IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S254599

In re GREGORY GADLIN
on Habeas Corpus.

Court of Appeal of California
Second District, Division Five
No. B289852

Superior Court of California
Los Angeles County
No. BA165439
Hon. William C. Ryan

Answer Brief on the Merits

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ANSWER BRIEF ON THE MERITS

Comes now Gregory Gadlin, habeas petitioner in the court below, in answer to the opening brief on the merits (OB) filed August 13, 2019, by respondent Secretary of the California Department of Corrections and Rehabilitation (CDCR or Department). For the reasons set forth below, the Court should affirm the decision of the Court of Appeal granting Gadlin relief from the Department's regulatory exclusion of him from early parole consideration under Proposition 57.

Issue Presented

Did the Court of Appeal correctly grant Gadlin habeas relief from CDCR's exclusion of him from Proposition 57's mandate that CDCR provide early parole consideration to "any person convicted of a nonviolent felony offense" (Cal. Const., art. I, § 32, subd. (a)(1)), where the exclusion was based not on any current conviction of a violent felony offense, but simply on his status as a sex-offender registrant due to a prior conviction?

Summary of Argument

CDCR denied Gadlin early parole consideration under Proposition 57 pursuant to its blanket exclusion of all sex-offender registrants from such consideration – regardless of how old or minor and nonviolent their registrable convictions may have been and regardless of how nonviolent their current felony conviction may be. CDCR did so in the face of an explicit duty

Proposition 57 imposed on it to provide early parole consideration to all its prisoners serving sentences for nonviolent offenses.

CDCR's regulatory exclusion from early parole consideration of its nonviolent offenders who must register due to a prior registrant conviction was based simply on its own determination that registrants inherently and forever are too dangerous to even be considered for early release. The electorate, however, determined that the line separating those who qualify for early parole consideration and those who do not should be drawn between those serving a sentence for a nonviolent felony and those serving a sentence for a violent felony. Overruling that determination, CDCR substituted its own determination that a further line should be drawn between those who need not register as a sex offender and those who must register. That line makes prior registrant convictions the only prior convictions -- violent or nonviolent, felony or misdemeanor -- that disqualify a nonviolent offender from early parole consideration. Nothing in the language of the proposition even hints at such disqualification.

CDCR claims authority to make this exception based on the proposition's direction in Section 32(b) that it promulgate regulations to carry out the programs for early parole consideration and expanded credit earning that Section 32(a) established. But CDCR may not, under the guise of its rulemaking power to implement *how* the program for early parole should operate, arrogate to itself the electorate's policy determination of *who* qualifies for early parole consideration. The electorate spoke on that question in no uncertain terms, specifying that "any person convicted of a nonviolent felony offense" was entitled to early parole consideration. It delegated to

CDCR only the authority to determine how that early parole consideration program should work, not who qualified for it. And to the extent that the electorate delegated to CDCR the determination of which offenses are nonviolent felonies within the meaning of the provision for early parole consideration, the electorate limited that determination to current felony convictions, so that CDCR's exclusion based on prior registrant convictions – including prior misdemeanor convictions – fell outside its delegated powers.

According to CDCR, the voters intended to leave to its "expert view" the determination of what "class of offenders" was too dangerous to consider for early parole. (OB 11.) To the contrary: The electorate determined which class of offenders was entitled to early parole consideration by extending such to all those convicted of a nonviolent felony, and left the determination of dangerousness for the Board of Parole Hearings to make on an individual basis from that class of offenders. The electorate indicated this intent by the principal way it always does – by the clear and unambiguous language of the text itself. To the degree consideration of the ballot materials may be necessary to divine the electorate's intent, those materials reinforce the conclusion that the electorate intended to provide early parole consideration to all current nonviolent offenders, without any carve-out of those offenders with prior registrant convictions on their record, and to leave the dangerousness determination for actually release to the Board upon individual consideration. Moreover, the provision of early parole consideration to as many nonviolent offenders as possible furthers the proposition's goal of reducing the prison

population to achieve its stated purposes of enhancing public safety, improving rehabilitation, and avoiding the release of prisoners by federal court order.

