Subsection 3176(a)(3)(A) was amended for consistency with changes made within the section to replace the language "*is*" with "*may be.*" This revision was necessary for consistency with the revisions made in the initial Notice of Change to Regulations to subsection 3173.2(d)(7), and to better reflect the standard for reasonable suspicion. The standard articulated in *Terry v. Ohio* for reasonable suspicion was a reasonable conclusion that criminal activity "may be afoot." (Terry v. Ohio (1968) 392 U.S. 1, 30.)

<u>Revisions to CDCR Form 888, Notice of Request for Search:</u>

After further review, the department determined that additional revisions to the CDCR Form 888 were necessary for clarity and corrective purposes. Revisions to the CDCR Form 888 were as follows:

In the second paragraph, second to last sentence which read: "Absent positive proof of relationship, (e.g., birth certificate, court order, notarized authorization by parent or legal guardian), a search of a minor will not be conducted and visiting will not be allowed" the

sentence was revised to correctly state that "… *the minor's visit* will not be allowed" rather than "… *visiting* will not be allowed."

In the third paragraph language was added for clarification purposes to further explain the visiting progressive search process. A clothed body search is conducted if the visitor does not clear metal detectors/scanners, then after a clothed body search if additional attempts to clear the metal detectors/scanner fail, an unclothed body search would be requested.

Also in the third paragraph, new language was added to clarify that "Exceptions to the gender of the staff member conducting the search will only be allowed for those identifying as transgender, intersex, or non-binary," this language was necessary to allow for transgender, intersex, or non-binary individuals to be able to select the gender of their preference to perform the search, as well as to provide for equity and nondiscrimination of these individuals and align with emerging changes in today's culture. Additionally, new language provided clarity regarding the gender of the person witnessing the search, and specified "A second staff member, of the same gender as the staff member conducting the search, will serve as the witness to the search."

New checkboxes were added for "Gender Identification," and "Gender Search Preference." The Gender Identification checkboxes allow for visiting individuals to identify their gender so that an individual's gender is not left up to the perception of Visiting staff, which will help to avoid any possible misidentification by Visiting staff. The Gender Search Preference checkbox was added to allow for transgender, non-binary, and intersex individuals to select the gender of their choice to conduct the search, which will provide for equity and nondiscrimination of these individuals and align with emerging changes in today's culture.

Addendum – Initial Statement of Reasons:

After publication of the initial Notice of Change to Text as Originally Proposed and also the 15-Day Re-Notice Text of Proposed Regulations, it was determined that revisions to the Initial Statement of Reasons were necessary for correction purposes and to further comply with the Necessity and Clarity standards of the Administrative Procedure Act (APA).

In the section titled "Specific Purpose and Rationale for Each Section, Per Government Code Section 11346.2(b)(1)," the following subsections were corrected:

Section 3173.2(d)(7) – The last sentence for this subsection in the ISOR stated: "Other minor grammatical changes are made for consistency and clarification purposes." The department corrected this statement as it relates to the change to revise the language "… the visitor *is* carrying contraband" to "… the visitor *may be* carrying contraband." The revision to change the language from "*is*" to "*may b*e" was revised because "*may be*" better reflects the standard for reasonable suspicion. The standard articulated in *Terry v.*

Ohio for reasonable suspicion was a reasonable conclusion that criminal activity "may be afoot." (Terry v. Ohio (1968) 392 U.S. 1, 30.).

Existing section 3173.2(i)(1) renumbered 3173.2(j) – Further rationale was given to provide additional necessity and clarity for removing the word "inmate." The language in this subsection referring to the "inmate," was removed because it could have been interpreted as meaning the inmate was being searched, when only the visitor is searched. In addition, the prior language in section 3173.2(i)(1) now renumbered as (j) had a reference to section 3176(a)(3), which was incorrect because 3176(a)(3) was not applicable to the inmate or visitor receiving written notification. The original wording of this section was incorrect, problematic, confusing, and therefore needed to be corrected.

Section 3176(a)(3)(A) – The second sentence for this section incorrectly stated: "Reasonable suspicion is when staff believe the visitor *is* attempting to introduce contraband or unauthorized items or substances into the institution or facility," the sentence should have stated: "Reasonable suspicion is when staff believe the visitor *may be* attempting to introduce contraband or unauthorized items or substances into the institution or facility." After the 1st 15-Day Re-Notice, the department realized that language used throughout the section was inconsistent, and therefore made revisions in the 2nd 15-Day Re-Notice to provide consistency with language used throughout the section. Additionally, while the initial explanation for the revisions to this section, which stated "the language '*will* attempt' is replaced with '*is* attempting*'* was done because '*will* attempt' indicates a future act and '*is* attempting' indicates a current act, and is more appropriate language" was initially correct, the department determined the language needed to be revised for consistency with the section, and to better reflect the standard for reasonable suspicion, as articulated in *Terry v. Ohio.*

SUMMARIES AND RESPONSES TO THE WRITTEN PUBLIC COMMENTS RECEIVED DURING THE INITIAL COMMENT PERIOD:

Commenter #1

Comment 1A: Commenter states the fiscal impact does not state the cost to CDCR in liability due to lawsuits for unreasonable strip searches. Staff could face sex charges. There is an abuse of power issue.

Response 1A: CDCR does not believe that the proposed changes will increase the frequency or magnitude of lawsuits. California Code of Regulations (CCR), Title 15, section 3173.2(d)(7), already provides that an unclothed body search may be performed when there is reasonable suspicion that the visitor is carrying contraband. These regulations are necessary to ensure institution or facility security, including the prevention of the introduction of contraband. The proposed regulations provide consistency with previously adopted regulations that already have the "reasonable suspicion" language. The only place where the proposed regulations change the standard from probable cause to reasonable suspicion is in section 3176(a)(3)(A), which discusses when visits may be denied. All searches will only be conducted when reasonable suspicion is present.

Further, searches are conducted in a humane and private setting, by staff members of the same gender as the visitor being searched. Not all visitors will be subject to an unclothed body search. The search process is progressive, with the less intrusive search method being used first (clothed), prior to the more intrusive search method (unclothed). A clothed search will be conducted first if the visitor did not pass the metal detectors/scanners; then after a clothed search if the visitor still did not pass metal detectors/scanners, an unclothed body search would be conducted. At any time, the visitor can refuse a clothed or unclothed body search. A visitor who refuses to participate in a clothed or unclothed body search or fails to clear any contraband/metal detection device shall be denied visits for that day.

As stated in the ISOR, the standard was changed from probable cause to reasonable suspicion because reasonable suspicion is the standard used in criminal procedure, and to determine the legality of a police officer's decision to perform a search. Revising this language will provide consistency with the current terminology that is used in criminal procedures and will also provide consistency with the language used throughout section 3173.2.

Comment 1B: Commenter believes it would be easier to catch people in the act, allow them to make the illegal transaction, then strip search the inmate and put them through machines that can see inside clothes and body. Video footage could then be used to prosecute, or at least deny future visits.

Response 1B: Preventing contraband from entering the institutions is the main goal of the proposed regulations. Any person coming onto the property of a CDCR institution or facility shall be subject to search and inspection as necessary to ensure institution or facility security, including prevention of the introduction of contraband. The department shall not record the unclothed body searches. The department has other regulations that cover detection of contraband that has already entered the institution, such as sections 3287, 3041.3, 3213.

Comment 1C: Commenter states a visitor might allow a strip search out of fear of being denied future visits. A sex abuse victim might be traumatized if made to strip naked.

Response 1C: The CDCR Form 888, Notice of Request for Search, indicates that if visitors refuse the search, they forego their visit for the day. At any time, the visitor can refuse a clothed or unclothed body search. A visitor who refuses to participate in a clothed or unclothed body search or fails to clear any contraband/metal detection device shall be denied visits for that day. See also, Response to Comment 1A.

Commenter #2

Comment 2A: Commenter is a Berkeley law student and strongly opposes section 3173.2, changing the standard for unclothed body searches from “probably cause” to “reasonable suspicion.” Lowering the standard will stifle people’s desire to visit their loved

ones. There is no justification for a heightened standard. The intrusion into personal privacy and bodily autonomy of visitors greatly outweighs any modest security interest.

Response 2A: See Response to Comment 1A.

Comment 2B: Decreased visitation will lead to higher recidivism (we already know regular visitation and connections with home communities helps reduce recidivism), behavioral problems, and increased intrusion and profiling of visitors.

Response 2B: The department does not believe that the change in regulations will decrease visitation in any significant way. In addition, inmates may take advantage of video visits. All inmates should have ample opportunity to connect with family and friends. The department must also prioritize the safety and security of the public, the institution, and inmates; this is why detecting contraband is a necessity.

Current regulations, or specifically Title 15 section 3173.2(a), already indicate that "Any person coming onto the property of an institution/facility shall be subject to search and inspection as necessary to ensure institution/facility security including prevention of the introduction of contraband."

Comment 2C: It's already difficult to follow all of CDCR's visitation rules. Making rules more strict adds another layer of difficulty, and will be a deterrent to the most vulnerable people, particularly survivors of sexual violence or other trauma.

Response 2C: Regulations currently prohibit contraband in institutions and facilities and authorize search and inspection for contraband. The proposed regulations do not change these requirements, and contraband will still be prohibited if the proposed regulations are implemented. In addition, section 3173.2, already provides that an unclothed body search may be performed when there is reasonable suspicion that the visitor is carrying contraband. The only place where the proposed regulations change the standard from probable cause to reasonable suspicion is in section 3176, which discusses when visits may be denied. The change is necessary to provide consistency with language used in section 3173.2, which was previously adopted. See also, Response to Comment 1A:

Commenter #3

Comment 3A: Commenter is a parent of a previously incarcerated person and strongly believes the proposed changes are unnecessary and burdensome and create grave potential of abuse of visitors because they will infringe on visitors' privacy and cause unnecessary mental stress and anxiety. This adds to the stress of traveling many hours with limited resources, only to be turned away due to these unfair proposed changes. The proposed changes provide opportunity for male correctional officers to target and harass women (mothers, sisters, daughters of the incarcerated). Commenter asks that CDCR consider not going forward with the proposed changes which will allow strip searches under a standard of reasonable suspicion and permit CDCR to disallow visits to those refusing to be searched.

Response 3A: Any person coming onto the property of a CDCR institution or facility shall be subject to search and inspection as necessary to ensure institution or facility security, including prevention of the introduction of contraband. Searches are conducted in a humane and private setting, by staff members of the same gender as the visitor being searched. The department has adopted statewide regulations regarding conduct that all institutions and staff shall adhere to. If a visitor feels that regulations are not being followed, or staff misconduct has occurred, the visitor may submit a citizen's complaint per Title 15, section 3417. See also, Response to Comment 1A:

Commenter #4

Comment 4A: Commenter is a female with a loved one incarcerated and has been on their side for about 10 years. She has witnessed demeaning situations of women in the Visiting room, who are wanded and harassed by how they look. Guards take them behind the back office and wand and strip search them. The "reasonable suspicion" encourages them to abuse their force. They do this to anyone they don't like or feel some way about for having an incarcerated person in prison. They can be bullies, and this will cause even more harm to visitors. Commenter relays her personal experience of being unreasonably searched for no reason. She has been humiliated, demeaned, and harassed by Correctional Officers, they stare at her and make her uncomfortable. Commenter states if this passes it will allow guards to deny visits, which is not okay, they just don't want to be assaulted. This punishes the prisoner and the visitor. It's traumatizing to be strip searched, when you've done nothing wrong. If CDCR thinks we are the problem, they need to invest in x-ray machines instead of strip searches.

Response 4A: See Responses to Comments 1A and 3A.

Commenter #5

Comment 5A: Commenter disagrees with Subsection 3176(a)(3)(A) that will authorize strip searches under the standard of "reasonable suspicion" and permit CDCR to disallow visits for those refusing to be searched under "reasonable suspicion." Commenter states as a family member of an incarcerated loved one, they already endure rudeness, unprofessional manners, long waiting periods, etc. There is no empathy for the family. The proposed change will only give more authority to CDCR staff. This will only cause unnecessary burden and grave potential for abuse of visitors. The "reasonable suspicion" search in which CDCR is trying to prevent incoming contraband has nothing to do with visitors. During COVID when visits were not allowed, contraband still made its way inside prison grounds. Stop treating families like prisoners, when all we want to do is visit our loved one to spend some time.

Response 5A: Although it is every intention of the department to maintain rehabilitation through family connections, the safety and security of the public and the institution as well as the safety of the inmates is of primary concern and the responsibility of the department.

The visiting process is not changing. See also, Responses to Comments 1A, 3A, and 6B.

Commenter #6

Comment 6A: Commenter is a mother who has visited within the CDCR system for over 28 years and has been subject to searches because she is an activist for prisoners' rights and an abolitionist pursuing the end the Death Penalty in California and across the nation. She states there is no other reason for any "reasonable" searches to be directed at her.

Response 6A: See Responses to Comments 1A and 3A.

Comment 6B: Commenter states a solution to stop most contraband from entering prisons is to search the guards, all staff, and volunteers who have the greatest potential to being contributors for self-monetary gain. All staff should be subject to x-ray, search, wand search along with their big lunch bags and backpacks that should be thoroughly searched and run through a detection machine along with their large liquid carriers. During Covid when there were no visitors, the contraband did not stop but ran high and drug OD's were happening along with cell phone distributions from inside. CDCR needs to police their own. Governor Newsome has given the order to implement a rehabilitation center at San Quentin, with these harsh regulation proposals and no changes to staff of any prison, rehabilitation and re-entry to the community is a double standard for the incarcerated persons and their loved ones to comprehend when living in real time. Consideration of implementing this new visiting rule must be stopped and consideration of changes within all staff entrance must be considered.

Response 6B: The department understands that both staff and visitor inspections are essential to maintaining institutional safety and security. Regulations addressing searches of staff are set forth in Title 15, sections 3410.1 and 3410.2. The proposed regulatory change does not modify regulations that address searches of staff; it only modifies the regulations pertaining to visitor searches. Any person coming onto the property of a CDCR institution or facility shall be subject to search and inspection as necessary to ensure institution or facility security, including the prevention of the introduction of contraband, and this includes staff.

Commenter #7

Comment 7A: Commenter is an attorney who represents Legal Services for Prisoners with Children (LSPC). Commenter submitted a lengthy report in opposition to the proposed regulations, which are based on several factors.

