SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, et al.,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.,

Respondents.

Case No.: 34-2017-80002581

ORDER AFTER HEARING ON PETITION FOR WRIT OF MANDATE

The petition for writ of mandate challenging regulations by the California Department of Corrections and Rehabilitation ("CDCR") to implement Proposition 57 is granted in part and denied in part as explained below.[1]

Proposition 57 amended California's Constitution to provide that: "Any person convicted of a ***nonviolent felony offense*** and sentenced to state prison shall be eligible for parole consideration after completing the full term of his or her primary offense." (Cal. Const., art. I, §

[1] On February 9, 2018, hearing was held on the court's tentative decision on the petition. Petitioners Alliance for Constitutional Sex Offense Laws, et al., were represented by Janice Bellucci. Respondents CDCR, et al., were represented by Deputy Attorney General Maria Chan. The court's ruling on the merits of the petition renders moot CDCR's demurrer.

32(a)(1), emphasis added.)[2]

The drafters of Proposition 57 did not define the term "nonviolent felony offense." However, the Legislature lists offenses it considers "violent" for sentencing purposes in Penal Code section 667.5.[3] CDCR excludes these crimes from parole review under Proposition 57. Petitioners do not challenge this.

CDCR additionally excludes all persons ever convicted of any sex offense listed in section 290. Not because CDCR found these offenses are "violent" and thus fall outside Proposition 57's meaning of "nonviolent" felonies. Rather, CDCR excluded those who commit these offenses because they are likely to reoffend. The court finds excluding crimes based upon ***recidivism rates*** rather than ***violence*** is contrary to the voters' focus in Proposition 57 on "nonviolent" felonies.

The voters mandated early parole review for those serving prison terms for "nonviolent" felonies. The drafters of Proposition 57 may have created an ambiguity by failing to define the term "nonviolent" felony. But it is clear the voters did not limit parole review based on recidivism. Many nonviolent offenses such as drug and theft crimes would also be excluded based on high recidivism rates.

CDCR's regulations are therefore set aside. However, the court does not grant Petitioners' request that CDCR be directed to exclude only those felonies the Legislature designates "violent" in section 667.5.

The drafters' failure to define the term "nonviolent felony" in Proposition 57 created an ambiguity, raising a fundamental question of public policy: Should those convicted of sex offenses the Legislature has not designated "violent" be eligible for parole review under Proposition 57? This question can be addressed by the Legislature amending its list of "violent" felonies in section 667.5. And it can also be addressed through CDCR's regulations defining "nonviolent" felonies comporting with the voters' directive in Proposition 57. It is not the province of this court to opine what the law should be. This court merely holds CDCR's current regulations, on the basis given, are contrary to the voters' direction in Proposition 57.[4]

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[2] All constitutional references are to the California Constitution.

[3] All statutory references are to the Penal Code, unless otherwise indicated.

[4] This action challenges emergency regulations issued by CDCR in March 2017, and approved by the Office of Administrative Law on April 13, 2017. These emergency regulations were initially set to expire September 21, 2017.

CDCR advises these emergency regulations "continue to undergo the rule making process," with proposed amendments being circulated for public comment. (Opp. at p. 10, fn. 3.) According to CDCR's website, it is in the process of responding to thousands of comments received on the

INTRODUCTION

On November 8, 2016, the voters adopted Proposition 57, amending California's Constitution to declare: "Any person convicted of a ***nonviolent felony offense*** and sentenced to state prison ***shall*** be eligible for parole consideration after completing the full term of his or her primary offense." (Art. I, § 32(a)(1), emphasis added.) While Proposition 57 did not define "nonviolent felony offense," the Legislature lists 23 felonies in section 667.5, subdivision (c), it deems "violent" for sentencing. The Legislature's list of "violent" felonies includes some, but not all, sex offenses. [5]

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proposed amended regulations.

In the interim, CDCR requested two extensions of the emergency regulations at issue here, which the Office of Administrative Law approved. As of the date of this order, the emergency regulations Petitioners challenge are now set to expire on March 21, 2018. (See "History" following 15 Cal. Code Regs § 3490.)

CDCR advises under its proposed changes to the current emergency regulations, inmates convicted of registrable sex offenses would still be excluded from early parole consideration. (Opp. p. 10, fn. 3.) Neither party suggests the proposed amendments to CDCR's current regulations would have any effect on the issues before this court.

[5] Section 667.5, subdivision (c) states:

"For the purpose of this section, 'violent felony' shall mean any of the following:
(1) Murder or voluntary manslaughter.
(2) Mayhem.
(3) **Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.**
(4) **Sodomy as defined in subdivision (c) or (d) of Section 286.**
(5) **Oral copulation as defined in subdivision (c) or (d) of Section 288a.**
(6) **Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.**
(7) Any felony punishable by death or imprisonment in the state prison for life.
(8) Any felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7, 12022.8, or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55.
(9) Any robbery.
(10) Arson, in violation of subdivision (a) or (b) of Section 451.
(11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.
(12) Attempted murder.
(13) A violation of Section 18745, 18750, or 18755.
(14) Kidnapping.
(15) Assault with the intent to commit a specified felony, in violation of Section 220.
(16) **Continuous sexual abuse of a child, in violation of Section 288.5.**
(17) Carjacking, as defined in subdivision (a) of Section 215.
(18) **Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.**

The Legislature separately lists in section 290 those sex offenses requiring registration. This list includes sex offenses the Legislature has not designated "violent" offenses in section 667.5.[6]

The issue Petitioners pose is the difference between felonies the Legislature lists as "violent" in section 667.5, and the Legislature's separate list of sex offenses requiring registration under section 290. In promulgating regulations to implement Proposition 57, CDCR excludes from parole review all sex offenses requiring registration under section 290, even if the Legislature does not designate them "violent."