For all these reasons, the Court should affirm the decision below, holding – as that court did -- that those serving sentences for nonviolent felonies like Gadlin may not be excluded from early parole consideration based on a prior conviction for a registrant offense.

Statement of Facts

A. Proposition 57.

On November 8, 2016, California voters approved Proposition 57. (See also *In re Edwards* (2018) 26 Cal.App.5th 1181, 1185 ["California voters approved Proposition 57, dubbed the Public Safety and Rehabilitation Act of 2016, at the November 2016 general election"].)

Proposition 57's preamble expressed the measure's "Purpose and Intent." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141.[1]) "As relevant here, the (uncodified) text of Proposition 57 declares the voters' purposes in approving the measure were to: '1. Protect and enhance public safety. [¶] 2. Save money by reducing wasteful spending on prisons. [¶] 3. Prevent federal courts from indiscriminately releasing prisoners.

[1] The Voter Information Guide can be found in the record as Exhibit 3, pp. 15–21, supporting the return to the order to show cause filed in the Court of Appeal. (See OB 15, fn. 3.)

[¶] 4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.' [Citation.]" (*In re Edwards*, *supra*, 26 Cal.App.5th at p. 1185.)

Among other things, Proposition 57 added article I, section 32 to the California Constitution[2], which "significantly expanded parole consideration to all state prisoners convicted of a nonviolent felony offense." (*In re Gadlin* (2019) 31 Cal.App.5th 784, 786, review granted May 15, 2019, No. S254599, citing Cal. Const., art. I, § 32, subd. (a)(1); see also *Brown v. Superior Court* (2016) 63 Cal.4th 335, 341–342, emphasis in original [then-proposed Section 32(a)(1) was "a constitutional amendment that would significantly modify parole consideration for *all* state prisoners 'convicted of a nonviolent felony offense'"].)

Section 32 provides in full:

> (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.
> >
> > (A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for

[2] Unless otherwise specified, references in this brief to sections are to this section of the California Constitution, with its subsections often referred to as Section 32(a) or Section 32(b).

> any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.
>
> (2) Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.
>
> (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.

(Cal. Const., art. I, § 32; see also *In re Edwards*, *supra*, 26 Cal.App.5th at p. 1185 ["Under section 32(a)(1), '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.' (§ 32(a)(1)].) And for purposes of section 32(a)(1), 'the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.' (§ 32(a)(1)(A).)"].)

Although Section 32(a)(1) did not define "nonviolent offense," "Penal Code section 667.5, subdivision (c) defines 23 criminal violations, or categories of crimes, as violent felonies—including murder, voluntary manslaughter, any robbery, kidnapping, various specified sex crimes, and other offenses." (*In re Edwards*, *supra*, 26 Cal.App.5th at p. 1188, fn. 3.) It was generally understood that a nonviolent felony offense included any felony

not on the legislative list of felony offenses. (See, e.g., Voter Information Guide, *supra*, Prop. 57 analysis by the Legislative Analyst, p. 57 ["this analysis assumes a nonviolent felony offense would include any felony offense that is not specifically defined in statute as violent"]; Voter Information Guide, *supra*, rebuttal to argument against Proposition 57, p. 59 ["Prop. 57: … [d]oes NOT authorize parole for violent offenders.… Violent criminals as defined by Penal Code 667.5(c) are excluded from parole."].) In sum, "[a] review of the material provided by the 2016 voter information pamphlet suggests that the enactors define 'non-violent felony' as any crime not listed in section 667.5, subdivision (c)." (Couzens & Bigelow, Proposition 57: "The Public Safety and Rehabilitation Act of 2016" (May 2017 Barrister Press) 6, found online at www.courts.ca.gov/documents/prop57-Parole-and-Credits-Memo.pdf.)

B. CDCR's Implementing Regulations and Judicial Invalidation of Features of Them that Deprived Categories of Nonviolent Offenders from Early Parole Consideration.

"Proposition 57 directed CDCR to adopt regulations 'in furtherance of section 32(a)' and 'certify that these regulations protect and enhance public safety.' (Cal. Const., art. I, § 32, subd. (b)." (*In re Edwards*, *supra*, 26 Cal.App.5th at p. 1187, brackets in quote deleted.)