Inadequate Information on the Effects of the Regulations. The proposed regulations are not based on adequate information regarding the need for, and effect of, the regulations. In 2023 the Office of Inspector General (OIG) issued a report detailing its audit of CDCR procedures relating to contraband detection and interdiction. The findings reveal that the incidence of contraband possessed by staff is a significant issue; and yet the study does

not provide adequate information to know the full scope of the problem and to reliably know the actual rates of contraband transport from staff versus non staff and visitors. Without a clearer comprehensive picture of the process whereby contraband is introduced into facilities, it is not possible to say whether the visiting procedures proposed by the new regulations will be effective at all, let alone that they will be cost-effective and preferable to less burdensome measures. Further study is needed before the rule-making process can be affirmed. Government Code 11346.3(a)(1) requires that proposed administrative regulations "shall be based on adequate information concerning the need for, and consequences of, proposed governmental action." Additionally, "the benefits of the regulation to the health and welfare of California residents" and "worker safety" must be assessed. The Initial Statement of Reasons (ISOR) does not analyze the effect of the proposed strip searches on the health and welfare of visitors. Nor does it assess the need for and consequences of the regulations. Instead, it merely states in conclusory form, without citing any evidence, the statement that "The department anticipates the proposed regulatory amendment will benefit the public" and that safety and security of CDCR facilities "will be enhanced." The department relied on no "technical, theoretical, or empirical study report, or similar document." Accordingly, the belief that the regulation proposed will improve security by stopping contraband is not empirically supported, nor is there any theoretical support provided whatsoever. It is pure speculation or regulation based on faith. This is not consistent with state administrative law and best practices of rational government. Commenter states there is in fact a study that addresses the issue of contraband in prisons: the OIG report from January 2023 titled *Audit of the Department of Corrections and Rehabilitation's Controlled Substances Contraband Interdiction Efforts, Audit Report No. 21-01.* Both it's finding and its limitations have important bearing on the regulations at issue. The report suggests that lax screening of staff is a source of contraband. Commenter provides several excerpts from the OIG report. Commenter further states that even during Covid shutdowns of visiting, contraband continued to flow. Staff and civilian contractors found to possess contraband increased more than threefold. It became clear that visitors are not the main source of drugs. Even if one looks at the pre-Covid figures, it is to be noticed that though detection of events of visitor drug smuggling is higher than detected staff smuggling, this does not necessarily translate to a higher rate of contraband possession among visitors than staff. One would need to collect more data, and finely analyze it, to make that determination.

Response 7A: The commenter references Gov. Code section 11346.3. Under section 11346.3, the department does not need to provide empirical studies to justify proposed regulatory changes; it only needs to provide some factual basis for the regulatory change. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 310.) The department proposes to change the standard in Title 15, section 3176 to reasonable suspicion because the standard in 3173.2 is already "reasonable suspicion," and it makes logical sense for the sections to be consistent. Section 3173.2, was implemented per the rulemaking procedures and standards in the Administrative Procedure Act (APA). See also, Responses to Comments 1A and 6B.

Comment 7B: Alternatives to the Regulations Proposed May be More Effective. As we don't truly know the causes of the presence of contraband, and there is little reason to

assume that visitors are a major source thereof – we cannot conclude that the proposed regulations targeting visitors for privacy-invasive searches, will be of any significant effectiveness in combating the alleged problem. The OIG audit highlighted vulnerabilities in the process of screening at entrances; inspectors observed vulnerabilities especially in regard to the screening of staff. The OIG recommended measures including comprehensive routine search of staff, their belongings, and vehicles at entrances to prisons' secured perimeters, and better training for routine searches. Accordingly, there exists an alternative that would be more effective in achieving the stated purpose of the proposed regulations, namely conduct more rigorous screening of staff. At present, proper procedures for inspecting staff bags appear not to be reliably followed (OIG Audit, p 39-41). This is also true of the so called "enhanced" searches of staff. The absence of any pat-downs by staff or other rigorous searches of staff severely limits the ability to detect staff-possessed contraband. Strip searching and inspection of the body cavities of staff is not a contraband-screening practice the CDCR performs. However, if we take seriously the OIG report, one could conclude that there is no reason to presuppose that a close inspection of visitors would be more necessary or more likely to discover contraband than like searches of staff. If there is a legitimate basis for strip-searching visitors upon reasonable suspicion, why would there not be equivalent grounds for strip-searching and performing body cavity inspection of staff reasonably suspected of possessing contraband? LSPC does not believe that anyone should be subjected to such invasive searches in the absence of a judicial warrant (or, perhaps, in very narrowly circumscribed emergency exceptions), let alone in the absence of probable cause. And one imagines that CCPOA would agree that invasive searches are inherently unreasonable. An alternative can be devised to better achieve the goals of deterring and interdicting contraband. An alternative is to more frequently and more stringently conduct adequate routine screenings and less predictably and more rigorous "enhanced" (though respectful) searches of staff. This involves thoroughly inspecting their carried baggage, taking more time to search pockets, and possibly the use of pat-downs of staff performed by professionally trained and gender-identity appropriate technicians.

Response 7B: The department does use the pat-down, or clothed body search methods for staff. See also, Responses to Comments 1A and 6B.

Comment 7C: Less Burdensome Alternatives to the Proposed Regulations Exist. Alternatives include the following:

Response Comment 7C: The department does not believe less burdensome alternatives to the proposed regulations exist.

Comment 7C1: Scanning Technologies are Less Burdensome Than Strip Searches: The OIG points to sensing technologies as proven devices for detecting contraband, available to CDCR but underutilized. The OIG criticized CDCR for not adopting, and instead discontinuing, these programs. The findings as to the superiority of these technological devices over technologically unaided methods is striking. Commenter quotes a Cal. State Fresno study that reinforces this point. However, CDCR claimed that the millimeter wave technology was too costly despite not conducting any cost-benefit analysis

(OIG Audit p. 30). CDCR, in the present rulemaking process, gives no indication of having considered such alternatives. If airports, courthouses and other government buildings and the like are any indication, persons generally feel that scanners are less intrusive and less humiliating than strip searches. CDCR should try these less burdensome alternatives before resorting to the latter.

Response 7C1: Since the department already uses reasonable suspicion as the standard for allowing an unclothed search, it makes sense to also use reasonable suspicion that a visitor is carrying contraband as the standard for denying the visit. Therefore, there should be no change to the frequency of unclothed searches that would necessitate an upgrade in technology. See also, Response to Comment 1A.

Comment 7C2(a): The Proposed Form 888 Has Pervasive Flaws Needing Essential Fine-Tuning. The revised Form 888 does not give the persons asked to sign, giving consent, adequate notice of the manner of search that they are consenting to. It does not expressly say whether touching is or is not permitted. Instead, the form merely says an unclothed search "involves" visual inspection; it does not specifically say whether this also precludes touching. "Involves" can be read inclusively or exclusively. The ambiguity in the form mirrors the ambiguity in the regulation itself. It is unacceptable to leave the subject whose consent is sought guessing as to the meaning of the authorization they are giving or withholding. The form should be revised, at a minimum, so as to specify that consent to an unclothed search involving visual inspection does not entail consent to any touching during such inspection; and it should state that touching is not permitted during an unclothed inspection.

Response 7C2(a): The comment is fully accommodated. Section 3173.2(d)(7) was revised to specify "The visitor's body will not be touched by staff during the unclothed body search." The word "involves" is used in the definition of unclothed body search because there are multiple elements to the unclothed search – the visual inspection of the body and body cavities, and the inspection of the person's clothing. Additionally, in the 2nd 15-Day Re-Notice, language was added to the CDCR Form 888, to clarify the progressive search process, that a clothed body search is conducted if the visitor does not clear metal detectors/scanners, then after a clothed body search if additional attempts to clear the metal detectors/scanner fail, an unclothed body search would be requested. After further review, the department determined this language was necessary for clarification purposes.

Comment 7C2(b): The Form 888 also has additional unclarity. The form advises that an unclothed search will be conducted in a private setting "by staff members of the same sex" as the subject searched. "Sex" is not defined on the form. Current regulations require that "additional searches will be conducted by staff of the same gender as the visitor" (3173.2(d)(4)). The ISOR does not explain the department's theory of the relationship between sex and gender. Nor is the switch from "gender" in the regulation, itself left in place by the proposal, to "sex" on Form 888 explained. No indication is given as to how visitors with non-binary, transgender, or non-conforming gender identities will be assigned to appropriate staff. The form does not have any question whereby the

subject states their sex or their gender. Therefore, this leaves it to the arbitrary decision of officials as to who gets assigned to whom. The problem can be alleviated by adding a question to the form that enables the subject (or the parent/guardian) to select an appropriate gender assignment, taking into account the aforementioned considerations.

Response 7C2(b): The comment is fully accommodated. In the 2nd 15-Day Re-Notice, the CDCR Form 888 was modified to include fields for gender identification, and to allow persons who identify as transgender, intersex, and non-binary to select the gender of their preference to conduct the clothed/unclothed body search. Language on the CDCR Form 888, which stated "This search shall be conducted in a private setting and by staff members of the same sex as the adult or minor visitor" was amended in the 1st 15-Day Re-Notice, to replace the word "sex" with "gender," for appropriate use of terms used in today's culture, and consistency with the regulation text.

Comment 7C2(c): The form says that searches are "conducted" by staff members of the same sex, but further down the page the form is to be filled in listing one staff as "conducting" and another as "witnessing." These are two different-in-scope uses of the term "conducting." CDCR should revise the form to clarify that gender-identity appropriate staff will be assigned both to the conducting and witnessing roles. However, the person searched should probably also, if and only they choose, be allowed to have their own preferred witness included when the subject of the search is an adult.

Response 7C2(c): The comment is partially accommodated. The CDCR Form 888 specified in the 2nd Re-Notice that "A second staff member, of the same gender as the staff member conducting the search, will serve as the witness to the search." Accommodating a visitor by allowing the visitor to provide their own witness would be burdensome because it would require additional staffing for the department. It means more visitors, which in turn means more visitors to search and process through visiting.

Comment 7C2(d): The CDCR Form 888 has a line in which the person affirms voluntary consent to search and checks either the Clothed or Unclothed box or both. The other option is to refuse any search on the day, and thus forgo a visit. Suppose the subject wants to consent to clothed but not to unclothed search. The only way that choice is registered is by checking the Clothed option and leaving Unclothed blank. We do not think it is reasonable to expect the person filling out this form to trust that no one will check the blank box without their permission, maliciously or otherwise. Even a stray mark from a pen, accidentally produced in the shuffling of papers, could produce the impression that the Unclothed box was too checked. The risk of bad faith or inadvertent false checking-off of the Unclothed box could be eliminated by having separate options for consenting/refusing clothed searches and consenting/refusing unclothed. That way, refusal of the Unclothed search could be expressly registered. Fear of doctoring of the form, or inadvertent false markings, might result in users hesitating to fill out the form at all. The carbon-copy duplicates are no fail-safe mitigation of this problem. The form's footer "Distribution" should be interpreted as imposing a duty on the staff processing the form to provide one of those copies to the person filling out the form. But this is not encoded in the regulations explicitly. Subsection 3173.2(c)(3)(G) should expressly

instruct CDCR officials that they are required to provide an accurate copy of the consent form to the person. That would be an improvement, but it doesn't solve the problem entirely. There might be discrepancies claimed between what the top form shows and what the bottom layer impression showed. An unscrupulous perpetrator could pre-check the carbon layers and doctor the top layer, perhaps without the signatory ever noticing it. Again, this danger is avoided if an express refusal/consent is required for each distinct category of search.

Response 7C2(d): The department believes the proposed regulations are sufficient regarding the CDCR Form 888 checkboxes for consenting to a clothed or unclothed search. There are separate checkboxes for a clothed and unclothed body search and these checkboxes properly denote what consent is given. If a visitor only consents to a clothed body search, they would only check the box for a clothed body search. In addition, there is no carbon copy for this form, a photocopy is provided to the visitor. The CDCR Form 888, Notice of Request for Search, indicates that the visitor receives a copy of the form in the distribution list, and staff are aware of the procedures to provide the visitor a copy of the CDCR Form 888. To the extent the commenter is trying to raise a staff misconduct issue, see Response to Comment 3A. Staff are required to provide accurate copies of forms; providing an inaccurate copy would violate 15 CCR section 3392.5(b), in that it would be considered falsification of material facts in reports.

Comment 7C2(e): The form unnecessarily forces the person refusing any search to expressly "forgo" a visit. Since the regulations would place a duty on CDCR to deny the visit in such circumstances, there is no reason to give the appearance that the subject is herself [Sic] choosing not to visit. Instead, the form could simply ask the person to record their refusal and, at the same time, their acknowledgement of the notice that a consequence of the refusal is the denial of the visit. There is a logical and legal distinction between agreeing to forgo something and being denied it as a consequence of another decision. The form elides that difference.

Response 7C2(e): The CDCR Form 888 contains a box for visitors to check when they refuse to be searched, and contains the following language: "I refuse to be searched. I understand by refusing to be searched, I will be foregoing my visit today." This does not give the appearance that the subject is choosing not to visit.

Comment 7C2(f): When it comes to parental/guardian authorization of a minor's search, the form paradoxically says "we" – here, referring to the parent/guardian and the child – "will be forgoing the visit today." That would be the likely expected result, in fact, when a solo-traveling parent/guardian refuses the child's search, and no alternative child-care arrangement exists while that adult has their visit. However, it is easy to foresee situations when there is no need to deny the adult visitor to visit – either because they consented to the search requested, and passed, or because they weren't reasonable [Sic] suspected of contraband possession and no extra search was required of them. In such a scenario, if there were another adult who could, with parental/guardian permission, safely watch the child while the first adult visited, there is no reason in the regulations or in sound policy why the first adult would be asked to "forego" their visit. The Form 888 should revise the

line applicable to minors whose search is refused so as to substitute “the minor” for the word “we.”

Response 7C2(f): The comment is fully accommodated. After further review the department determined that the CDCR Form 888 needed to be amended for clarity. Language on the CDCR Form 888 was revised to read: “I REFUSE TO AUTHORIZE the search of minor. I understand by refusing the search, the minor will be foregoing the visit today”.