CDCR maintains all individuals convicted of these offenses should be excluded from parole review under Proposition 57 based upon "public safety," because these individuals reoffend at high rates. Whatever the support for that proposition, it is contrary to the voters' clear

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(19) Extortion, as defined in Section 518, which would constitute a felony violation of Section 186.22.
(20) Threats to victims or witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22.
(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.
(22) Any violation of Section 12022.53.
(23) A violation of subdivision (b) or (c) of Section 11418. The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person."(Emphasis added.)

[6] Section 290, subdivision (c), states:

"The following persons shall register:

Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286, 288, 288a, or 289, Section 207 or 209 committed with intent to violate Section 261, 286, 288, 288a, or 289, Section 220, except assault to commit mayhem, subdivision (b) and (c) of Section 236.1, Section 243.4, Section 261, paragraph (1) of subdivision (a) of Section 262 involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1, 266, or 266c, subdivision (b) of Section 266h, subdivision (b) of Section 266i, Section 266j, 267, 269, 285, 286, 288, 288a, 288.3, 288.4, 288.5, 288.7, 289, or 311.1, subdivision (b), (c), or (d) of Section 311.2, Section 311.3, 311.4, 311.10, 311.11, or 647.6, former Section 647a, subdivision (c) of Section 653f, subdivision 1 or 2 of Section 314, any offense involving lewd or lascivious conduct under Section 272, or any felony violation of Section 288.2; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been or is hereafter convicted of the attempt or conspiracy to commit any of the above-mentioned offenses."

direction in the Constitution: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration...."

A) The court does not address questions of public policy

Whether sex offenses not designated by the Legislature as "violent" ***should*** be eligible for parole review is a matter of public policy for the voters and Legislature to address – not this court. That question is not before the court. The court's task is simply one of construction: ***What does the term "nonviolent felony" mean as used in Proposition 57?***

Proposition 57 was the subject of much debate. Its proponents told voters "Proposition 57 focuses resources on keeping dangerous criminals behind bars, while rehabilitating juvenile and adult inmates and saving tens of millions of taxpayer dollars." (Argument in Favor of Proposition 57.) They explained: "Proposition 57 focuses our system on evidence-based rehabilitation for juveniles and adults because it is better for public safety than our current system." (Argument in Favor of Proposition 57.) The voters were told: "Prop. 57 saves tens of millions of taxpayer dollars by reducing wasteful prison spending, breaks the cycle of crime by rehabilitating deserving juvenile and adult inmates, and keeps dangerous criminals behind bars." (Rebuttal to Argument Against Proposition 57.)

Proposition 57 directs it is to be "broadly construed." (Prop. 57, § 5.) This is reflected in the drafters' use of the broad term "nonviolent" offender in granting parole review, and failure to exclude any specific crimes. Proposition 57 then requires that CDCR adopt regulations "in furtherance" of its provisions. Proposition 57 thus amended California's Constitution giving a broad directive for parole review for all inmates serving terms for nonviolent felonies, requiring CDCR to fill in the details.

Proposition 57 was opposed by the California District Attorneys Association, the San Francisco Police Officers Association, the Association of Los Angeles Deputy Sheriffs, the Orange County Sheriff, a victims' organization and a retired Justice of the Court of Appeal. (Rebuttal to Argument in Favor of Proposition 57, and Argument Against Proposition 57.)

The opponents stressed the issue before the court today – Proposition 57's failure to define "nonviolent felony" or exclude sex offenses listed in section 290. They explained:

> The authors of Proposition 57 claim it only applies to 'non-violent' crimes, but their poorly drafted measure deems the following crimes 'non-violent' and makes the perpetrators eligible for EARLY PAROLE and RELEASE into local communities:

- Rape by intoxication
- Rape of an unconscious person
- Human trafficking involving sex act with minor …
- Failing to register as a sex offender …
- Lewd acts against a child 14 or 15….

(Argument Against Proposition 57.)

The opponents told voters Proposition 57 would allow early parole consideration for those ***currently serving*** sentences of "many … horrible crimes, including RAPE of an unconscious victim; HUMAN SEX TRAFFICKING; … LEWD ACTS against a 14-year-old …." (Rebuttal to Argument in Favor of Proposition 57.) The opponents also told voters, "Those ***previously convicted*** of MURDER, RAPE and CHILD MOLESTATION would be eligible for early parole release." (*Ibid.*, emphasis added.)

The proponents never disputed these crimes would be eligible for the benefits of Proposition 57. (Rebuttal to Argument Against Proposition 57.)

The arguments against Proposition 57 show voters knew it could make some registered sex offenders eligible for the new parole procedures. This is consistent with the Legislative Analyst's Official Voter Information Guide on Proposition 57, which explained:

> The measure changes the State Constitution to make individuals who are convicted of "nonviolent felony" offenses eligible for parole consideration after serving the full prison term for their primary offense. As a result, [the Board of Parole Hearings] would decide whether to release these individuals before they have served any additional time related to other crimes or sentencing enhancements.
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> The measure requires CDCR to adopt regulations to implement these changes. ***Although the measure and current law do not specify which felony crimes are defined as nonviolent, this analysis assumes a nonviolent felony offense would include any felony offense that is not specifically defined in statute as violent.***

(Emphasis added.) This, again, would mean any sex offense not listed in section 667.5 could be eligible for parole review.

After considering these arguments, the voters approved Proposition 57, amending California's Constitution to direct: "***Any person*** convicted of a nonviolent felony offense and sentenced to state prison ***shall*** be eligible for parole consideration after completing the full term of his or her primary offense." (Art. I, § 32, subd.(a)(1), emphasis added.) Neither CDCR nor this court may second-guess the voters' directive. The sole issue here is what does Proposition 57 include within its term "nonviolent felony offense"?