As recounted in *Edwards*, which invalidated CDCR's regulatory exclusion of third strikers whose life terms arose from

conviction of a nonviolent felony, CDCR at first excluded both third strikers and sex-offender registrants from its regulatory definition of "nonviolent offender":

> In April 2017, California's Office of Administrative Law (OAL) approved an "emergency rulemaking action" promulgated by CDCR in response to section 32(b)'s direction. The rulemaking purported to flesh out the terms of section 32(a), adding definitions of "nonviolent offender," "primary offense," and "full term." (Cal. Code Regs., tit. 15, former § 3490.) Most relevant here was the definition of nonviolent offender, which the emergency regulations defined as all inmates *except* those who (1) are "[c]ondemned, incarcerated for a term of life without the possibility of parole, or incarcerated for a term of life with the possibility of parole," (2) are incarcerated for a violent felony within the meaning of Penal Code section 667.5, subdivision (c), *or (3) have been convicted of a sexual offense that requires registration as a sex offender*. (Cal. Code Regs., tit. 15, former § 3490, subd. (a), italics [modified]; see also Cal. Code Regs., tit. 15, former § 2449.1, subd. (a).) With this definition, inmates like Edwards [] who were not then incarcerated for a triggering violent felony specified in Penal Code section 667.5 were nevertheless excluded from the "nonviolent offender" definition ….

(*In re Edwards*, *supra*, 26 Cal.App.5th at pp. 1187–1188, emphasis changed.) Thus, under these regulations, inmates like Gadlin who were not then incarcerated for a triggering violent felony specified in Penal Code section 667.5 were nevertheless excluded from the "nonviolent offender" definition because they had a conviction for a registrable offense. (See also OB, quoting former Cal. Code Regs., tit. 15, § 3490, subd. (a)(3), Register 2017,

No. 15 (Apr. 13, 2017), brackets omitted [CDCR's regulatory definition of "nonviolent offender" excluded "any inmate 'convicted of a sexual offense that requires registration as a sex offender under Penal Code section 290'"].)

CDCR issued final regulations that amended its regulatory section 3490 defining nonviolent offenders to *include* nonviolent third-strike and sex-registrant offenders, effectively requiring the commission of a violent offense within the meaning of section 667.5 to place the offender outside the definition of "nonviolent offender"; but then it turned right around and excluded third strikers and registrant offenders committed to prison for a nonviolent felony from early parole consideration "notwithstanding" they were nonviolent offenders. Again, *Edwards* recounted the regulatory change:

> When it later came time to issue final, adopted regulations in May 2018 after a public comment period, CDCR reconsidered its definition of nonviolent offender. The adopted regulations, now codified at sections 3490 and 2449.1 of title 15 of the California Code of Regulations, no longer exclude Edwards and others like him from the nonviolent offender definition. (Cal. Code Regs., tit. 15, § 3490, subd. (a) [providing an inmate is a nonviolent offender so long as the inmate is not, among other things [irrelevant here], condemned to death, serving a life without possibility of parole sentence, or serving a sentence for commission of a violent felony within the meaning of Pen. Code, § 667.5, subd. (c)]; Cal. Code Regs., tit. 15, § 2449.1, subd. (a) [same].)
>
> Although the adopted regulations therefore treat Edwards as a nonviolent offender, CDCR made another change in the regulations as adopted so that

> he and similarly situated others would remain ineligible for Proposition 57 relief. Specifically, the adopted regulations state nonviolent inmates are generally eligible for early parole consideration (Cal. Code Regs., tit. 15, § 3491, subd. (a)), but notwithstanding that general eligibility, "an inmate is not eligible for parole consideration by the Board of Parole Hearings if the inmate is currently incarcerated for a term of life with the possibility of parole for an offense that is not a violent felony" (Cal. Code Regs., tit. 15, § 3491, subd. (b)(1)).

(*In re Edwards*, *supra*, 26 Cal.App.5th at pp. 1187–1188.)