Comment 7C3: The Proposed Definition of Unclothed Searches (Section 3173.2(d)(7) Must be Clarified to Avoid Being Ambiguous. As discussed for the Form 888, the question of whether an Unclothed search may include touching is a crucial one. It is an unclarity in the proposed regulations. The Clothed search provisions specify that such a search “may include touching sensitive areas of the body” (Section 3173.2(d)(6)). That provision is left in place. The new version of subsection 3173.2(d)(7), adds body cavity to the scope of the Unclothed inspection. However, whether or not touching is permitted is not explicitly stated. The proposed text reads, in pertinent part: “An unclothed body search is a security procedure that involves visual inspection of a person's body and body cavities with all of their clothing removed.” One can interpret this provision in accord with the canon of negative implication, for two reasons – expressly stating “visual inspection” could be construed as implicitly meaning visual inspection *only*, i.e, not manual; and the express listing of touching in subsection (d)(6) could be construed as implying, by omission, that in subsection (d)(7) touching is excluded. That is a valid interpretative possibility; but the vital importance of the matter at stake – personal privacy, dignity, and bodily autonomy secure from unreasonable invasion – cautions against relying on construction of the implicit. For, there is a plausible counter-canon that might be applied, if one takes the word “involves” as akin to a nonexclusive reading of “includes.” On that reading, an Unclothed search involves visual inspection, but it may also involve more than that. Visitors should not be forced to wager their privacy on such uncertain textual grounds. The ambiguity can easily be reduced by specifying whether or not touching is allowed. We think the best clarification would be to clarify that touching is prohibited in any Unclothed inspection.

Response 7C3: The comment is fully accommodated. After further review, the department determined section 3173.2(d)(7) should be amended for clarity. Language was added to clarify that “The visitor's body will not be touched by staff during the unclothed body search.” See also, Response to Comment 7C2(a).

Comment 7C4(a): Provisions Authorizing Unclothed Searches Should be Eliminated or Restricted. Whether touching is expressly excluded, or its exclusion is left to chance, there are powerful grounds for eliminating the Unclothed search option, or at least sharply restricting it. The regulations should be modified so as to accomplish that elimination or restriction. The OIG audit revealed searches conducted in a “no tech” manner are negligible in effectiveness compared to technological devices. The unclothed body cavity searches are very intrusive and burdensome, they are warrantless and without probable cause. A less burdensome, reasonable alternative is to *not* conduct warrantless body

cavity inspections, free of probable cause. CDCR's ISOR has shown no proven benefit achieved by incorporating body cavity inspections relative to unclothed inspections. There is no evidence as to any benefit of strip searches at all, relative to clothed searches. Since no benefit has been shown that it would be lost by adopting the less burdensome procedure of *not* strip-searching visitors, that alternative seems to be a Pareto improvement vis-à-vis the proposed regulations. Should significant evidence of a need for any strip searches of visitors be forthcoming, they should be restricted to *probable cause* to believe that dangerous contraband is possessed and less restrictive means cannot resolve the problem. By amending "reasonable suspicion" to "probable cause" that change would achieve consistency with the current regulations and be less burdensome for visitors. It could also be less costly for the state. Why weaker standards of privacy protection are "appropriate" is unexplained. How such a weaker standard serves to "ensure human rights and due process for visitors" is mystifying.

Response 7C4(a): See Response to Comment 1A. Additionally, the department has considered the alternative of not strip-searching visitors and determined that unclothed body searches are necessary in order to ensure the safety and security of inmates and staff within the institutions and facilities.

Comment 7C4(b): Puzzling too is the rationale for changing the language in 3173.2(d)(7) from "is" to "*may be* carrying contraband"; this is especially odd given that the proposal at the same time changes 3176(a)(3)(A)'s "will attempt" to "is attempting." If "is" is appropriate for 3176(a)(3)(A), it should be suitable *a fortiori* for 3173.2(d)(7). The modal language of "may be" seems to render that subsection less clear than with the more straightforward "is" – after all, the thing described via "is" is that which is the object of the officials' "reasonable suspicion." Because the event described is already merely a possible object of "suspicion" (3173.2(d)(7)) and (in subsection 3176(a)(3)(A)) "belie[f]", there's no need to qualify it with "may." But that very use of "may" works further mischief by rendering the meaning rather indeterminate. What criteria define the level of probability or plausibility that makes such a possibility relevant? At the weakest level of constraint, we could say that anybody, at any time, *could* carry contraband – if a body has a body cavity, it physically is capable of carrying a small item of contraband such as a capsule of drugs. But that mere physical possibility would mean that there is no significance to the "suspicion" or "reasonable" components; in terms of physical possibility alone, everyone "may" be a suspect. Since that interpretation is unworkable and absurd, we can instead gather that the "reasonable" component in the regulations is what qualifies and restricts the possibilities at issue; hence, the change to "may" is without purpose and only confuses the analysis.

Response 7C4(b): The changes to 3173.2(d)(7) were made to clarify the definition of an unclothed body search because the language "may be" better reflects the standard for reasonable suspicion. The standard articulated in *Terry v. Ohio* for reasonable suspicion was a reasonable conclusion that criminal activity "may be afoot." (Terry v. Ohio (1968) 392 U.S. 1, 30.). The search process is progressive, with the less intrusive search method being used first (clothed), prior to the more intrusive search method (unclothed). A clothed search is conducted first if the visitor did not pass the metal detectors/scanners;

then after a clothed search if the visitor still did not pass metal detectors/scanners, an unclothed body search is conducted.

In addition, for correction purposes to provide consistency with subsection 3173.2(d)(7), the department made additional changes in the 2nd 15-Day Re-Notice to subsections 3173.2(a), 3173.2(j)(1), and 3176(a)(3)(A), so that language in all sections is consistent with the "may be" verbiage, which is the standard articulated in *Terry v. Ohio*.

Comment 7D: The Proposed Regulations are Unlawful, and the Proposed Rules Create an Unconstitutional Condition Implicating the Fourth Amendment. The strip search procedure proposed in NCR 23-05 is unconstitutional. It conflicts with other regulations aimed at maintaining a well-disciplined administration of carceral institutions. Commenter writes at length citing the Fourth Amendment of the U.S. Constitution. The Fourth Amendment is premised on the conceptual foundation that searches and seizures require a warrant, and warrants require probable cause. Courts have recognized limited exceptions, such as consent. Commenter asserts that the condition placed on accessing the benefit of visitation, that the visitor forgo exercising her Fourth Amendment right not to be strip searched, constitutes an unconstitutional condition. That is, the visitor has to refrain from invoking her right to refuse the highly invasive search; otherwise, she will be denied the benefit of visiting. Because the searches proposed by the department are so unreasonable, they implicate the core of the Fourth Amendment concerns. The body cavity search and the unclothed search envisioned under NCR 23-05 are a "general exploratory search" this type of search is, like a general warrant, to be prohibited by the Fourth Amendment. The examples given in the ISOR pertaining to reasonable suspicion seem anything but reasonable. Commenter cites the example given in the ISOR regarding if a visitor has a scent coming from their person or vehicle that has the smell of marijuana. Commenter states the nexus that leads suspicion from car to cavity is not proximal. Even if the scent of cannabis be upon garments of the visitor, this alone does not provide the sort of reasonable suspicion that governs the "legality of a police officer's decision to perform a search" as the ISOR claims. After all, for adults, marijuana has been legalized under California state law. It is not reasonable, as a general matter, to presume that such a smell is due to smuggling cannabis through the visitor's orifices. Commenter further contends the ISOR's assertion regarding "receipt of confidential information" as an example of reasonable suspicion that would warrant a search of a visitor, as the allegations comprising the confidential information may lack credibility.

Response 7D: See Response to Comment 1A. In addition, performing an unclothed body search of a visitor to a prison is not unconstitutional. Visitors to prisons "may be strip-searched when based on reasonable and individualized suspicion" (*Cates v. Stroud* (9th Cir. 2020) 976 F.3d 972, 980.) Further, the visitor can refuse a clothed or unclothed body search at any time. A visitor who refuses to participate in a clothed or unclothed body search, or fails to clear any contraband/metal detection device shall be denied visits for that day.

Comment 7D1: The Proposed Rules Create an Undue Burden on Fundamental rights of Visitors. Visitation is more than a benefit: it is a *right*, at least for family members and

intimate associates. The Ninth Circuit Court of Appeals has declared that there is a "fundamental right to familial association" the restriction of which may, under certain conditions, be "substantively unreasonable." The search regime that the regulations propose is a substantively unreasonable burden imposed on the "fundamental liberty interests" of visitors. The regulations in NCR 23-05 are not only unwise policy but are incompatible with constitutional principles.

Response 7D1: See Response to Comment 1A. Contact visits are a privilege, not a right. (Barnett v. Centoni (9th Cir. 1994) 31 F.3d 813, 817). Additionally, limiting visitation rights is permissible when the limitations are reasonably related to legitimate penological interests. (*Overton v. Bazzetta* (2003) 539 U.S. 126, 132.). Searching visitors for contraband is related to the legitimate penological interest of maintaining institutional safety and security.

Comment 7D2: The Proposed Rules Unreasonably Limit the Rights of Incarcerated Persons. Restrictions of incarcerated persons must be "reasonably related" to "legitimate" interests of penal administration. The U.S. Supreme Court has recognized that family relations cannot be severed or negated when a person is incarcerated. Since the strip search regulations at issue would unreasonably restrict the visitors from entering, these regulations also unreasonably restrict the incarcerated persons' access to visitation. Where, by hypothesis, probable cause is lacking as to the visitor – which is the premise of the department's desired change to 3176(a)(3)(A) – and where, by hypothesis, there is not even any suspicion, reasonable or otherwise, that the incarcerated person is seeking to obtain contraband, then in such a scenario there is no logical reason to force the visitor to undergo an invasive search on pain of denial of the visit. The latter hypothesis is appropriate for purposes of analysis since the proposed regulations – and current one, too – in no way require a suspicion as to the incarcerated person's activity as a prerequisite for the implementation of the "progressive" search procedures applied to the visitor. In such circumstances, when there is no particularized suspicion, and no reasonable suspicion, regarding the incarcerated person and no probable cause as to the visitor, there is no legitimate basis for an invasive search of the visitor. Therefore, the resulting infringement of the incarcerated person's familial association rights, due to the deterrence and denial of visitors, is unreasonable *even under the deferential rule of* Turner.

Response 7D2: See Responses to Comments 1A and 7D. In addition, although it is every intention of the department to maintain rehabilitation through family connections, the safety and security of the public and the institution as well as the safety of the inmates is of primary concern and the responsibility of the department. Visitors who refuse to submit to an unclothed body search, where reasonable suspicion exists, shall have their visiting privileges denied for that day. Such searches may be repeated on subsequent visits for as long as institution or facility officials have reasonable suspicion to believe the visitor is attempting to introduce contraband, or unauthorized substances, or items into the institution or facility.

Comment 7D3: The Proposed Rules are Inconsistent with Existing Regulations. Commenter cites Title 15, section 3170(a), which encourages visitation for successful release and rehabilitation. Additionally, section 3170(b) states the privacy of visitors shall be respected, subject to necessary exceptions. CDCR has not shown any "need" for the highly invasive regulations applied to visitors that NCR 23-05 describes. Commenter cites section 3391 regarding respectful employee conduct standards towards others. Commenter states that it will be nearly impossible for CDCR employees to meet these standards when the regulations authorize and require them to conduct searches that are inherently disrespectful and can easily become harassment. Rather than fostering respect, the lax rules enabling strip searches and body cavity inspections are apt to be seen as degrading and inhumane treatment of persons. That is the exact opposite outcome to the respect for human rights that NCR 23-05 mentions.

Response 7D3: See Responses to Comments 1A, 2B, and 7D. Further, the visitor can refuse a clothed or unclothed body search at any time.

Comment 7E: The Proposed Changes Carry a Risk of Serious Liability and Associated Costs to the State. The risk that unclothed searches, as defined and authorized by the regulations as proposed, will be used to harass visitors is a serious danger. The ordinary operation of the proposed regulatory regime itself, as the Initial Statement describes it, arguably constitutes sexual harassment when visitors are made to strip naked and submit to visual inspection of their body cavities. The unclarity discussed previously, whereby the rule regarding touching is not clear as to unclothed searches, increases the likelihood of harassment and of assault and battery committed by officials against visitors. This includes a risk of sexual abuse. It could result in criminal conduct by officials as well as civil liability actionable against them and against the State. Assuming that rule is clarified in the direction of "no touching," risk of abuse enabled by the regulations still remains. Whether it be an individual corrupt officer misusing their authority in a strip search context, or whether it be an institution-specific policy or practice of escalating the search technique unnecessarily and inappropriately, the risks are huge. The harm occasioned to visitors subjected to traumatizing experiences of privacy violation is incalculable. And the cost to the State of resulting liability for damages could well be calculated only with the aid of calculators. It is therefore in the legal, moral, and economic interests of the State to reject the regulations as proposed.

For the foregoing reasons, the regulatory changes as proposed must not be adopted. Instead, a less burdensome and more effective regime should be considered. Some of the alternative suggestions outlined above are the following: eliminating strip searches of visitors entirely; requiring a warrant for a strip search; prohibiting strip searches of visitors without both consent and probable cause; clarifying that unclothed inspections cannot involve touching; revising Form 888 in the ways discussed; better utilization of non-intrusive technologies in lieu of personal invasion of privacy; conducting a thorough, empirical study of contraband before adopting new regulations; and focusing greater detection and interdiction efforts on staff rather than on visitors.

Response 7E: See Responses to Comments 1A, 3A, 7C2(a), 7D, 7D1.

Commenter #8

Comment 8A: Commenter represents Initiate Justice Action, a statewide non-profit organization that fights for system-impacted people and progressive policies that end mass incarceration. Commenter strongly opposes NCR 23-05, which will inflict immense harm on the families and loved ones of incarcerated Californians while undermining efforts towards recovery and healing. They urge CDCR to reject these proposed regulatory changes in their entirety. The proposed changes are unnecessary and dangerous, creating grave potential for abuse and causing undue burdens on visitors. As early as 1972, CDCR's Research Division identified its "central finding" as "*the discovery of a strong and consistently positive relationship between parole success and the maintenance of strong family ties while in prison… evidence suggests that the inmate's family should be viewed as the prime treatment agent and family contacts as a major correctional technique*." Furthermore, as recently as 2020, CDCR's Budget Proposal recognized that "*high quality visiting programs for inmates have been proven to reduce prison violence, maintain family bonds, break the intergenerational cycle of incarceration and smooth the reentry process, thereby reducing recidivism rates*." It is both odd and disturbing, then, that CDCR is proposing regulatory changes that defy the findings of its own research division and written statements to the California Legislature. The United States Supreme Court has recognized a constitutional right to maintain parent-child relationships absent a compelling government interest, such as protecting a child from an unfit parent. (Santosky v.Kramer (1982) 455 U.S. 745, 753). The United States Court of Appeals for the Ninth Circuit has recognized that this constitutional right logically encompasses a right to maintain a relationship with a life partner. (United States v. Wolf Child (2012) 699 F.3d 1082, 1091). The greatest harm ensuing from these proposed changes are the impacts on individuals and families impacted by incarceration. CDCR's rules around visitation are cumbersome, byzantine, and discriminatory enough as they stand - the proposed changes under NCR 23-05 would only further undermine efforts to reduce recidivism and promote healing and recovery. Commenter provides personal stories from some of their members, and states these stories clearly articulate that CDCR must eliminate the red tape and discriminatory practices that currently exist surrounding visitation, not double down on harmful policy. Lowering the standard for prohibiting visitation from 'probable cause' to 'reasonable suspicion' and subjecting visitors to degrading strip searches - will only lead to more estranged families and greater harm under the guise of public safety. With the California Legislature actively working on new legislation such as AB 958 and given the preponderance of evidence on the positive value and impact of visitation on lowering recidivism and promoting recovery, we urge CDCR to reject the proposed regulatory changes under NCR Number 23-05.