B) No one is ordered released

Proposition 57 does not require that anyone be released from prison. It merely makes "nonviolent" offenders ***eligible for parole review***. As the proponents explained to the voters, "To be granted parole, all inmates, current and future, must demonstrate that they are rehabilitated and do not pose a danger to the public. The Board of Parole Hearings – made up mostly of law enforcement officials – determines who is eligible for release." (Argument in Favor of Proposition 57.)

Parole suitability will continue to be made on a case-by-case basis. If the parole board concludes factors such as an individual's criminal history, crime of commitment or conduct in prison makes them unsuitable for parole, nothing in Proposition 57 or this ruling requires release.

C) The Legislature may address any failure to include sex offenses

Finally, the court observes that if the Legislature concludes the list of crimes it has designated "violent" in section 667.5 overlooks sex offenses which should be excluded from parole consideration under Proposition 57, the Legislature is free to amend the code. As noted, the Legislature currently lists some sex offenses as "violent" in section 667.5, but omits other sex offenses it lists in section 290. In the 15 months since the voters adopted Proposition 57, the Legislature has not seen a need to amend section 667.5 to address Proposition 57's new parole procedures. This leaves the landscape unchanged since the voters acted.

BACKGROUND

CDCR's regulations define a "nonviolent offender" for Proposition 57 as excluding any inmate who has been convicted of a sex offense requiring registration under section 290. Petitioners are an organization advocating the rights of those required to register as sex offenders and John Doe, an inmate incarcerated for what Petitioners claim is a nonviolent sex offense.[7] Petitioners argue CDCR's regulations impermissibly exclude from parole review sex offenders the Legislature does not designate "violent," contravening the voters' intent in passing Proposition 57.

Petitioners seek a writ of mandate directing CDCR to do two things: (1) set aside the

[7] CDCR argues Doe lacks standing to bring this action because he is serving time for a sex offense defined as "violent" by section 667.5. The court need not resolve this issue because CDCR does not dispute the Alliance has standing.

challenged regulations; and (2) adopt new regulations making those serving sentences for offenses requiring registration under section 290 eligible for parole consideration, unless the individual is currently serving a sentence for a "violent felony" listed in section 667.5, subdivision (c).

The court agrees the challenged regulations must be set aside as failing to comport with the voters' directive in Proposition 57. But the court does not direct CDCR to adopt any particular replacement regulations. Instead, the court remands this matter to CDCR to adopt new regulations defining the term "nonviolent felony offense" consistent with the voters' directive.

A) Proposition 57 and CDCR's regulations

Proposition 57 added the following provision to California's Constitution:

> (a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:
>
> (1) Parole Consideration: ***Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.***
>
> . . . .
>
> (b) ***The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions***, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

(Art. I, § 32, emphasis added.)

CDCR's regulations define the term "nonviolent offender" in the negative – any inmate who is ***not***:

1. Sentenced to death or incarcerated for a term of life;
2. Serving a term of incarceration for a "violent felony" listed in section 667.5, subdivision (c); or
3. Convicted of a sexual offense requiring registration under section 290.

(15 Cal. Code Regs § 3490, subds. (a) and (c). ["Regulations"])[8]

[8] CDCR's regulations also implement Proposition 57's separate provisions authorizing CDCR to award increased credits for good behavior and participation in rehabilitative programs. (Art. I, § 32, subd. (a)(2).) CDCR notes "Programs using a cognitive-behavior approach have reduced adult and juvenile recidivism by as much as 26 percent." (CDCR Statement of Reasons [Request for Judicial Notice ("RJN") B at p. 3].) *Continued on next page...*

Petitioners challenge only the third part of CDCR's definition, precluding parole review for anyone convicted of a sex offense requiring registration under section 290, even if the offense is not listed by the Legislature as "violent" in section 667.5.

Petitioners argue CDCR's regulations implementing Proposition 57 conflict with the voters' directive for two reasons: First, the regulations deny parole review for any person incarcerated for a registrable sex offense not listed in section 667.5. Second, CDCR's regulations preclude parole review for any one ***previously convicted*** of a registrable sex offense, even if the person is not currently incarcerated for a crime listed in either section 290 or 667.5.

B) "Violent" offenses

Section 667.5 enhances prison terms for those convicted of 23 designated "violent felonies," stating: "The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation of these extraordinary crimes of violence against the person." (§ 667.5, subd. (c).) The list includes several sex offenses. (*Id.*)

C) Sex offender registration

Section 290 lists sex crimes for which registration is required. There is overlap between the list of "violent" felonies in section 667.5 and the list of registrable sex offenses in section 290. For example, assault with intent to commit rape, rape by force or fear, and lewd or lascivious acts with a child under the age of 14 are listed in both sections. These offenses would be excluded from Proposition 57's parole review.

There are, however, numerous other sex offenses for which registration is required by section 290 but which the Legislature does not define as "violent" felonies in section 667.5, including:

- Rape of a drugged or unconscious victim. (§ 261, subd. (a)(3) and (a)(4).)
- Touching the intimate part of another person while that person is unlawfully restrained. (§ 243.4.)
- Pimping a minor. (§ 266h.)

This is consistent with the voters' intent that Proposition 57 would "stop the revolving door of crime by emphasizing rehabilitation ...." (Prop. 57, § 2.) CDCR's regulations addressing credits under Proposition 57 are not challenged.

- Incest. (§ 285.)
- Sodomy with a person while confined in state prison. (§ 286, subd. (e).)
- Sending or exhibiting certain harmful (i.e., sexual) matter to a minor. (§ 288.2.)
- Sexual penetration with a foreign object while the victim is unconscious. (§ 289, subd. (d).)
- Advertising or possessing child pornography. (§§ 311.10, 311.11.)
- Indecent exposure. (§ 314.)

(§ 290, subd. (c).) Petitioners argue the Legislature's determination these are not "violent" offenses makes them eligible for Proposition 57's parole review.