Likewise, notwithstanding the general eligibility of nonviolent offenders for early parole consideration, nonviolent registrants were excluded from that consideration. (See, e.g., OB 19, quoting Cal. Code Regs., tit. 15, § 3491, subd. (b)(3), Register 2018, No. 18 (May 1, 2018) [notwithstanding meeting the regulatory definition of nonviolent offender, "an inmate is ineligible for parole consideration if 'the inmate is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code'"]; *In re Gadlin*, *supra*, 31 Cal.App.5th at p. 788, quoting Cal. Code Regs., tit. 15, § 3491, subd. (b)(3) ["CDCR's regulations exclude from early parole consideration an inmate who 'is convicted of a sexual offense that currently requires or will require registration as a sex offender'"].)

Edwards further reported:

> In a final statement of reasons accompanying the adopted regulations, CDCR asserted "life term inmates remain ineligible for parole consideration

> because the plain text of Proposition 57 makes clear that parole eligibility only applies to determinately sentenced inmates, and furthermore, public safety requires their exclusion." (CDCR, Credit Earning and Parole Consideration Final Statement of Reasons (Apr. 30, 2018) p. 14.[3])

(*In re Edwards*, *supra*, 26 Cal.App.5th at p. 1188.)

Although CDCR notably did not base its maintenance of its ban on early parole consideration for nonviolent offenders with prior registrant offenses on either the text of the initiative or the electorate's intent, it likewise supported that ban on the ground of public safety, stating:

> Public safety requires that sex offenders be excluded from nonviolent parole consideration.... [¶]... The department has determined that ... sex offenses demonstrate a sufficient degree of force and represent an unreasonable risk to public safety to require sex offenders be excluded from nonviolent parole consideration.

(CDCR Final Statement, *supra*, p. 20; see also *In re Gadlin*, *supra*, 31 Cal.App.5th at p. 788 [quoting same].)

Edwards voided CDCR's regulatory exclusion of nonviolent third strikers from early parole consideration and ordered CDCR "to make any further conforming changes thereafter necessary to render the regulations adopted pursuant to California Constitution, article I, section 32, (b) consistent with section 32(a) and this opinion." (*In re Edwards*, *supra*, 26 Cal.App.5th at pp.

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[3] CDCR's "Final Statement" is in the record as Exhibit 6 supporting the return to the order to show cause filed in the Court of Appeal. (See OB 18, fn. 7.)

1192–1193.) “The CDCR then adopted emergency regulations, effective January 1, 2019, to comply with [*Edwards*].” (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 787, citing Cal. Code Regs., tit. 15, § 3491, subd. (b)(1), Register 2018, No. 52 (Dec. 26, 2018).) Those regulations, like those set forth above for determinately-sentenced prisoners, similarly included sex registrants committed to prison for a nonviolent felony in its definition of nonviolent offenders (Cal. Code. Regs, tit. 15, § 3495), but then excluded them from early parole consideration “notwithstanding” the fact that they were nonviolent offenders (Cal. Code. Regs, tit. 15, § 3496). These regulations graphically illustrate the CDCR carve-out for registrant offenders, providing in pertinent part:

> (a) An “indeterminately-sentenced nonviolent offender,” as defined in subsections 3495(a), shall be eligible for a parole consideration hearing by the Board of Parole Hearings under Article 16 of Chapter 3 of Division 2 of this title.
>
> (b) Notwithstanding subsection (a), an inmate is not eligible for a parole consideration hearing by the Board of Parole Hearings under Article 16 of Chapter 3 of Division 2 of this title if the inmate is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act, codified in sections 290.

(Cal. Code. Regs, tit. 15, § 3496.)

The reviewing courts uniformly have ruled that to the extent CDCR regulations exclude nonviolent offenders from early parole consideration based on a prior registrant conviction, they are inconsistent with both the letter and spirit of Proposition 57 and

thus cannot stand. This Court granted review in this case to resolve that issue, and meanwhile granted review in the other cases and is holding them pending its resolution of Gadlin's claim. (See, e.g., *In re Bowell* (Mar. 1, 2019, B285434) 2019 Cal. App. Unpub. LEXIS 1504, review granted June 12, 2019, No. S255066 [2019 Cal. LEXIS 4189] [nonviolent third striker denied early parole consideration due to his sex-registrant felony conviction in 1991]; *In re Bertram* (June 17, 2019, B293475) 2019 Cal. App. Unpub. LEXIS 4134, review granted Aug. 28, 2019, No. S257104) [2019 Cal. LEXIS 6557] [nonviolent third striker denied early parole consideration due to his sex-registrant misdemeanor conviction in 1998 [actually, 1988 according to the record[4]]; *In re Adams* (June 18, 2019, B292106) 2019 Cal. App. Unpub. LEXIS 4083, review granted Aug. 28, 2019, No. S25708) [2019 Cal. LEXIS 6451] [nonviolent third striker denied early parole consideration due to two sex-registrant felony convictions in 1981].)