Response 8A: See Responses to Comments 1A, 2B, 2C, 3A, 7D, 7D1.

Commenter #9

Comment 9A: Commenter is a PhD candidate whose research focuses on Latino experiences of criminalization, policing, and incarceration. Commenter strongly opposes

the proposed regulations. Women and children deserve to visit their incarcerated loved ones without fear of random invasive strip and/or cavity searches. Lowering the standard to reasonable suspicion will put women and children at tremendous risk for unreasonable harassment, traumatic experiences, or potential experiences at even the worry of having to endure a random strip search, and potential sexual abuse. Commenter respects that CDCR is taking initiative to curb what has clearly become an epidemic of overdoses and deaths within California prisons, however criminalizing visiting families and putting women and children at higher risk for wrongful invasive searches is not an adequate response.

Response 9A: See Responses to Comments 1A, 2B, and 3A.

Comment 9B: The proposed regulation puts people with mental or intellectual disabilities at a higher risk for invasive searches based on their probability of being perceived as displaying behavior deemed as abnormal or suspicious.

Response 9B: See Response to Comment 1A.

Comment 9C: The proposed regulations do not identify whether touching would be allowed as part of these invasive searches, nor identify whether accompanying children would be held to the same arbitrary standard for invasive searches.

Response 9C: Partial accommodation, see Response to Comment 7C2(a). The standard for unclothed searches is not arbitrary, see Response to Comment 1A. Per section 3173.2(a) all visitors are subject to search.

Comment 9D: The proposed regulations, as vaguely as they have been presented, and the after-effects of risk and harm that could transpire, additionally puts CDCR at significant risk of potential lawsuits.

Response 9D: See Response to Comment 1A. The current rulemaking action does not change the trigger for an unclothed body search; therefore, the department does not anticipate the proposed changes will affect department liability.

Comment 9E: The curbing of contraband must be centered within the facilities themselves. CDCR has long relied upon the misconception that visitors are responsible for bringing in all or nearly all contraband and uses this as a scapegoat for addressing overdoses and deaths. This same misconception is where the proposed regulations are stemming from. CDCR must abandon this misconception. Only then will true results be a realistic possibility. While no in-person visitation was permitted at any CDCR institution between March 2020-April 2021, California Correctional Health Care Services nonetheless reported 796 overdoses in California prisons. With this data in mind, if the threshold is lowered for invasive searches for visitors, correctional staff within facilities would need to be subjected to invasive strip searches prior to entering institutions based on the standard of reasonable suspicion as well.

Response 9E: See Responses to Comments 1B, 5A, and 6B.

Comment 9F: For those who do receive disciplinary measures for possessing or distributing illegal substances, requiring NA groups when one is found in possession of illegal substances, does little to no good when many facilities are understaffed and do not run program as intended. An example of a facility-centered approach would be to expand on the Integrated Substance Use Disorder Treatment Program, providing more resources and support for those struggling with substance abuse disorders under the guidance of trained substance abuse counselors and social workers.

Response 9F: This comment is not directed at the changes described in the Notice of Change to Text as Originally Proposed or the procedures followed by the department in proposing or adopting these regulations, therefore the comment is irrelevant pursuant to Government Code, Section 11346.9(a)(3).

Comment 9G: Research shows that visits and other forms of family programming reduce disciplinary infractions, increase the chances of successful parole, and decrease recidivism rates upon release and reentry into the community. In addition, positive familial relationships support healthy child development. The regulatory changes as proposed will deter family connections and deter child and/or parent desire to connect in-person with their incarcerated parent or loved one. Strong family connections can reduce intergenerational cycles of incarceration and create healthier and safer communities.

Response 9G: See Response to Comment 2B.

Commenter #10

Comment 10A: This is an absolute nightmare, to give officers this power over loved ones. To take us in a room and strip us and have us spreading our vaginas for inspection. This is traumatic for anyone, let alone someone who has past trauma of sexual assault. We have seen through the course of time and history the abuse of power within officers. Anything in the world can be used as reasonable. Where is the protection of us?! We are not in prison; we have not committed a crime. Unless there is a warrant, there should be no reason. You can bring in drug dogs. Are we able to bring in our phones to record and protect ourselves and audio or video the search? You've given the officers all the power and none for us. This is disgusting and giving them the green light to assault us. Already there have been lawsuits for sexually assaulting loved ones. You're doing nothing to protect us. You're protecting your business because it looks bad that our loved ones are overdosing, and you are looked at as not doing your job. Check within your own house. There are so many other options. Please do not subject the families to such a twisted traumatic experience to simply want to see the people we love the most.

Response 10A: See Responses to Comments 1A and 3A.

Comment 10B: These overdoses are tragic. During Covid when all visits were shut down, our loved ones were still dying right and left from overdoses. Where were the drugs

coming from? The same officers you're now giving power to have us naked in front of as they assault our bodies because they might think that maybe we have drugs.

Response 10B: See Responses to Comments 1B and 3A.

Commenter #11

Comment 11A: Commenter represents the Ella Baker Center for Human Rights, which works to advance racial and economic justice to ensure dignity and opportunity for low-income people and people of color. Commenter lists the following issues: Children and women, trans, non-binary, and femme-presenting individuals experience sexual violence and harassment at exponentially high rates and correctional staff are not exempt as perpetrators. The lack of an alternative to loss of visitation privileges for refusal to submit to search leaves no meaningful choice for those visitors who feel unsafe or violated in the instance of a required unclothed body search. These types of additional, excessive searches being performed by officers of the same gender as the visitor does not eliminate the threat or trauma resulting from this process. We find the inclusion of the visual body cavity search in the unclothed body search process to be overly intrusive and unfairly enforced.

Response 11A: See Responses to Comments 1A and 3A.

Comment 11B: Minors present a special issue here, where they are unable to legally provide such consent to the search of their bodies. We at the Ella Baker Center have already been contacted by community members concerned over how these changes will affect children and their capacity to safely visit their loved ones who are currently incarcerated.

Response 11B: A CDCR Form 888 shall be completed for each person searched, including minors. The parent or legal guardian of the minor must provide proof of their relationship to the minor, shall be required to consent to the search of minor children by signing the CDCR Form 888, and must be present during the search. Further, the parent or legal guardian of the minor can refuse a clothed or unclothed body search at any time. A visitor who refuses to participate in a clothed or unclothed body search or fails to clear any contraband/metal detection device shall be denied visits for that day.

Comment 11C: Studies have shown that correctional officers themselves tend to be the main demographic involved in the smuggling of contraband into correctional institutions, yet they remain excluded from the types of unclothed body searches that CDCR deems necessary to enforce upon vulnerable populations to help reduce the amount of these items entering correctional facilities.

Response 11C: See Response to Comment 6B.

Comment 11D: Given the privacy concerns associated with more extensive physical searches, the associated legal standard should not be lowered. Reasonable suspicion

appears to be far too low of a standard in relation to the invasiveness of the unclothed body search process - especially given the specification of the visual body cavity search. In criminal procedure, the highly subjective reasonable suspicion standard provides a legal basis for pat downs and brief frisks of outer clothing - not the removal of all clothing and the visual search of the subject's nude body and body cavities. It is well-documented that law enforcement usage of the reasonable suspicion standard to justify search remains tainted by racial animus and stereotyping. Use of such a standard in the context of visitor searches likely results in disproportionate searches - and, subsequently, disproportionate denial of visitation privileges - for people of color. The higher probable cause standard originally written into the regulatory language would be more appropriate given the extent of physical search allowed by the proposed regulations and supply better protection for visitors against search decisions made on prejudicial grounds.

Response 11D: See Response to Comments 1A and 3A.

Comment 11E: Currently incarcerated persons should be entitled to notification of incidents that affect their right to visitation with their family and loved ones. Proposed changes to regulation language would make it so that currently incarcerated persons no longer receive written notification that their visitor has been denied entry due to refusal to be searched. We know that access to loved ones on the outside plays an extremely important role in the rehabilitation process and contributes to lower recidivism rates. These types of regulation changes ignore the value in harm reduction and directly contradict the San Quentin/Scandinavian Model that aims to reimagine incarceration as a truly transformative experience. Individuals who are currently incarcerated should receive the same level of communication in regard to denial of visitation as their visitor since such denial also impacts their rights to their community and their capacity for successful reentry into society.

Response 11E: The proposed regulations do not affect inmates' rights to visit with their loved ones. The language regarding the inmate receiving written notification was removed for correction purposes, as it could be misinterpreted that the inmate was being searched, when only the visitor is searched. Additionally, the reference to section 3176(a)(3) was incorrect because it was not applicable to the inmate or visitor receiving written notification. The original wording of this section was incorrect, problematic, confusing, and therefore needed to be corrected. The inmate does not and has not ever received notification in writing of the visitor's refusal to be searched. The inmate is not notified of the reason that the visitor was not permitted to enter the institution, because providing that information to the inmate would likely violate the visitor's right to privacy (Cal. Const. Art. 1, § 1), and the visitor's rights under the Information Practices Act (Cal. Civ. Code section 1798 et seq.). See also, Response to Comment 2B.

Commenter #12

Comment 12A: Commenter represents the Ella Baker Center for Human Rights. Commenter states NCR 23-05 creates an unnecessary risk of discrimination, prejudice, and sexual harassment. Visiting provides an opportunity for incarcerated individuals to

build meaningful relationships. Rehabilitation, reconciliation, and meaningful connections are reestablished, reinforced and maintained. This NCR is an exaggerated response to achieving the goal of safety and security regarding preventing the introduction of contraband into institutions. Preventing the introduction of contraband can be achieved without subjecting visitors to extremely intrusive methods, such as unclothed body searches, and visual body cavity inspections. Clothed pat downs, metal detectors, and high-tech video camera surveillance systems are adequate measures to detect and intercept contraband entering prisons.

Response 12A: See Response to Comments 1A and 2B.

Comment 12B: Lowering the standard to "reasonable suspicion" instead of "probable cause" allows correctional staff occasions to abuse their discretion and subject visitors to unclothed body/cavity inspections for virtually any conduct staff deems reasonably suspicious. These intrusive searches will certainly be leveraged as sanctions against visitors for even perceived violations the officer may take offense to. For example, if a visitor doesn't consent to be searched, the NCR authorizes future visits to be conditioned upon the visitor submitting to an unclothed body/cavity search at a future date. This creates punitive sanction upon the visitor for exercising their right not to give consent to be searched. The reasonable suspicion is also permitted to be carried over to future visits, until the visitor either submits or gives up altogether on visiting. Because of the power dynamics between correctional officers and visitors, "probable cause" is the appropriate standard when determining whether a visitor can be subjected to an unclothed body/cavity search.

Response 12B: See Responses to Comments 1A and 3A. Every visit is separate in that reasonable suspicion, or refusal to submit to a search during one visit, will not affect what happens during the next attempt to visit. Reasonable suspicion for a search must be found when the visitor attempts to enter the institution, not a month prior, for example.

Comment 12C: Minors should never be subjected to an unclothed or visual body cavity search in any event. The physical manipulations a visitor must perform for officers to conduct a visual body cavity search is dehumanizing, demoralizing, and traumatizing, not only for the minor, but also for the parent or guardian who must give consent. This does not promote family ties or rehabilitation, but is a trauma inducing event, and psychological deterrent for future visits. No visitor, adult or minor, should be subjected to harassment, discrimination, or trauma, and placed in a vulnerable position to be objects of abuse at the hands of correctional officers with deviant tendencies.

Response 12C: See Responses to Comments 9C, 11B, and 1A.

Comment 12D: Sexual harassment can also be perpetrated by people of the same gender, and everyone does not conform to socially prescribed gender identities. Therefore, the NCR's direction that unclothed body and body cavity searches are to be conducted by staff of the same sex does nothing to alleviate the opportunities for sexual harassment.

Response 12D: See Response to Comment 3A.

Commenter #13

Comment 13A: Commenter represents Empowering Women Impacted by Incarceration and has concerns regarding the application of the "reasonable suspicion" legal standard, they believe there are potential drawbacks and issues associated with the use of this standard. The subjective nature of the standard raises concerns particularly when it comes to interactions between law enforcement and families visiting incarcerated loved ones. One of the primary concerns is the inherent subjectivity of the standard, which can lead to inconsistencies in its application. Different officers may interpret the same set of facts differently, potentially resulting in profiling or targeting of individuals or groups based on personal biases or simply because their dislike for a particular visitor and unfortunately them being anti-family support which they see often. Furthermore, it creates a potential avenue for abuse by custody officers. The lack of oversight from a judge or magistrate before actions are taken raises concerns about accountability and the potential violations of an individual's rights. Racial profiling cannot be overlooked. This troubling trend raises serious questions about systemic discrimination and the erosion of trust between law enforcement and marginalized communities.

Response 13A: See Responses to Comments 1A, 2B, and 3A**.**

Comment 13B: People might hesitate to visit their incarcerated family members or express themselves freely if they fear unwarranted stops or searches by staff. This climate of apprehension can disrupt daily activities and contribute to feelings of anxiety and humiliation. Striking a delicate balance between maintaining safety and safeguarding individual rights is paramount for importance. Commenter kindly requests that CDCR review and evaluate the current practices to ensure that they are fair, just, and respectful of the rights of all individuals involved.