STANDARD OF REVIEW

Reviewing the constitutionality of CDCR's regulations involves two questions: First, did CDCR exercise its authority "within the bounds" of Proposition 57's mandate? This is a question of law where the court exercises its independent judgment. Second, if CDCR exercises its authority consistent with the Constitution as amended by Proposition 57, then its regulations are reviewed under a more deferential standard and will be upheld unless they lack any rational basis. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 16-17 [con. opn. of Mosk, J.]; also *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 272 [same analysis for regulations implementing an initiative].) [9]

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[9] The Third District Court of Appeal recently summarized this two-step review as follows:

> Government Code section 11342.2 provides the general standard of review for determining the validity of administrative regulations. That section states that `[w]henever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless [1] consistent and not in conflict with the statute and [2] reasonably necessary to effectuate the purpose of the statute.'
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> Under the first prong of this standard, the judiciary independently reviews the administrative regulation for consistency with controlling law. ... In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void. This is a question particularly suited for the judiciary as the final arbiter of the law, and does not invade the technical expertise of the agency.
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> By contrast, the second prong of this standard, reasonable necessity, generally does implicate the agency's expertise; therefore, it receives a much more deferential standard of review. The question is whether the agency's action was arbitrary, capricious, or without reasonable or rational basis. *Continued on next page...*

The court does not accord deference to an administrative interpretation that is beyond the agency's authority. If CDCR's regulations do not properly implement Proposition 57, the regulations must fail. (*In re Lucas* (2012) 53 Cal.4th 839, 849; *Yamaha Corp. of America v. State Bd. of Equalization, supra,* 19 Cal.4th 11, fn.4 ["A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has final responsibility for the interpretation of the law under which the regulation was issued."] [Internal quotes omitted].)

The voters directed CDCR to promulgate regulations defining the term "nonviolent felony" as used in Proposition 57. Instead, CDCR excluded all sex offenses listed in section 290 and all persons ever convicted of such offenses. Not because CDCR determined these crimes are violent and thus fall outside Proposition 57's meaning of "nonviolent" offenses. Instead, CDCR excluded these offenses because it concluded those who commit these crimes are likely to reoffend. This is not what the voters said. By substituting recidivism for violence as the standard for parole review, CDCR exceeded the scope of its authority under Proposition 57.

ANALYSIS

1. General principles of construction

A) The voters' intent controls

CDCR's authority in adopting these regulations is conferred, and limited, by the voters' directive in Proposition 57. In interpreting a voter initiative, courts apply the principles governing statutory construction. (*Citizens to Save California v. California Fair Political Practices Commission* (2006) 145 Cal.App.4th 736, 747.) The fundamental purpose of construction is to ascertain the voters' intent to effectuate the purpose of Proposition 57. (*People v. Superior Court* (2014) 225 Cal.App.4th 1007, 1014.)

In determining the voters' intent, the court begins by examining the language of Proposition 57 itself, viewed as a whole, and giving its words their usual and ordinary meaning. (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747.) When the language is clear and unambiguous, there is no need for construction. (*People v. Superior Court* (*Cervantes)* (2014) 225 Cal.App.4th 1007, 1014.) If the terms of Proposition 57 are unambiguous, this court

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(*California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 602, 619-20.)

presumes the voters meant what they said. The plain meaning of Proposition 57's language governs. (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747.)

However, if Proposition 57 is ambiguous or permits more than one reasonable interpretation, the court may refer to extrinsic indicia of the voters' intent, particularly the analyses and arguments in the Official Voter Information Guide. (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747; *Blue v. Bonta* (2002) 99 Cal.App.4th 980, 988.) The Court of Appeal directs, "Using these extrinsic aids, we select the construction that comports most closely with the apparent intent of the [electorate], with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*Cervantes*, *supra*, 225 Cal.App.4th at 1014, internal quotes and cite omitted, brackets in original.)

B) Proposition 57 is ambiguous

By failing to define the term "nonviolent felony," Proposition 57 is ambiguous on this point, rendering it susceptible to more than one reasonable interpretation.

This very ambiguity was identified by the California Supreme Court before Proposition 57 went to the voters. Petitioners in *Brown v. Superior Court* (2016) 63 Cal.4th 335 challenged placing Proposition 57 on the ballot without submitting substantial late amendments to public review and comment pursuant to Elections Code section 9002. Although the Supreme Court allowed Proposition 57 to proceed to the voters, Justice Chin foresaw this issue in his dissent:

> [Proposition 57] never defines the term 'non-violent felony offense.' ...The Penal Code contains various lists of crimes satisfying various definitions, including a list of 'violent' felonies. (Pen. Code § 667.5, subd. (c).) Does that statute apply to mean that any crime not listed in it would be a nonviolent felony, even though many such crimes are arguably violent? ... The amended measure could greatly benefit from a definition of the term.

(*Id.* at 360.)

2. CDCR's definition of "nonviolent offender" conflicts with the voters' directive

A) CDCR would preclude parole consideration for offenses the Legislature does not designate violent

CDCR does not directly define the term "nonviolent." Instead, it declares a "nonviolent

offender" excludes anyone convicted of a sex offense requiring registration under section 290. This excludes inmates convicted of sex offenses which the Legislature has not designated "violent felonies" in section 667.5. As discussed below, in defining what constitutes a "nonviolent" offense for purposes of Proposition 57, CDCR is not necessarily limited to the Legislature's list of "violent" offenses in section 667.5. However, CDCR does not argue the sex offenses listed in section 290 are excluded because they are "violent." Instead, it excludes these offenses from parole consideration based on recidivism rates. This justification fails.

Proposition 57 amended the Constitution to direct that any person convicted of a "nonviolent felony offense" ***shall*** be eligible for parole consideration. CDCR impermissibly modifies the voters' directive by amending Proposition 57 to insert the phrase "except registered sex offenders."

CDCR cannot limit the Constitution as amended by the voters through its regulations. Nor does it have authority to modify Proposition 57 to achieve what CDCR believes the drafters of Proposition 57 meant, but did not say. (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747; see also *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827.) As the Court of Appeal instructs: "the voters should get what they enacted, not more and not less." (*Citizens to Save California*, *supra*, 145 Cal.App.4th at 747.)

Whether all registered sex offenders ***should*** be eligible for parole review is a question of public policy for the voters and the Legislature. The question here is only what did the voters actually direct in adopting Proposition 57?

B) CDCR may not substitute its policy preference for that of the voters

CDCR cites the language in Proposition 57 directing: "The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations ***protect*** and ***enhance public safety***." (Art. 1, § 32, subd. (2)(b); emphasis added.)

CDCR maintains Proposition 57 "… vests the Department with broad discretion to determine which inmates are nonviolent …." (Opp., p. 15.) It does. But, again, CDCR does not justify excluding all sex offenses listed in section 290 as "violent." Rather, CDCR argues Proposition 57 allows it to exclude those convicted of offenses which CDCR believes have a high rate of ***recidivism.*** CDCR cites Proposition 57's introductory statement of intent as giving it broad authority to protect "public safety." CDCR then concluded: "Recidivism equates to

enhancing public safety." (Reporter's Transcript, p. 7.)

CDCR's Statement of Reasons in its regulatory packet explained: "[T]he crimes listed in Penal Code section 290 reflect the determination of the people of the State of California (through the initiative and the Legislature) that 'Sex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or confinement and that protection of the public from reoffending by these offenders is a paramount public interest.'" (RJN Resp'ts Ex. B, at p. 15; citing § 290.03, subd. (a)(1).)

This argument fails for several reasons.

First, proponents of Proposition 57 told voters it assured public safety by keeping "the most dangerous criminals behind bars." (Argument in Favor of Proposition 57.) Not all criminals or those likely to reoffend – only the most dangerous. Proposition 57 defined "dangerous" as violent. The proponents guaranteed voters: "Prop. 57… Does not authorize parole for violent offenders… violent offenders as defined in Penal Code section 667.5(c) are excluded from parole." (Rebuttal to Argument Against Proposition 57.) The voters were clearly focusing on those convicted of ***violent*** offenses -- not on those who may ***reoffend***.

Second, CDCR's argument would effectively nullify Proposition 57. The voters decided parole consideration for those convicted of "nonviolent" felony offenses is consistent with public safety. CDCR cannot override the voters' direction placed in the Constitution by substituting a differing view of public safety.

CDCR's interpretation that crimes with high recidivism rates cannot qualify as "nonviolent" is inconsistent with the Constitution's clear directive and the voters' admonition Proposition 57 is to be "broadly construed" to accomplish its purposes, which include to "save money by reducing wasteful spending on prisons." (Prop. 57, § 5.) CDCR's position that crimes with high recidivism rates should be excluded from Proposition 57's parole procedures could apply equally to drug and property offenses. That is clearly not what the voters said.

CDCR also cites the voters' passage of Proposition 35 ("Californians Against Sexual Exploitation Act") on November 6, 2012, which increased punishment and made related changes addressing human trafficking. Proposition 35's introductory findings stated: "Protecting every person in our state, particularly our children, from all forms of sexual exploitation is of paramount importance." (Prop. 35, § 2 [Nov. 6, 2012].)

This is true. But CDCR does not explain how Proposition 35's declaration of intent in increasing penalties for human trafficking in 2012 establishes that the voters intended to exclude

all sex offenses listed in section 290 from Proposition 57's parole review in 2016. Indeed, Proposition 35 explained, "Because minors are legally incapable of consenting to sexual activity, these minors are victims of human trafficking ***whether or not force is used***." (Prop. 35, § 3, emphasis added.) The drafters of Proposition 35 thus clearly intended to increase penalties for all human trafficking crimes, whether or not force was used. But while Proposition 35 required those convicted of human trafficking to register under section 290, it did not add human trafficking to the list of "violent" offenses in section 667.5. The opponents of Proposition 57 cited this in arguing it allowed parole release for "human trafficking involving sex act with minor." (Argument Against Proposition 57.) Accordingly, CDCR's reference to Proposition 35 does not establish the voters intended the term "nonviolent" felony in Proposition 57 would exclude those convicted of any sex offense listed in section 290.

Finally, CDCR's construction is not necessary to protect public safety. Again, if the parole board believes any individual poses a risk of reoffending, parole may be denied. All Proposition 57 directs is that nonviolent offenders be reviewed for parole. It does not require their release.

In promulgating regulations implementing Proposition 57's new parole procedures and increased credits, CDCR is directed to protect public safety. However, this does not authorize CDCR to rewrite Proposition 57, or ignore the voters' simple direction: "***Any person*** convicted of a nonviolent felony offense and sentenced to state prison ***shall*** be eligible for parole consideration …."

C) Proposition 57 did not exclude all sex offenses listed in section 290

CDCR argues the voters understood persons convicted of any sex offense listed in section 290 would be excluded from parole review because they are excluded from parole procedures CDCR adopted to implement an earlier federal court order directing a reduction in California's prison population. (See *Brown v. Plata* (2011) 562 U.S. 493.) The court is not persuaded.

CDCR cites assurances in the ballot materials that Proposition 57 would not override the federal court order. (Rebuttal to Argument Against Proposition 57.) Its argument mixes apples and oranges.

The federal court order never mentions sex offenses, sex offenders or section 290. It simply sets a deadline to reduce the state's prison population. It specified one way the prison population would be reduced was creation of "a new parole determination process through which

non-violent second-strikers will be eligible for parole consideration by the Board of Parole Hearings once they have served 50% of their sentence." (CDCR's Req. for Jud. Not., Ex. A.)[10] The federal court order does not define "non-violent second-strikers."