Response 13B: See Response to Comment 2C**.**

Commenter #14

Comment 14A: Commenter represents Initiate Justice, which fights to end mass incarceration by activating the political power of those directly impacted by it. Commenter objects to NCR 23-05 changing the language from "probable cause" to "reasonable suspicion," and adding language regarding a visual inspection of body cavities to unclothed body searches. Commenter states the changes are unnecessary and will lead to harmful consequences. The current language of "probable cause" already provides enough discretion for Correctional Officers to perform searches when they deem necessary. Additionally, it is a regular procedure for incarcerated people to be subject to searches, including visual inspection of a person's body and body cavities. It would be unnecessarily repetitive to subject loved ones to this inhumane manner as well. There are already mechanisms preventing the introduction of contraband into institutions and

facilities. Lowering the standard will lead to more visitors subject to unnecessary and invasive searches and/or negative effects on future visits if they exercise the option to deny the search.

Response 14A: See Responses to Comments 1A and 3A.

Comment 14B: We have seen bias and discrimination in who is targeted for searches in current practice. Widening the net of searches and allowing for a more invasive practice (visual inspection of body cavities) without other safeguards or oversight will only compound the negative effects for those unfairly targeted. There is no protection for those denying a search that does not entail other harmful consequences on future visits. Namely, future visits may be conditioned upon the visitor's willingness to submit to a search prior to each visit, for as long as the institution deems necessary. There is no process or remedy to visit your loved one without consenting to be violated at future visits.

Response 14B: See Responses to Comments 1C, 3A, and 12B**.**

Commenter #15

Comment 15A: Commenter writes on behalf of San Quentin Inmate Family Council members. They oppose the proposed regulations which they state must not be approved. Commenter submitted personal stories of multiple women that were subject to unprofessional, unethical, intrusive, and immoral treatment during searches by a specific Sergeant at San Quentin State Prison. This Sergeant performed unclothed searches of female visitors alone and without authorization to do so or conferring with medical personnel. The women were traumatized by the experiences. Female visitors reluctantly consented to unclothed body searches and complied out of fear, retaliation, and the threat of being denied a visit, and the Sergeant noting in the computer of their refusal to submit to an unclothed search of their naked bodies. The Sergeant conducted unauthorized unclothed searches of visitors in an undignified manner, which traumatized, distressed, and targeted multiple female visitors. Many female visitors have been subjected to some form of abuse including sexual abuse in their past. Visitors should feel safe when encountering CDCR staff, and that is not the case with this Sergeant. These searches cause a delay in the processing of visitors by approximately 1 ½ - 2 hours, which significantly reduces the amount of time female visitors have with their loved one, and specifically targets only female visitors which is discriminatory. They want to reiterate the seriousness of this Sergeant's actions and the impact this change will have. While the repetitive unprofessionalism of the Sergeant is abhorrent, they understand and respect the need to conduct clothed and pat searches to prevent illegal activities and contraband from entering CDCR facilities. However, they believe this can be accomplished in a professional and dignified manner, which is not something they feel confident entrusting with this Sergeant, nor do they feel is fair to place the undue burden of conducting unclothed and cavity searches on CDCR staff. They wholeheartedly believe this change will open the door for improper actions, unnecessary traumatizing of visitors, and potential for increased legal action against CDCR staff, and possibly increased and costly misconduct investigations.

Response 15A: See Responses to Comments 1A, 2B, and 3A.

Commenter #16

Comment 16A: Commenter represents the Coalition for Family Unity of Legal Services for Prisoners with Children, which advocates for the civil rights to visit incarcerated people and their families, recognizing that having that right is the only way to protect family unity during incarceration. Family unity during incarceration creates a strong support system needed for successful reentry and to thrive after release. Commenter urges the department to rescind the proposed regs and further revise them before proceeding to adopt and implement any new rules. These proposed changes are presented as primarily language clean-up but are in fact substantive. They create potential for abuse and will impose undue burdens on visitors. Accordingly, the proposed amendments should not be approved without substantial changes. This description of the anticipated benefit stated in the Initial Statement off Reasons is self-contradictory: it suggests that the proposed amendments will simply clarify existing procedures while simultaneously evading a clear statement whether it intends to increase the frequency and intensity of visitor searches. Nowhere in the proposed rule change does CDCR offer any evidence that visitors are a significant source of contraband, yet it implies that more searches are necessary to achieve "proper" inspection and search procedures. We note with concern that neither existing regulatory language nor any of the proposed amendments specify that a visitor may not be asked to submit to an unclothed body search unless less intrusive search methods – hand wanding and clothed body searches – have failed to resolve the issue. Such a progression is implied but not clearly mandated by existing subsection 3173.2(d)(2). Although current subsection 3173.2(d)(7) states that unclothed searches "may" be used when less intrusive alternatives are not "available," the regulations do not provide clear rules for when and how the progressive method is to be applied. Saying "may only" would have been a slight improvement. The proposed changes in NCR 23-05, instead of improving the subsection to say that such searches "may *only*" or "shall *only*" be used under the specified conditions, would change it to say that they "shall" be conducted.

Response 16A: See Responses to Comments 1A, 3A, 7A**.**

Comment 16B: Proposed amendment of Subsection 3173.2(c)(3)(G): The proposed new requirement that any request for a clothed or unclothed body search be documented in writing on CDCR Form 888 is overdue, as is the mandate that the documentation include the specific facts on which the search request is based. However, the proposed revised Form 888 needs substantial further revision. The opening paragraph of revised Form 888 is objectionable on two counts: (a) It requests "your voluntary submission to a clothed/unclothed body search of your person and any minors accompanying you." Separate consents should be required for searches of each person, with specific facts documented to support the requested search of that person. Indeed, the Initial Statement of Reasons specifies that a "Form 888 shall be completed for each person searched." (b) Despite the assertion in the Initial Statement of Reasons that "the search process is

progressive," the proposed Form 888 *simultaneously* requests consents to both clothed and unclothed body searches. To reflect the asserted requirement that a clothed body search be completed without explaining the metal detector or scanner alarm before an unclothed body search is requested, the visitor's consent to an unclothed body search should not be sought until and unless a clothed search has been conducted and is deemed inadequate. Accordingly, Form 888 should be divided into two parts, to be filled out *sequentially*, with a separate section for documenting additional specific facts underlying a request for an unclothed search and a separate space for indicating consent to an unclothed search with both a checkbox and a second signature. In addition to a date, requiring the *times* of signatures of the first and second requests (clothed and unclothed, respectively) would ensure that the progressive search process is performed sequentially and not skipping steps.

Response 16B: See Responses to Comments1A and 7C2(d). In addition, the CDCR Form 888 was revised to clarify the progressive search process, indicating that a clothed body search is conducted if the visitor does not clear metal detectors/scanners, then after a clothed body search if additional attempts to clear the metal detectors/scanner fails, an unclothed body search would be requested. Regarding the request for formatting changes to the CDCR Form 888, the department believes the CDCR Form 888 is sufficient as is, and no further revisions are necessary.

Comment 16C: Proposed amendment to Subsection 3173.2(d)(7): The proposed amendment is inadequate. (1) CDCR asserts that the addition of language to the definition "unclothed body search" is "necessary" to give visitors "a clear understanding of what an unclothed body search consists of." Yet the definition does not specify whether an officer conducting an unclothed body search is permitted to touch the person being searched, a question of great concern to many of those who are searched. Nor does it specify whether an unclothed body search must be witnessed, and if so by whom, although proposed Form 888 includes a space for the signature of the "staff member witnessing the search." (2) Of greater concern is the question whether an unclothed body search, with or without visual inspection of body cavities, is ever necessary to prevent the introduction of contraband into the visiting area. CDCR's Initial Statement of Reasons includes a conclusory assertion unsupported by any evidence that contraband "is commonly concealed in a person's body cavities to evade the security process." Given the absence of privacy in the visiting area, which is under both human and camera surveillance during the entire time that incarcerated people and their visitors are in contact with each other, it is hard to visualize the circumstance in which a visitor could transfer a contraband item from a body cavity to the person they are visiting or deposit such an item in a location from which the incarcerated person could retrieve it. Balancing the interests at stake, we believe the miniscule risk that a visitor will transfer a contraband item from a body cavity to an incarcerated person cannot outweigh the extraordinarily intrusive nature of an unclothed body search. (3) The proposed amendment authorizes an unclothed body search on "reasonable suspicion that the visitor *may be* carrying contraband" (emphasis added). The phrase "may be carrying" replaces the existing phrase "is carrying" and makes the concept of reasonable suspicion so broad as to be meaningless. Any person randomly selected from the population *may be* carrying contraband or a

weapon or a gift. This proposed language must be rejected on the grounds that a "reasonable suspicion" that a person "may be carrying" contraband cannot meet the requirement that "reasonable suspicion" be supported by objective facts. No intrusive unclothed body search should ever be authorized on such flimsy grounds.

Response 16C: See Responses to Comments 1A and 7C2a.

Comment 16D: Proposed amendment to Subsection 3176(a)(3)(A): This amendment should be rejected. It offends the principle of due process to treat the distinction between "probable cause" and "reasonable suspicion" as mere "verbiage," as CDCR does in its discussion of Benefits of the Regulations. Visitors to incarcerated persons are not suspects. All visitors to prisons have been subjected to background checks prior to being approved to visit, and their identities and histories are available to the correctional officers who process them into the institution. It is offensive to treat decisions about how to search such visitors as instances of criminal procedure subject to the same standard as police encounters with unknown individuals who are perceived to be behaving in a manner that indicates illegal activity. Rather than lowering the standard for denying a visit to a person who refuses an unclothed body search from probable cause to reasonable suspicion, the regulations should *raise* the standard for authorizing any unclothed body search from reasonable suspicion to probable cause.

Response 16D: See Response to Comment 1A**.**

Commenter #17

Comment 17A: With respect to its legitimate security interests, the department continually neglects to direct its efforts or attention toward staff. As anybody who frequently visits any of the department's institutions knows, staff routinely walk in and out of its institutions without so much as having the contents of their large and bulky lunch totes examined. Indeed, under existing section 3173.2(a), it remains unclear that any search of staff at all is required, except to the extent that "staff shall be subject to inspection as necessary." Yet, it is staff who ultimately decide what is necessary, in the absence of enforceable and a better articulated regulations that require something more than a subjective or perhaps self-interested judgement call. This status quo runs counter to common sense – and equally runs counter to any assurance of transparency, fairness, and honesty. Moreover, the department must consider reasonable alternatives to the proposed regulatory action that would be: a) more effective in carrying out the purpose for which the regulatory action is proposed, b) as effective and less burdensome to affected private persons than the regulatory action proposed, c) more cost-effective to affected private persons, and equally effective in implementing the statutory policy or other provisions of law. The department must go back to the drawing board and clarify existing search protocols to provide for escalating search techniques as necessary, and according to a rational and reasonable calculus. These protocols need to be clearly understandable to staff and visitors alike. Moreover, the department is empowered to discipline staff who fail to fairly or consistently implement search procedures or agree to be searched themselves.

Response 17A: See Responses to Comments 3A and 6B.

Comment 17B: Proposed amended subsection 3173.2(c)(3)(G) would require that "all information regarding the reason(s)" for a clothed or unclothed body search be included on CDCR Form 888, with the exception of any "confidential information." Since no information regarding the reason(s) for such a search is currently required or provided to visitors on CDCR Form 888, this can only represent an improvement over the status quo. However, 3173.2(c)(3)(G) requires further revision if the goal is to ensure transparency, clarity, honesty, fairness, and due process. As currently drafted, it includes ambiguous language at the end of the last sentence. Commenter suggests the sentence be changed, as reflected by the language in bold as follows: "This form shall include the subject's name, date, all information regarding the reason(s) for the search excluding any confidential information, **the signature of the official ordering the search, and the visitor consenting to or refusing the search."**

Response 17B: The department believes the current revisions to the CDCR Form 888 provide enough clarity. In the proposed form, there is a signature line for the Watch Commander/Visiting Lieutenant, and a signature line for the visitor. Additionally, language was added in the 2nd 15-day Re-Notice to clarify "confidential information" by including a reference to the CCR section where this can be found.

Comment 17C: The proposed amendments of 3176(a)(3)(A) and 3172(d)(7) [sic] (*It is believed the commenter may mean "3173.2(d)(7)*") raise concerns, as currently codified they contain contradictory language with respect to unclothed body searches. At present, neither visitors nor staff can know whether an unclothed body search is authorized on a "probable cause" basis, or merely on the basis of reasonable suspicion. Under current subsection 3176(a)(3)(A), a visitor who refuses a "probable cause" strip-search loses their visiting privilege for the day. Current subsection 3172(d)(7) [sic] (*commenter may be referring to "3173.2(d)(7)"*) contrarily requires a visitor to consent to a "reasonable suspicion" strip-search in order to proceed with their visit. Perhaps this is one reason the department proposes the amendment of 3176(a)(3)(A) to lower the "probable cause" standard for an unclothed body search to "reasonable suspicion." That the two subsections are mutually inconsistent is certainly a problem. However, the proposed amendments of these two sections, taken together, are prohibitively problematic. If proposed amended subsection 3176(a)(3)(A) would provide consistency and clarity, proposed amended subsection 3172(d)(7) [sic] (*commenter may mean 3173.2(d)(7)*) would go a considerable distance further – authorizing a highly intrusive and likely traumatizing search of a visitor's body cavities on the basis of reasonable suspicion, where no body-cavity search is currently authorized under <u>any</u> circumstances.

Response 17C: See Response to Comment 1A. Additionally, the department is unable to determine what accommodation, if any, the commenter is requesting regarding some aspects of their comment, therefore portions of the comment are deemed irrelevant pursuant to Government Code section 11346.9(a)(3).

Comment 17D: The department already has a variety of effective and far less invasive search methods at its disposal for the purpose of conducting body searches on visitors – and is already authorized to use them without probable cause or reasonable suspicion. See subsections 3173.2(c)(2) and 3173.2(d)(1)-(6). Nonetheless, the department now seeks to add body-cavity searches to its roster of search methods. The department cites as examples of circumstances that lead to reasonable suspicion as "a scent coming from the person or vehicle that has the smell of marijuana, or... has received confidential information that a visitor is going to attempt to smuggle in or conceal contraband." Surely the department can't be proposing that such circumstances should immediately escalate to the level of triggering a body-cavity search – particularly when it currently has ion scanners and other electronic drug detectors at its disposal. Yet, nothing in the proposed amended regulations would prevent a body-cavity search from happening on the basis of a mere scent of marijuana, or a "confidential" allegation by a person who simply doesn't like the visitor, or the way they look.