In implementing the federal court order, CDCR excluded sex offenders required to register under section 290. (CDCR's Req. for Jud. Not., Ex. C.)[11] But CDCR's decision to exclude registered sex offenders from the federal court's parole process for non-violent, second-striker offenders does not demonstrate the voters intended to also exclude all registered sex offenders from Proposition 57's new, separate parole process. CDCR argues the voters should be presumed to know how CDCR implemented the federal court order by visiting its website. No authority is cited for this proposition.

Had the voters intended to categorically exclude all registered sex offenders from parole review under Proposition 57, they would have said so – as they did when they approved Proposition 47 ("Safe Neighborhoods and Schools Act") in 2014. Proposition 47 reduced penalties for some theft-related crimes and authorized resentencing persons incarcerated for felonies it reduced to misdemeanors. However, Proposition 47 expressly excluded persons required to register pursuant to section 290. (§ 1170.18, subd. (i).)

That the drafters of Proposition 57 did not use similar language can only mean they intended something different. (See, e.g., *County of San Diego v. Department of Health Services* (1991) 1 Cal.App.4th 656, 661 ["Where different language is used in different parts of a statute, we must presume the Legislature intended a different meaning and effect."].) The drafters' failure to expressly exclude registered sex offenders from Proposition 57 conflicts with CDCR's interpretation.

D) CDCR impermissibly precludes individuals from parole review based on <u>prior</u> offenses

CDCR's definition runs afoul of the voters' directive in a second way. Proposition 57 states "[a]ny person convicted of a nonviolent felony offense ***and sentenced to state prison*** shall be eligible for parole consideration after completing the full term for his or her primary offense."

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[10] CDCR's request to judicially notice this order is granted.

[11] CDCR's request to judicially notice its report to the federal court "on new parole process for non-violent, non-sex-registrant, second strike inmates in response to November 14, 2014 order" is granted.

(Art. I, §. 32, subd. (a)(1), emphasis added.) Plainly the voters intended any person ***currently sentenced to prison*** for a nonviolent felony offense would be eligible for parole review. For example, in calculating eligibility for parole Proposition 57 looks only to the term for the individual's "primary offense" – excluding any enhancements for prior convictions. (Art. I, § 32, subd.(a)(1)(A).) [12]

However, CDCR would bar parole review under Proposition 57 for anyone "convicted of a sexual offense that requires registration as a sex offender under Penal Code section 290." (15 Cal. Code Regs § 3490, subd. (a)(3).) Thus any person ***ever*** convicted of a registrable sex offense would be excluded from parole review, even if that person is not currently serving a term for that offense. For example, a person serving a prison sentence for theft (not a violent felony listed in section 667.5) would be ineligible for parole review under CDCR's interpretation of Proposition 57 if he was previously convicted of a registrable sex offense -- even a misdemeanor -- for which he served his sentence years ago

In short, CDCR defines parole eligibility by an individual's ***status***, rather than the current ***commitment offense***. This contravenes the Constitution's plain language added by Proposition 57. CDCR points to no language in Proposition 57 supporting such a construction.

For all of the above reasons, the court finds CDCR's regulations conflict with the voter's directive in Proposition 57. The regulations are thus void. [13]

3. The court will not instruct CDCR in defining "nonviolent felony"

Petitioners ask the court to go a step further and order CDCR to adopt regulations making

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[12] CDCR recognizes this, defining a "nonviolent offender" as including "An inmate who has completed a term of incarceration for a violent felony and is currently serving a concurrent term for a nonviolent felony offense …." (15 Cal. Code Reg. § 3490, subd (b)(1).)

Ironically, CDCR would allow an inmate convicted of both a violent offense under section 667.5 and a nonviolent felony to be reviewed for parole under Proposition 57 upon completion of the term imposed for the violent offense. In contrast, an inmate previously convicted of a sex offense listed in section 290 but currently serving a term for a nonviolent offense would be categorically excluded from Proposition 57's parole review.

[13] Although not dispositive, the court notes the Legislative Analyst also opined CDCR's regulation "appears to violate the language of Proposition 57" by "exclude[ing] nonviolent . . . sex registrants from the new parole consideration" process. (Legis. Analyst's Off., The 2017-18 Budget: Implementation of Proposition 57 (April 2017), p. 10.)

all persons convicted of registrable sex offenses not listed in section 667.5 eligible for parole review. The court declines.

Petitioners argue the term "nonviolent felony offense" in Proposition 57 must be interpreted to exclude only those serving a term for an offense listed in section 667.5. They contend the voters understood that any felony not listed in section 667.5 is, by definition, "nonviolent" for purposes of Proposition 57.

This would be one way to define the term "nonviolent" as used in Proposition 57. It comports with how many have read Proposition 57. The proponents told voters that, "Violent criminals as defined in Penal Code section 667.5(c) are excluded from parole." (Rebuttal to Argument Against Proposition 57.) And respected criminal law experts Justice Tricia Bigelow and Judge Richard Couzens (Ret.) write, "A review of the materials provided by the 2016 voter information pamphlet suggests that the enactors define 'nonviolent felony' as any crime not listed in section 667.5, subdivision (c)." (Couzens and Bigelow, Proposition 57: "The Public Safety and Rehabilitation Act of 2016" (2017) Barrister Press, at p. 6.)

However, the Legislature's list of violent offenses in section 667.5 is not the only way to define a "nonviolent" offense for Proposition 57. Proposition 57 never mentions section 667.5. CDCR thus argues, "[Proposition 57] uses the term `nonviolent felony offense' which is not the same as a 'violent felony.' Had the drafters wanted such a limitation, they could have easily included it in the text." (Opp., p. 16.)

This is true. Had the voters intended to define the term "nonviolent" felony to mean only felonies the Legislature lists in section 667.5, they could have said so. When the voters approved Proposition 36 ("Three Strikes Reform Act of 2012") they declared Proposition 36's resentencing was limited to inmates serving life sentences "for a conviction of a felony or felonies that are **not defined as** ... **violent felonies by subdivision (c) of Section 667.5** ... (§ 1170.126, subd. (e), emphasis added; see also, generally, *People v. Conley* (2016) 63 Cal.4th 646, 652-53 [describing purposes and effect of Three Strikes Reform Act].)

The language of Proposition 36 demonstrates the voters know how to limit sentencing relief to exclude those convicted of violent felonies listed in section 667.5. That Proposition 57 did not use similar language suggests CDCR may have discretion to define the term "nonviolent" felony offense without reference to section 667.5.

CDCR argues limiting Proposition 57's exclusion from parole review to only the "violent felonies" the Legislature lists in section 667.5 for sentencing purposes "ignores the universe of

felonies that do not make the list of violent felonies for sentencing enhancement purposes, yet are arguably violent ...." (Opp. at p. 17.) CDCR maintains the Legislature's designation of crimes as "violent" for sentencing is different from Proposition 57's directive to review the parole eligibility of those serving sentences for "nonviolent" felonies. (*Id.* at p. 18.) Here CDCR cites Proposition 57's declaration that its provisions are to apply "notwithstanding ... any other provision of law ...." (Art. I, § 32, subd. (a).) CDCR also points to Justice Chin's dissenting opinion in *Brown v. Superior Court, supra*, 63 Cal.4th at 360, where he notes "many" crimes not listed in section 667.5 "are arguably violent."[14]

Under CDCR's analysis, the Legislature's decision not to list rape of an intoxicated person (§ 261, subd. (a)(3)) or rape of an unconscious person (§ 261, subd. (a)(4)) as "violent" felonies in section 667.5 would not preclude CDCR from nevertheless concluding these crimes are excluded from the voters' meaning of "nonviolent" felonies for purposes of Proposition 57's parole review.

Petitioners counter that the arguments, statements and analyses in the Official Voter Information Guide show voters understood the term "nonviolent" felony offense meant any offense other than those listed in section 667.5.[15] Perhaps. However, again, neither Proposition

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[14] However, Justice Chin also cautioned that the United States Supreme Court had already declared the term "violent felony" unconstitutional as impermissibly vague in one federal statute. (*Brown v. Superior Court, supra*, 63 Cal.4th at 360.)

The Armed Career Criminal Act (18 U.S.C. § 924(e)(2)(B)) provided increased punishment if the defendant had suffered prior convictions for a "violent felony," which the federal statute defined as any felony that "involves conduct that presents a serious potential risk of physical injury to another." (*Johnson v. United States* (2015) 135 S. Ct. 2551.) Justice Scalia, writing for the majority, explained the "indeterminacy of the wide-ranging inquiry" required to establish if a particular crime qualifies as a violent felony denies fair notice to the defendant and invites arbitrary enforcement denying due process. (*Id.* at 2556-2559.)

[15] Petitioners asked the court to judicially notice: (1) the text of Proposition 57; (2) the arguments in favor of and against Proposition 57 published in the Official Voter Information Guide; (3) the three-judge court's February 10, 2014 order granting in part and denying in part CDCR's request for extension of December 31, 2013, deadline in *Plata v Brown*, United States District Court for the Eastern District of California, Case Nos. 3:01-cv-01351 TEH [hereafter "*Plata v. Brown* order"]; (4) CDCR's report on new parole process for non-violent, non-sex-registrant, second-strike inmates in response to November 14, 2014 order, filed in *Plata v. Brown* on December 1, 2014 [hereafter "Defendant's report in *Plata v. Brown*"]; and (5) CDCR's notice of proposed emergency regulations and its certification of operational necessity.

CDCR asked the court to judicially notice many of the same documents as Petitioners, including the text of Proposition 57, the arguments in favor of and against Proposition 57 published in the Official Voter Information Guide, the *Plata v. Brown* order and Defendants' report in *Plata v. Brown*. CDCR also asked the court to judicially notice: (1) its Notice of Change to Regulations, NCR 17-05, Credit Earning and Parole Consideration Prop 57, which

57 nor the ballot materials defined "nonviolent felony."

For example, the official title and summary prepared by the Attorney General stated the initiative "[a]llows parole consideration for persons convicted of nonviolent felonies." But the Attorney General did not identify those felonies deemed nonviolent, nor did she reference section 667.5.

Similarly, proponents of Proposition 57 stated the initiative "[k]eeps the most dangerous offenders locked up" and "[a]llows parole consideration for people with non-violent convictions." But they did not explain what they meant by "the most dangerous offenders" or which convictions would be deemed "non-violent." (Argument in Favor.) Although the proponents stated "[v]iolent criminals as defined in Penal Code 667.5(c) are excluded from parole," they did not state ***only*** such individuals would be excluded. (Rebuttal to Arguments Against.)

For their part, the opponents of Proposition 57 told voters it "deems the following crimes 'non-violent' and makes the perpetrators eligible for EARLY PAROLE and RELEASE into local communities: • Rape by intoxication • Rape of an unconscious person • Human Trafficking involving sex act[s] with minors . . . • Failing to register as a sex offender . . . • Lewd acts against a child 14 or 15." (Argument Against; see also Rebuttal to Argument in Favor.) The opponents thus apparently assumed the term "nonviolent" was to be defined by reference to the Legislature's list of "violent" felonies in section 667.5. The opponents' argument may illuminate the voter's understanding, but is not dispositive.

Petitioners point to statements made by CDCR ***after*** passage of Proposition 57 to show CDCR interpreted the term nonviolent felony to mean any felony not listed in section 667.5. Such after-the-fact interpretations shed no light on how the voters understood the term when they approved Proposition 57. (See, e.g., *Armstrong v. County of San Mateo* (1983) 146 Cal.App.3d 597, 618.)