Response 17D: See Responses to Comments 1A and 2C.

Comment 17E: The department's repeated emphasis on so-called confidential information throughout the notice disturbingly calls into question whether its authentic intent is to ensure transparency, clarity, honesty, fairness, or due process, - or, rather, to intimidate visitors, pit them and staff against one other, and capriciously curtail visiting privileges. In the meantime, abuses that result from the use of confidential information by law enforcement and correctional officers have been increasingly well documented over the past several years. The reliance on confidential information is not only a poor substitute for a diligent and fair-minded approach to enforcing regulations or the law, but it is also hostile to due process.

Response 17E: All information regarding the reason(s) for the search shall be documented excluding any confidential information. Confidential information includes: (1) Information which, if known to the inmate, would endanger the safety of any person; (2) Information which would jeopardize the security of the institution; (3) Specific medical or psychological information which, if known to the inmate, would be medically or psychologically detrimental to the inmate; and (4) Information provided and classified as confidential by another governmental agency. The purpose of confidential information is to protect the safety of an individual or institution. See also, Response to Comment 3A.

Comment 17F: Equally well documented are the positive impacts of in-person visits upon both family and wards of the state alike. Yet those of us with incarcerated family members and loved ones now find ourselves in a bewildering and Orwellian situation whereby: 1) The Governor talks about completely reimagining what prison means and transforming San Quentin into a rehabilitation center, 2) the state legislature is poised to pass SB 98 to restore visitation as a right (after passing substantially the same legislation last year), 3) The department touts "the California Model" as a vehicle for "building safer communities through rehabilitation, education, restorative justice, and reentry," and Yet, 4) the department's instant proposed amended regulations, if approved, would have the effect of discouraging visitation and further vilifying us.

Response 17F: See Response to Comment 2B.

Comment 17G: The department claims that it is "not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action." The department's lack of awareness here, if any, can only be willful. A great many of us have repeatedly been denied visitation privileges through no fault of our own – whether due to staff outages, emergencies, or capriciousness on the part of staff. In such instances, we've incurred costs related to traveling and lodging, after we've spent up to several hours traveling and have reworked our schedules to see our loved ones. And should we face the prospect of being denied access due to the fact that we've refused to consent to the trauma of a pretextual body-cavity search, our numbers will only increase.

Response 17G: See Responses to Comments 1A and 2B. Additionally, the department believes the response as stated in the Notice of Change to Regulations for the Cost Impact on Representative Private Persons or Businesses is adequate, as the department is not aware of any cost impact that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

Commenter #18

Comment 18A: I believe that the proposed regulations, as written, do not comport with the CDCR's promotion of visitation as a rehabilitative tool. It is widely recognized both within and outside of CDCR that visitation reduces in prison violence and other misbehavior in addition to reducing recidivism.

Response 18A: See Response to Comment 2B.

Comment 18B: Increasing the likelihood and incidence of unclothed body searches can only frighten visitors and incline incarcerated people to tell their loved ones not to visit rather than risk their being strip searched. This goes doubly for children who could only find the experience frightening, humiliating, and traumatizing.

Response 18B: See Response to Comment 1A.

Comment 18C: The supposed voluntary nature of the searches means that visitors who are asked to strip search, and who know that they are not carrying any contraband, are then required to make a choice to be humiliated or not to see their loved one after already enduring the often onerous travel and other processes required. This is unnecessarily cruel.

Response 18C: See Responses to Comments 1A, 3A, and 7D.

Comment 18D: Another major concern is that the proposed regulations appear to be intended not only for children, families, and other loved ones but also for legal visitors.

This is inconsistent with current practice where legal visitors are cleared and processed in a different manner than ordinary visitors. Nor are the exceptions granted in the law permitting mandatory voluntary searches in order to have a visit with an incarcerated person considered or accounted for. My reading of *In re Roark* (48 Cal.App.4th 1946) suggests that these regulations, which contemplate an unclothed body search of counsel based not on a particularized suspicion, but on a lesser standard for a search, would violate the incarcerated persons rights to attorney visitation through their chilling effect.

Response 18D: *In re Roark* (48 Cal.App.4th 1946) does require a particularized suspicion in order to justify an unclothed body search. In addition, "reasonable suspicion requires *particularized suspicion*." (*U.S. v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, 1131.) Therefore reasonable suspicion, which is the standard proposed in this rulemaking action, is not a lesser standard than a particularized suspicion. See also, Response to Comment 2B.

Comment 18E: There are many reasonable alternatives that do not appear to have been considered. One that is particularly glaring is a failure to consider a greater emphasis on searching correctional employees. This would have seemed to be the obvious focus in the wake of the Office of the Inspector General's Report on efforts to prevent the introduction of contraband, and the major gaps in employee searching they observed (see https://www.oig.ca.gov/wp-content/uploads/2023/01/CDCR-Controlled-Substances-Contraband-Interdiction-Efforts-Audit.pdf). The increase of searches of visitors ignores the strong likelihood that most contraband in fact enters the prison [Sic].

Response 18E: See Response to Comment 6B.

Comment 18F: Another alternative that ought to have been considered is some sort of tracking mechanism for the success rate of searches, and the number of unclothed body searches that net no contraband. Absent some form of tracking of these searches and their effectiveness, no one will be able to tell whether the regulations serve their stated purpose. Neither will any patterns of discrimination, sexual harassment, or other misdeeds be discernible. The form 887-B is proposed to provide documentation of contraband or a refused search, but no such form exists to document the negative search. This ought to be remedied.

Response 18F: The department believes the CDCR Forms 888 and 887-B combined is sufficient to collect enough data to review and make changes to policy if needed. The proposed forms document whether contraband was found, or whether it was not found.

Comment 18G: Finally, I am concerned that the term "reasonable suspicion" used throughout the proposed regulation is too vague. Without a definition being provided in the regulations, it is difficult to comment on them adequately let alone correctly enforce them. This vagueness will invite staff complaints, litigation, and too many baseless searches based on stereotypes and ethnic tropes.

Response 18G: See Response to Comment 1A.

Commenter #19

Comment 19A: The change in policy regarding “reasonable suspicion” to allow CDCR to conduct unclothed and body cavity searches is not only inhumane and unethical, but a gross violation of one's basic human dignity and personal privacy of their bodies. Visitors are not criminals, nor should they be treated as such just by merely visiting a loved one in prison.

Response 19A: See Responses to Comments 1A, 2B, and 7D.

Comment 19B: I am a victim of sexual assault (rape) by Military Police and Correctional Officers. It was so horrific that I am still over almost 20 years later severely traumatized when having to disrobe in front of anyone. I have anxiety every time I enter a CDCR facility that I may be searched for any reason even though I am doing nothing wrong. It is very scary to visit a loved one in prison. Visitors should feel safe when interacting with CDCR staff. If I were to be searched while being completely naked, I would feel like I was being raped all over again, my mental health would be seriously impacted, and I would feel embarrassed and humiliated. The proposed changes, if implemented may create traumatization and increased risk of re-traumatization of visitors with added anxiety, fear, and distrust of law enforcement officers.

Response 19B: See Responses to Comments 1A and 2B.

Comment 19C: I do not believe proper and thorough research was conducted when consulting with other agencies pertaining to their search procedures of visitors. I was a Correctional Officer for 6 ½ years and worked in a prison for over 15 years. Unfortunately, the majority of contraband comes in from staff, not visitors. While visitors do attempt and sometimes succeed in introducing contraband, the vast majority is brought in by staff. I believe the statistics of drug overdoses during the Covid-19 pandemic lockdown and cancelation of social visitation prove staff is the most common means contraband is introduced. The Federal Bureau of Prisons does NOT conduct visual (unclothed) or cavity searches of visitors. Only medical personnel are authorized to perform cavity searches of inmates and only in emergency situations. There are absolutely no unclothed searches or cavity searches of visitors. Bureau of Prisons staff are required to pass through a walk-through metal detector. If they cannot pass without an alarm, they are then checked via a handheld metal [sic]. If they cannot successfully clear the handheld, they are to be pat searched. Their vehicles are subject to search at any time on the prison property. I believe this would be far more effective than unclothed searches of visitors. As a law enforcement officer and someone with over 16 years of correctional experience (none of which was served with CDCR) I absolutely understand the need to perform searches to ensure the safety and security of the institutions, staff, and inmates, and prevent the introduction of contraband. However, there are other ways to accomplish this without subjecting visitors to the humiliation of unclothed and body cavity searches. Please reconsider this change.

Response 19C: See Responses to Comments 1A and 6B.

Comment 19D: The proposed changes, if implemented may have the potential for gross misuse/abuse of power by CDCR staff and would increase CDCR staff misconduct allegations and investigations.

Response 19D: See Responses to Comments 2C and 3A.

Comment 19E: The proposed changes, if implemented may increase lawsuits filed against CDCR and its staff, and increase costs to provide safe, secure, and appropriate search areas and staff to conduct the searches.

Response 19E: See Responses to Comments 2C, 3A, and 9D.

Comment 19F: The proposed changes, if implemented directly oppose Governor Newsom's new "model" for prison and rehabilitation.

Response 19F: See Response to Comment 2B.

Comment 19G: The proposed changes, if implemented directly impact familial ties which are supposed to be supported and facilitated by CDCR.

Response 19G: See Response to Comment 2B.

Comment 19H: The proposed changes, if implemented places undue hardship on CDCR staff to perform the searches and is harmful to visitors to be subjected to a burdensome and unnecessary unclothed search.

Response 19H: See Responses to Comments 1A and 2B.

Commenter #20

Comment 20A: Commenter is a regular visitor at CDCR. Commenter relays her personal story regarding being illegally searched on many occasions and strip-searched and cavity searched. Commenter states her rights were violated several times, she suffered anxiety and depression due to her experience, which was traumatic. Commenter relays that she was deterred from visiting out of fear of correctional officers' misconduct and retaliation against her loved one. She filed a lawsuit against CDCR and won. Correctional officers are abusing their privileges based on reasonable suspicion and probable cause. Nothing was ever found on the searches conducted on her.

Response 20A: See Response to Comment 3A.

Comment 20B: Commenter asks what is the percentage of contraband discovered during a strip search or cavity search? Also, the anatomy of a woman's body will not allow a visual inspection of a woman's vaginal cavity, unless invasive and dangerous

attempts are made. These inspections should only be performed by trained law enforcement personnel, and not based on a person's suspicion or feelings. Additionally, they should only be performed in certain locations, not in the standard utility room or locker room where CDCR usually performs these searches. CDCR continues to violate the rights of citizens with the regulations already in place as they have for many years. Commenter asks CDCR to not lower the threshold for an officer to request a search from probable cause to reasonable suspicion. This would give the scope of discretion much easier for correctional officers and a greater opportunity to abuse their power. By doing so this will take away from the families the only possibility of protection.

Response 20B: See Responses to Comments 1A and 3A.

Comment 20C: Commenter states a CDCR spokesman stated that "The regulations are not intended to change the threshold for searches, that the standard for strip searches and cavity searches would remain unchanged and would continue *to be used only after less evasive means were made available. Unclothed searches are completely voluntary unless a search warrant is presented. Unclothed searches are used very sparingly, and only when all other contraband interdiction efforts have been exhausted.* Contraband interdiction efforts to be used before an unclothed search is proposed includes walk-through metal detectors and hand-held metal detectors." Commenter states the italicized language was unfortunately not true in her situation, and for many other visiting families. There have been several complaints to CDCR and the Inspector General's Office from people visiting their loved ones complaining about their rights being violated, proper strip search warrants not being obtained and searches not being voluntary. As well as retaliation for denying a strip search or a cavity search.

Response 20C: See Responses to Comments 1A. and 3A.

Comment 20D: Commenter asks lawmakers and those in charge of implementing and enforcing rules within CDCR to take a second look and consider all aspects possible in which contraband is entering the facility. Commenter offers some alternatives to eliminate contraband entering prisons, such as: developing and implementing a budget for drug-sniffing dogs at **every prison**; tougher consequences for persons including staff members and visitors that bring illegal contraband into the prison; and communication with families and citizens of the community that visit somebody in prison.

Response 20D: Regulations addressing searches by canines are set forth in Title 15, section 3173.2. Canine teams are not always available to conduct frequent searches at their assigned prisons. Consequences for visitors and staff that bring illegal contraband into the institutions are covered in Title 15, sections 3176.1 through 3176.3, and these sections are not the subject of this rulemaking action.

Commenter #21

Comment 21A: Commenter represents ACLU and opposes the proposed regulation changes. Commenter states the proposed changes would authorize unnecessary and

burdensome strip searches under a highly discretionary standard of "reasonable suspicion" and permit CDCR to deny visits to those refusing such searches. The changes also create grave potential for the abuse of visitors. Reasonable suspicion is a much lower standard that creates the opportunity to target, intimidate, and harass visitors unnecessarily at every visit. If there are to be any changes, CDCR should use the higher standard because it is more protective of privacy, respectful of human dignity, and ensures that the 4th Amendment is fully satisfied by requiring substantial proof that contraband will be found before conducting a warrantless search of a person's body cavities. This is especially imperative given that this policy applies equally to minors.

Response 21A: See Responses to Comments 1A. and 3A.

Comment 21B: The proposed change is also coercive, as the families and friends visiting their loved ones in prison are forced to consent to an unclothed search, including body cavities, or forfeit their visit. These same families already face multiple barriers to visits, which include unreasonable administrative exclusions, long travel distances and costs, disrespectful and harassing screening procedures, and unpredictable cancellations. The requested amendments add to these barriers.

Response 21B: See Response to Comments 1A and 2B.

Comment 21C: If CDCR's goal is to prevent contraband from entering prisons, there are better ways. This includes following the recommendations outlined in the Office of the Inspector General's recent report on CDCR's Controlled Substance Contraband Interdiction Efforts. The report noted that CDCR was conducting "inadequate" searches of employees, contractors, and official visitors, and often only "glanced for one to two seconds" during employee bag "searches" and frequently allowed employees to enter facilities without verifying their identification or checking their bags. Shockingly, the report highlights that during periodic enhanced searches of staff, CDCR employees are not "subject to physical search (including pat downs), search by electronic drug detection devices, or search by canines" – some of the very same tactics these amendments aim to force upon visitors. What is even more concerning is the continued circulation of drugs and drug overdoses of people who are incarcerated when COVID-19 visiting restrictions were in place. During this time, visitors were not allowed in CDCR facilities as a preventative measure. While drug overdose decreased by 37% from 1,274 the prior year to 796 in the first year of COVID-19 operating restriction, still, as noted in the OIG's report, "the suspension of in-person visiting meant that incarcerated people were not able to obtain drugs from visitors but were able to get drugs in other ways."

Response 21C: See Response to Comment 6B.

Comment 21D: Lastly, the proposed changes to Subsection 3173.2(i)(1) and renumbered as (j) remove the notification to the person who is incarcerated when a visitor refuses a search and "forgoes" their visit. This is both troubling and unjustified in the notice in change of regulations (NCR 23-05). Both the person who is incarcerated and

the visitor should continue to receive these notifications especially when such CDCR is proposing a substantial change to their search policies that could lead to abuse of visitors.

Response 21D: See Response to Comment 11E.

Summaries and Responses to the 15-Day Re-Notice Comment Period:

Re-Notice Commenter #1 (same as Commenter #11)

Re-Notice Comment 1A: Commenter acknowledges and appreciates the addition of clarifying language that affirms that the visitor's body will not be physically touched in the process of an unclothed body search. However, concerns associated with the other proposed changes still remain – see full Comment #11.

Response Re-Notice Comment #1: See Responses to Comments 11A – 11E.

Re-Notice Commenter #2 (same as Commenter #7)

Re-Notice Comment 2A: Commenter is pleased to see a few changes in the latest version of NCR 23-05. Specifically, the explicit instruction that no touching is permitted in a visual cavity search is a welcome clarification of 15 CCR, subsection 3173.2(d)(7). Nonetheless, there remain serious problems with that subsection and related subsections. Commenter states it would be preferable to use the word "shall" so as to require that CDCR staff *shall not* touch the subject of the unclothed search. Commenter asks if the subject of an unclothed search can be ordered to touch themselves? This would be tantamount to a cavity search with touching by officials and could be psychological torture. If the state actor forces another to do what is forbidden to the official to do, is this not a violation too? Commenter cites *U.S. Const., Article 16 (1) of the Covenant Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, as well as other related Articles. Commenter expands on comments from his original comment with respect to unclothed body searches, and cites multiple court cases, and references many citations from them, for example: *"Strip searches involving the visual exploration of body cavities are dehumanizing and humiliating" Kennedy v L.A.P.D; "A strip search is humiliating and intrusive" Cates v Stoud; "Body-cavity searches […] represent one of the most grievous offenses against dignity and common decency" Bell v. Wolfish; "The intrusiveness of a body cavity search cannot be overstated" Fuller v. M.G. Jewelry.* The legal standard for strip search in prisons is when based on "reasonable and individualized" suspicion. CDCR's proposed regulations at 3173.2(d)(7), 3173.2(i)(2), and 3176(a)(3)(A) each appear to misstate the legal standard. Commenter discusses the *Cates* decision. Commenter states something like a *Miranda* warning (a verbal and written notification that the visitor has the right to refuse a search), should be issued, serving the function of alerting visitors verbally and in writing would be an improvement in transparency, fairness, honesty, and due process, and ensure CDCR practices comport with the 4th amendment as interpreted by *Cates.* CDCR's practice of strip-searching visitors violates international human rights law, that is, the foreign relations law of the United States. Strip searches are, as the Ninth Circuit said, "dehumanizing";

such treatment is banned by international law, binding on the United States by treaty; therefore, CDCR's practice contravenes federal law. Commenter reiterates alternatives identified in his previous comment.

Response Re-Notice Comment 2A: The visitor may be asked to facilitate the unclothed body search by touching their own body. To clarify the unclothed body search process, language was added in the 2nd Re-Notice, that the visitor's body will not be touched *by staff* during the unclothed body search. The process for performing the unclothed body search is not changing as a result of changes proposed herein. Reasonable and individualized suspicion is the same standard as reasonable suspicion; therefore, it is not clear why the commenter thinks the legal standard has been misstated. Further, the department will not accommodate Commenter's request for a Miranda warning. A Miranda warning is only required when a person is subject to "custodial interrogation." (*Oregon v. Mathiason* (1977) 429 U.S. 492, 494. Custodial interrogation means the person is subject to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Visitors have not been taken into custody; they are free to refuse the search and leave at any time. Further, visitors should be aware, as they approach the entrance to the institution that they are subject to a search because signs are posted notifying visitors that they will be subject to search. The department has reviewed the international bill of human rights and does not think the proposed rulemaking action violates any of the rights therein. See also, Responses to Comments 1A, 2C, and 7D1.

Re-Notice Comment 2B: Commenter is pleased to see that the Form 888 section pertaining to denial of consent to search a minor does not automatically preclude the parent/guardian from holding their visit if another responsible adult can look after the child in the meantime. However, Forms 888 and 887-B continue to require adjustments. A rethinking of the compatibility between the proposed regulations and the law governing searches of visitors is called for in order to protect the privacy and dignitary rights of visitors and to ensure the "transparency, fairness, honest, and due process" that were the policy goals of the original rulemaking. Form 888 does not address how situations of non-conforming gender identity will be treated, nor does the form have any place where the subject indicates their own (or their child's) gender. So the "same"-ness of gender will be up to the decision-making ability of CDCR officials without any apparent guidance from the regulations. The Form 888 doesn't say whether the staff "witnessing" the search must be of the same gender.

Response Re-Notice Comment 2B: The comment is fully accommodated. See Response to Comment 7C2(b).

Re-Notice Comment 2C: In the Re-Notice, the old, to-be-deleted version of Form 887-B was attached. Comparing it closely with the proposed new version, one observes a glaring omission. The previous Form 887-B had printed on it, near the top, a Distribution instruction, indicating that triplicate copies be distributed as follows: ORIGINAL – Visiting File, CANARY – Inmate, PINK – Visitor. This has been completely omitted from the 2/23 version. The consequences are potentially serious. Visitors will not be informed that they

can and should receive a copy. Staff will not know, or won't be reminded, that they are to provide copies to visitors and to the incarcerated person intended to be visited. Accordingly, transparency and fairness of the process will be sacrificed. Accountability will be diminished. This will likely decrease the efficiency of operations and could increase liability for the State. The Form 887-B must include an instruction about the distribution of copies. Moreover, the immediate distribution of a copy to the visitor should be expressly encoded in the regulation's text at section 3173.2(c)(3)(G) and/or 3176(b). From personal testimonies and anecdotal evidence, it is our understanding that under current practice, many visitors are not being given copies of the relevant forms, neither Form 888 nor 887-B, on numerous occasions. To ensure that does not continue, the regulations need to expressly require distributing copies of the completed forms to the persons concerned. We do not believe that the written notification described in subsection 3176(b), even as proposed in its revised version mentioning Form 887-B, clearly enough specifies the need to provide the visitor with a copy of Form 887-B at the moment of the encounter. Indeed, without that immediate copy, it would be difficult to verify the accuracy of any subsequent notice provided pursuant to subsection 3176(b). Of course, the visitor should also receive notice of any subsequent additions or amendments to their "file" pertaining to the denial/restriction of visiting. Providing a copy on the spot ensures that the officially retained original cannot be doctored by unscrupulous officials seeking to cover up misconduct or other protocol violations. This measure of accountability therefore helps the department maintain orderly administration and proper behavior of staff.

Response Re-Notice Comment 2C: As stated in the ISOR, the distribution list on the CDCR Form 887-B was removed, as it is no longer necessary due to the form now being electronic and located within the Strategic Offender Management System (SOMS). The visitor will be provided with a photocopy of the form. Written notification to the visitor is outlined in section 3176(b). The department believes information regarding the CDCR Form 887-B as provided in the regulations is sufficient.

Re-Notice Comment 2D: Also problematic is the question of what documentation the visitor will be provided, and how, when a strip search turns up negative. The regulations do not appear to describe this scenario in detail, but do provide that Form 888 is incorporated, in subsection 3173.2(c)(3)(G). On the proposed version of the form, as with the older version, a distribution instruction is present, directing that a copy be provided to the visitor. It would improve transparency and accountability to expressly include in the regulation's text the requirement that negative search results must be documented. There is a space on the form for negative results, as well as for positive results and a description of objects found. However, one can easily imagine that officials may neglect to complete that section when there are negative results. Indeed, in the case of a negative result, since the visitor will presumably not receive Form 887-B pursuant to subsection 3176(b), having an accurately filled-out copy of Form 888 becomes even more important. Visitors should be provided with the form, completed, whether the results are positive or negative.

Response Re-Notice Comment 2D: Visitors are provided with form 888, and the 888 will indicate that the results of the search were negative. If a visitor feels that regulations are not being followed, or staff misconduct has occurred, the visitor may submit a citizen's complaint per Title 15, section 3417. See also, Response to Comment 11E.

Summaries and Responses to the 2nd 15-Day Re-Notice Comment Period

2nd Re-Notice Commenter #1 (same as Commenter #7 and Re-Notice Commenter #2)

2nd Re-Notice Comment 1A: Commenter states the revisions to Form 888 with regard to gender complexity are a notable effort, but the improvement is extremely limited. The instruction which states "Exceptions to the gender of the staff member conducting the search will only be allowed for those identifying as transgender, intersex, or non-binary" are unclear. They could be interpreted as saying that the "exception" to the gender similarity is determined by the department staff. An alternative that would more efficiently serve the needs of the department and be less burdensome to visitors would be to specify that visitors who self-identify as "transgender, non-binary, or intersex, regardless of anatomy" may select the preferred gender of the staff person conducting the search. This borrows language from PC 2606. The added language which matches the gender identity of the witness staff with that of the search conductor, is helpful and should be retained in any revision.

Response 2nd Re-Notice Comment 1A: The CDCR Form 888 was modified to include fields for gender identification, and to allow persons who identify as transgender, intersex, and non-binary to select the gender of their preference to conduct the clothed/unclothed body search. The department believes the current revisions to the CDCR Form 888 provide enough clarity.

2nd Re-Notice Comment 1B: Visitors will have their gender identity respected on paper, only to be humiliated anyway. Commenter mirrors many of the issues identified in his previous comments (2A, 7C4, 7D, and 7D3), citing several court cases, *Bell v. Wolfish, Cates v. Stroud, Fuller v. M.G. Jewelry; c*avity searches represent "grievous offenses against personal dignity and common decency" *Bell v. Wolfish*; the Ninth Circuit, citing that statement in agreement, says it applies to purely "visual" searches too *Cates v. Stroud*. The *Cates* panel recognized a very narrow justification for visual body cavity strip searches, "such searches are 'valid only when justified by institutional security concerns.'" The concept of security concerns, it must be understood, is not equivalent to penological interests. Security is narrower than penological interests, e.g. the state's interest in punishment and rehabilitation extends beyond the institution's security. The mere fact that something has been designated contraband, does not justify a search even when there is reasonable suspicion that it is possessed. Rather, the contraband must threaten safety and security *Cates.* No such limitation exists in the proposed regulations, and therefore the regulations are not aligned with the Circuit's constitutional jurisprudence. The regulations sweep broader than constitutionally allowed because the regulatory definition of "contraband" includes, inter alia, a catch-all provision or "material that is

reasonably deemed to be a threat to the legitimate penological interests" (15 CCR, 3006(c)(16)), which is distinct from other categories. The standard under the Fourth Amendment for conducting a strip search is whether prison officials have a reasonable suspicion based on particularized and individualized information, that such a search will uncover contraband on the visitor's person on that occasion – *Cates.* The *Cates* court then added a "security" standard, as explained above. By omitting the attention to the particularized and individualized character of the information upon which reasonable suspicion is based, the proposed regulations offer protections far weaker than required by the Fourth Amendment.

Response 2nd Re-Notice 1B: See Response Comment 2C. An unclothed body search only violates the 4th amendment when the visitor is not permitted to leave. (*Cates v. Stroud* (9th Cir. 2020) 976 F.3d 972, 984.) The Form 888 proposed in this rulemaking action provides that "All visitors have the right to refuse the search and forego the visit for a day." Accordingly, these regulations do not violate the 4th amendment.

2nd Re-Notice Comment 1C: Visitors' reasonable expectations of privacy are weakened further by the department's switch to "may be" language. To soften the content of the suspicion about what a person is doing, to a mere "may be" amounts, as it were, to multiplying the improbability of the suspicion being borne out. There was thus no need to change the wording in 3173.2(a) from "is" to "may be." By broadening the scope of permissible searches, the regulatory change imposes an unnecessary burden on visitors without any corresponding gain in effectuating a legitimate policy. LSPC already criticized the "may be" language in 3173.2(d)(7) in initial comment. Subsection 3173.2(j)(1) was initially changed to "is" then inexplicably, in the last Re-notice it has become "may be." The revised Statement of Reasons offers none [Sic]. There is rationale given for the switch to "may" in 3176(a)(3)(A) and 3173.2(d)(7). Because 3176(a)(3)(A) deals in part with the future, the department likely assumes that the same rationale applying to it applies to 3173.2(j)(1). That rationale is consistency in language. Logical consistency and grammatical correctness, of course, do not require verbatim repetition of words. Otherwise there would be little need for multiple grammatical tenses and moods. The commenter feels the department's given rationale that "the "may be" language better reflects the standard for reasonable suspicion, and that the standard articulated in *Terry v. Ohio* for reasonable suspicion was a reasonable conclusion that criminal activity "may be afoot" is fundamentally flawed because the quotation has been ripped out of context. The department misread *Terry* in several respects. The quotation's line about criminal activity that "may be afoot" was not considered sufficient in itself for the search conducted in that fact situation. Commenter provides the full quotation. That criminal activity "may be afoot" was only one piece off a broader scenario that included assessments off the threat posed by the subject of the search. The afootness of crime was really part of the basis for the "stop" and not what the Court held justified the "frisk," rather the frisk was about the danger posed, especially to the officer himself. It was not justified by the desire to find evidence of a suspected crime, even if later admissible. Moreover, what *Terry* authorized was an "outer clothing" search, a far cry from the visual body cavity inspection. The principle of *Terry* would rather point in the direction of requiring the inspecting staff to have a reasonable fear for their own safety or that of others in the visiting area. The

Terry officer conducted a pat down for a weapon. Most items of contraband, even if legally proscribable [Sic], do not pose such a risk and so would not be proper objects for a search justified under *Terry.*

Response 2nd Re-Notice 1C: See Response to Comment 7C4(b). In addition, the words "may be" and "may be afoot" are meant to help accurately capture the reasonable suspicion standard. These words were not meant to imply that a reasonable suspicion will always justify an unclothed body search. The circumstances of *Terry v. Ohio* were different than the context in question. In *Terry v. Ohio*, "Officer McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing." (*Terry v. Ohio* (1968) 392 U.S. 1, 19.) In the context of visitor searches, there is no seizure, because the visitor may leave at any time, instead of being subject to an unclothed body search. The phrasing "may be" is only meant to accurately reflect the standard for reasonable suspicion, not to imply that the context of *Terry v. Ohio* is the same as the context of visiting prison. Further, CDCR staff working at institutions always have a reasonable fear for their own safety, and the safety of inmates and visitors around them, due to the large number of violent incidents that occur at institutions.