Petitioners additionally argue Proposition 57 must be construed in light of existing laws,

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includes CDCR's rationale for excluding registered sex offenders from Proposition 57 [RJN, Ex. B, pp. 14-20.]; (2) two "fact sheets" published by CDCR and available on its website, titled, respectively, "Three-Judge Court Population Reduction Measures" and "Parole Review for Non-Violent, Non-Sex Registrant, Second-Strike Inmates;" (3) the Legislative Analyst's Analysis of Proposition 57 published in the Official Voter Information Guide; and (4) the text of, and portions of the Official Voter Information Guide on, Proposition 35, approved by the voters in 2012.

These requests for judicial notice are granted. These documents for which judicial notice was requested and granted are the only evidence either party proffered in support of or opposition to the petition.

including section 667.5. The voters are "deemed to be aware of existing laws . . . and to have enacted or amended a statute in light thereof." (*Cervantes*, *supra*, 225 Cal.App.4th at 1015.) However, as discussed above, section 667.5 defines the term "violent felony" only "[f]or purposes of ***this section***." (§ 667.5, subds. (a) and (c), emphasis added.) Assuming voters were aware of this language, it is hardly conclusive evidence they intended the term "nonviolent felony" in Proposition 57 to mean every crime not listed as a "violent" felony in section 667.5

Petitioners also cite Welfare and Institutions Code section 6600, dealing with sexually violent predators. Section 6600 defines the term "violent" as "committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on the victim or another person, or threatening to retaliate in the future against the victim or any other person." From this definition, Petitioners argue the term "nonviolent" as used in Proposition 57 must mean without force, violence, duress, menace or fear of bodily injury or threats of retaliation. But neither Proposition 57 nor the ballot materials mention Welfare and Institutions Code section 6600. It is hard to conclude the voters intended sub silentio to incorporate its definition.

Finally, Couzens and Bigelow note the proponents of Proposition 57 assured voters "Proposition 57 … [d]oes NOT authorize parole for violent offenders." (Rebuttal to Argument Against Proposition 57.) They conclude, "it is clear that the ballot argument was attempting to convince the voters that persons who commit crimes with violence would not benefit from the new parole provisions" (Couzens & Bigelow, Proposition 57: "The Public Safety and Rehabilitation Act of 2016, *supra,* at p. 8.) Again, this could be more than just the felonies listed in section 667.5.

It is by no means clear what the voters understood, or intended, the term "nonviolent" to mean in Proposition 57.

But for today, the sole issue is the validity of CDCR's regulations excluding anyone convicted of a sex offense listed in section 290 from Proposition 57's parole review -- based upon recidivism rates. The court holds CDCR's categorical exclusion of all offenses listed in section 290 for this reason conflicts with the plain language of the Constitution added by Proposition 57. That is all the court addresses.

In revisiting its regulations to define "nonviolent" felonies for Proposition 57, CDCR enjoys broad discretion. The court does not impose its own policy judgment. Nor does it set aside CDCR's determination of which crimes are "nonviolent" in the absence of an arbitrary decision. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748-749.) This is particularly true here

"when an issue of interpretation is heavily freighted with policy choices which the agency is empowered to make." (*Yamaha Corp. of America v. State Bd. of Equalization*, *supra*, 19 Cal.4th 17 [conc. opn. of Mosk, J.].)

The viability of other possible definitions is not before this court. The voters directed CDCR to promulgate regulations implementing Proposition 57. Defining the term "nonviolent felony offense" in light of this decision is CDCR's responsibility.

CONCLUSION

Seeking to reduce prison overcrowding, lower costs and improve public safety with evidence-based rehabilitation programs, the voters enacted Proposition 57. They amended California's Constitution to direct: "***Any person*** convicted of a ***nonviolent felony offense*** . . . ***shall*** be eligible for parole consideration after completing the full term for his or her primary offense." (Art I, § 32(a)(1), emphasis added.)

The voters were told this could make persons convicted of sex offenses the Legislature does not designate "violent" eligible for parole review. They were also told this would not endanger public safety, because the parole board may still deny parole for anyone unsuitable for release. Proposition 57 only directs nonviolent offenders be reviewed for parole. It does not direct their release.

CDCR must promulgate regulations defining "nonviolent felony offense" to implement Proposition 57. CDCR declared no person convicted of a sex offense requiring registration shall be reviewed for parole, even though the Legislature has not deemed all such sex offenses to be violent crimes. CDCR based this exclusion on recidivism rates – not whether a particular sex offense is "nonviolent." That is not what the voters directed.

CDCR went even further by declaring that all persons previously convicted of a sex offense requiring registration under section 290 are ineligible for the parole review mandated by Proposition 57 – even if currently serving a prison sentence for a nonviolent offense. That is not what the voters said.

CDCR cannot substitute its judgment for what it wishes the drafters of Proposition 57 had said. Nor may CDCR's departmental regulations override a clear directive in the Constitution. Accordingly, CDCR's current regulations must be set aside.

The California Department of Corrections and Rehabilitation is directed to define "nonviolent" in a manner consistent with the Constitution and the voters' directive.

Counsel for Petitioners is directed to prepare a formal judgment and writ, incorporating this order as an exhibit; submit it to opposition counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment.

Dated: 3/5, 2018

Allen Sumner
Judge of the Superior Court of California,
County of Sacramento

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, et al.	**Case Number: 34-2017-80002581**
vs.	**CERTIFICATE OF SERVICE BY MAILING (C.C.P. Sec. 1013a(4))**
CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, et al.	

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the foregoing **ORDER AFTER HEARING ON PETITION FOR WRIT OF MANDATE** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

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I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Dated: March 5, 2018

By: M. GARCIA,
Deputy Clerk