In addition, the explanation for the reason for the revision to subsection 3173.2(j)(1) was explained in the cover letter for the 2nd Re-Notice changes, titled 2nd Notice of Change to Text as Originally Proposed.

2nd Re-Notice Comment 1D: For the amendment to 3173.2(d)(7), to add the words "by staff," the amended ISOR does not explain this detail. The previously submitted comment pointed out that the previous version left open the possibility that staff would order self-touching by the subject of the search and pointed out that this may present legal problems. The department's implicit response is to ignore those concerns or indeed embrace the possibility that gives rise to those concerns. This is without explaining why the objection was rejected. The revised version of the text, by specifying merely "by staff" arguably exacerbates the problem. Are non-staff persons other than the search subject allowed to touch the person? It is a rule that still leaves a wide margin for abusive conduct.

Response 2nd Re-Notice 1D: The explanation for the reason for the revision to 3173.2(d)(7) was explained in the cover letter for the 2nd Re-Notice changes, titled 2nd Notice of Change to Text as Originally Proposed. The department added the language in 3173.2(d)(7) to clarify that the visitor's body would not be touched by staff during the unclothed body search. This revision addressed the commenter's previous question [Re-Notice Comment 2A] asking whether the visitor would be asked to touch themselves. As stated in Response to Re-Notice Comment 2A, the visitor may be asked to facilitate the unclothed body search by touching their own body. However, there will be no touching of the visitor's body by staff. There would be no other persons involved in the unclothed body search besides the staff conducting/witnessing the search and the visitor, therefore the commenter's suggestion that other non-staff persons might be allowed to touch the visitor is unreasonable.

SUMMARIES AND RESPONSES TO THE VERBAL PUBLIC COMMENTS RECEIVED DURING THE PUBLIC HEARING HELD AUGUST 9, 2023:

Verbal Commenter #1: I am the family coordinator with Legal Services for Prisoners with Children, and I represent the Coalition for Family Unity as well that is a coalition of 23 impacted and system impacted organizations. Today, I am here to oppose the regulation proposed by CDCR from probable cause to reasonable suspicion that would greatly harm California families and visitors and it's discouraged the visiting community from keeping family connections needed by the incarcerated population to have a successful reentry. These proposed changes are presented as primarily language cleanup that are in fact substantive, the proposed amendment should not be approved without any substantial changes and nowhere in the proposed rule change does the CDCR offer any evidence that visitors are a significant source of contraband, yet it implies that more searches are necessary to achieve proper inspection and search procedures. The only way to be effective in cutting any contraband in the prison is if it's both family members and CEOs going through the same search procedure.

Response Verbal Commenter #1: See Response to Comment 1A.

Verbal Commenter #2 (Same as written Commenter #11): I'm the prison advocacy coordinator at Ella Baker Center for Human Rights. Based in Oakland, California. The Ella Baker center works to advance racial and economic justice to ensure dignity and opportunity for low-income people and people of color. Children and women, trans, nonbinary and femme presenting individuals, experienced sexual violence and harassment at exponentially high rates and correctional staff are not exempt as perpetrators. Changes to CDCR regulations provide clarifying language that an unclothed body search includes a body cavity search as well. While additional changes require written consent prior to search, the lack of an alternative to loss of visitation privileges for refusal to submit to search leaves no meaningful choice for those visitors who feel unsafe or violated in the instance of a required unclothed body search or body cavity search. These types of additional excessive searches being performed by officers of the same gender as the visitor does not eliminate the threat or trauma resulting from this process. Minors present a special issue here where they are unable to legally provide such consent to the search of their bodies. We at the Ella Baker Center have already been contacted by community members concerned over how these changes will affect children and their capacity to safely visit their loved ones who are currently incarcerated. Studies have shown that correctional officers themselves tend to be the main demographic involved in the smuggling of contraband into correctional institutions, yet they remain excluded from the types of unclothed body searches that CDCR deems necessary to enforce upon vulnerable populations to help reduce the amount of these items entering correctional facilities. We find the inclusion of the body cavity search in the unclothed body search process to be overly intrusive and unfairly enforced. Given the privacy concerns associated with more expensive physical searches the associated legal standards should not be lowered. Reasonable suspicion appears to be far too low of a standard in relation to the invasiveness of the unclothed body search process especially given the specification of the body cavity search. In criminal procedure, the

highly subjective reasonable suspicion standard provides a legal basis for pat downs and brief frisks of outer clothing, not the removal of all clothing and the visual search of the subject's nude body and body cavities. It is well documented that law enforcement usage of the reasonable suspicion standard to justify search remains tainted by racial animus and stereotyping. The use of such a standard in the context of visitor searches likely results in disproportionate searches and subsequently disproportionate denial of visitation privileges for people of color. The higher probable cause standard originally written into the regulatory language would be more appropriate given the extent of physical search allowed by the proposed regulations and supply better protection for visitors against search decisions made on prejudicial grounds. Currently incarcerated persons should be entitled to notification of incidents that affect their right to visitation with their family and loved ones. The proposed changes to regulation language make it so that currently incarcerated persons no longer receive written notification that their visitor has been denied entry due to refusal to be searched. We know that access to loved ones on the outside plays an extremely important role in the rehabilitation process and contributes to lower recidivism rates. These types of regulation changes ignore the value and harm reduction and directly contradict the San Quentin California model that aims to reimagine incarceration as a truly transformative experience. Individuals who are currently incarcerated should receive the same level of communication in regard to denial of visitation as their visitor, since such denial also impacts their rights to their community and their possibility for successful reentry into society. The Ella Baker Center is in opposition to the proposed regulation changes by CDCR.

Response Verbal Commenter #2: See Responses to Comments 1A, 2B, and 11E.

Verbal Commenter #3: I'm a program coordinator at the Ella Baker Center for Human Rights. We are in stark opposition to this policy change, as my colleague stated this is incredibly harmful for families and children alike. Those incarcerated inside CDCR should have the sense of comfort that their loved ones are being protected when they are visiting them, they should have the sense of security that their loved ones are being respected by those in the facility. As my colleague who worked so so long and hard to show and demonstrate the harm that has been conducted, I myself as a visitor to CDCR have been violated, have been searched. This reality is not a safe space for children and young people and women alike, or just trying to foster and facilitate connection that is fundamental to both the incarcerated persons and the families and maintaining a strong and meaningful connection.

Response Verbal Commenter #3: See Response to Comments 1A, 7D, 7D1**.**

Verbal Commenter #4: I am a summer policy intern at the Ella Baker Center for Human Rights, and I am providing public comment in opposition to CDCR's proposed changes to CDCR Form 888 and CDCR 3173.2, 3174, and 3176, regarding the unclothed body search and process of visitors.

Response Verbal Commenter #4: See Response to Comment 1A.

Verbal Commenter #5: I am a staff attorney with Legal Services for Prisoners with Children here in stern opposition to the proposed changes to NCR 23-05. Changing the standard for shockingly invasive unclothed searches from probable cause to the much more lax reasonable suspicion. This regulation is another in a long line of roadblocks set up to hinder families from visiting their loved ones under the guise of safety. Let's take a moment to acknowledge the evidence that it is the *staff* at the prisons that have been found to have brought paraphernalia into the institutions. Specifically note People v. Saucedo the 2020 case, and the more recent 2022 case People v. Hutchinson, and yet these invasive strip searches do not apply to staff, poking a giant hole in the argument that it is a safety issue. I anticipate that whomever is listening to this will argue that these correctional officers are not smugglers and deserve the benefit of the doubt, yet I would argue back that shouldn't our dedicated citizens striving to keep their families united be granted the same consideration. Turning to another consideration, let's just say we put aside the human rights issue entirely and simply do not acknowledge the bodily autonomy that the families of incarcerated individuals deserve, consider that every single study at least since 1998 including the Pew Charitable Trusts and the Vera Institute of Justice has said that the maintenance of family bonds is the primary key to preventing recidivism, specifically marking the family visitation is central to the prevention of recidivism. As such by creating yet another roadblock to family visitation, we are just continuing the cycle of the criminal justice system which is inherently flawed.

Response Verbal Commenter #5: See Responses to Comments 6B and 7D.

Verbal Commenter #6: Commenter works for Legal Services for Prisoners with Children, and also served 25 years inside of the California State Prison system. Commenter stated: Due to COVID we all have a new light shown that without visitors present in the prison system that the drug business inside is still flourishing. So that leaves a big problem for me as someone that served 25 years and having my family struggle to come see me, and thinking that the officers will receive this reprieve and not be strip searched, and my own mother or children or family could be strip searched and even more invasive cavity searched, is just disgusting and frankly it's appalling that CDCR has a blatant disregard for the family structure and family unity in all, and this is just a blatant attack on families at the core of it.

Response Verbal Commenter #6: See Responses to Comments 6B and 1A.

Verbal Commenter #7: I am a policy fellow with Legal Services for Prisoners with Children. Lowering the standard to allow more invasive violations of visitor privacy is unreasonable and serves no penological interests. These changes will only heighten the stress and scrutiny placed upon visitors without producing any result that increases the safety of any CDCR institution. This unreasonable change will not have any major impact on detecting or preventing the introduction of contraband. In fact, a recent OIG report has proved 2 things: 1) the majority of contraband entering institutions is transported via CDCR staff, and other free staff. This report also highlights the lack of scrutiny and security measures these staff members are subjected to, and notes how security measures that are in place for them are most times not used. There is no data supporting

the need for change and regulations aimed at incarcerated individuals' visitors. The potential for harm being caused due to this regulation change is tremendous and contradicts the ideology of true rehabilitation, which in turn undermines the department's alignment for uplifting public safety. Any regulation that becomes an obstacle to building family bonds and reducing recidivism serves no penological interest and therefore does not qualify as a need or necessitated regulation change.

Response Verbal Commenter #7: See Responses to Comments 1A, 2B, and 6B.

Verbal Commenter #8: I work as a policy analyst with Legal Services for Prisoners with Children, also organizer With All of Us or None, and am definitely in strong opposition to the new proposed regulations by CDCR. A lot of my colleagues and fellow movement builders and leaders have talked about the OIG report, which is you know very damning I would say as it relates to this when you talk about the fact that during COVID when there were no visits the contraband continued to flow, as well as there is data that says that California State prisons recorded 1274 overdoses between March 2019 and February of 2020. And the following 12 months after pandemic restrictions took effect, overdoses declined to 796 according to the California Department of Correctional Healthcare Services. So, this data shows that more than half of drugs are entering through the staff. We're literally in the process of trying to pass regulations to make visiting less burdensome for families. Also highlighting the importance of this when it comes to rehabilitation, the fact that CDCR continues to have rehabilitation in their name this flies in the face of that. Families are being punished unduly when they have nothing to do with whatever's going on in CDCR. These families and especially children and women, but obviously anyone that wants to go visit a loved one inside deserves that right to see their loved one and to maintain those connections, because it's not only for the rehabilitation of the incarcerated person it's for the well-being and the mental health of the family member of the community member that's visiting. So again, I hope that these regulations do not become something that is permanent, we're going to do all that we can to fight this and make sure that families have the right and aren't unduly searched. I also want to highlight a story I don't have the name right now but there's a woman here in Sacramento who is fighting a case because she was sexually assaulted while visiting inside, being strip searched, and so just again highlighting the gruesome really and barbaric natures that strip searching, and invasive searches cause. The OIG report gave a lot of recommendations that talked about looking at staff more, looking at the folks that are working for CDCR and really having them go through more rigorous review, and making sure that they're not the ones bringing in the contraband. Nothing in the OIG report said we should start strip searching visitors, to the contrary, that OIG report focused on CDCR and CDCR took that information and said let's go ahead and focus on the families of incarcerated people. Children being subject to this is just unbelievable. So LSPC and our movement stands strongly against these regulations.

Response Verbal Commenter #8: See Responses to Comments 1A, 2B, and 6B.

Verbal Commenter #9: I'm here from Legal Services for Prisoners with Children to speak about this inhumane topic, visiting. I was directly impacted by strip searching and visiting. I was incarcerated for 20 years and 4 months so my family would come to visit me, my children, and my mother. I am a mother, a parent trying to raise children, the only way of seeing my children is through a visit. If there's somebody that perhaps was on the bus or was maybe perhaps smoking around a child and they're going to smell that, are they going to threaten to search and take away the dignity? Because that's what they do, they take away our dignity. [Commenter relays a very personal and disturbing, traumatic experience of being strip searched in prison]. And this is what they're going to try to do to our families, this isn't right this is going to discourage rehabilitation this is going to discourage family reunification, this is going to discourage our children to even want to look up to their parents if their parents are trying to be a role model in the sense of doing it through visiting. So, I'm pleading with everybody to please take a second, look at this, this isn't right. This is just a discouragement of trying to bond with our children. And to this day it's hard for me to bond after 20 years only seeing them through the visit. So, I really, really, am opposed to this, everybody that I know that I've spoken to on the inside are opposed to this, the family members are discouraged, they're not wanting to visit, and it's causing an uproar, so please.

Response Verbal Commenter #9: See Responses to Comments 1A, 2B, and 5A.

Verbal Commenter #10: I work for Legal Services for Prisoners with Children, and I'm here in strong support of the visiting. We need visiting as a right to keep our families united, our family should not be punished for our criminal behavior. A lot of us got caught up in the criminal lifestyle out of survival and out of bad circumstances in childhood that eventually create negative destructive behaviors that are fueled by the society we grew up in, the systems that oppress us. And so to continue more oppression and more harm by keeping us far away from our families, disconnected from our children, that continues that cycle of recidivism, the multigenerational behavior that's never treated and healed. When we bring people together, when we allow families to stay, we provide healing and growth for our next generation to prevent the next generation from ending up in the past that some of us had to go through. So, I stand in strong support of this bill, and I ask our representatives for their support.

Response Verbal Commenter #10: See Response to Comment 2B.