Lastly, one more appellate court "confront[ed] another attempt by [CDCR] to curtail the right created by Proposition 57 of numerous inmates to parole consideration by the Board of Parole Hearings (the board)." (*In re McGhee* (2019) 34 Cal.App.5th 902, 905.) That court held "that the department's creation of a screening and referral process that excludes from parole consideration more than a third of otherwise eligible inmates based on their in-prison conduct is at odds with the clear language of the constitutional amendment." (*Ibid.*) The court accordingly directed CDCR "to treat as void and repeal the

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[4] See that case's Answer to Pet. Rev. 7, fn.1.

portions of section 3492 of title 15 of the California Code of Regulations challenged in this proceeding." (*Id.* at p. 914.) CDCR has done so. (See Cal. Code Regs., tit. 15, § 3492 (Register 2019, No. 37).)

Standard of Review

CDCR promotes a standard of review of its eligibility regulations that elevates them to "quasi-legislative regulations [that] have the dignity of statutes." (OB 23, citing *Assn. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 389 *(ACIC)*; see, e.g., OB 28 ["the Secretary properly exercise[d] his quasi-legislative authority … to define which inmates qualify for nonviolent parole consideration"].) But CDCR's eligibility regulations for early parole consideration were not an exercise of a power to make law; rather, the electorate had already legislated who was eligible for early parole consideration – namely, any person convicted of a nonviolent felony – and imposed a ministerial duty on CDCR to provide them with such early parole consideration. Thus, its eligibility regulations were quintessentially "interpretive regulations," and, as CDCR explains:

> An interpretive rule, in contrast [to quasi-legislative rules], "represents the agency's understanding of the statute's or constitutional provision's meaning and effect. In that case, "a court must also consider whether the administrative interpretation is a proper construction. In answering that question, … a court takes ultimate responsibility for construing the statute or provision, exercising independent judgment ….

(OB 24, quoting *ACIC*, *supra*, 2 Cal.5th at p. 397, ellipsis and brackets deleted.)

This Court has further noted in this regard:

> Even quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, 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. (*Whitcomb Hotel, Inc. v. Cal. Emp. Com*. (1944) 24 Cal. 2d 753, 757; see cases cited, *post*, at pp. 11–12; *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (1996) 43 Cal. App. 4th 1011, 1022 [Standard of review of challenges to "fundamental legitimacy" of quasi-legislative regulation is '"respectful nondeference."'].)

(*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4; see also *California Cannabis Coal. v. City of Upland* (2017) 3 Cal.5th 924, 934 [applying independent judgment in interpretation of an initiative's provisions].)

CDCR correctly further notes, "Some regulations 'defy easy categorization,' for they "may have both quasilegislative and interpretive characteristics." (OB 24, quoting *ACIC*, *supra*, 2 Cal.5th at p. 397.) "In such cases, 'it may be helpful instead to imagine "quasilegislative" and "interpretive" as the outer boundaries of a continuum measuring the breadth of the authority delegated."' (OB 24, quoting *ACIC*, *supra*, 2 Cal.5th at p. 397.) And, in any event, ultimately "[w]hether judicial deference to an agency's interpretation is appropriate and, if so,

its extent--the 'weight' it should be given--is … fundamentally *situational*" and dependent on the complex of factors in the case at hand. (*Yamaha Corp. of Am. v. State Bd. of Equalization, supra*, 19 Cal.4th at p. 2, emphasis in original.)

Here, the electorate mandated that CDCR consider for early parole any person convicted of a nonviolent offense, where the Legislature already provided a definition and list of violent offenses. Thus, the electorate left little if anything at the margins of qualification for early parole consideration for CDCR either to legislate or determine, so that its eligibility regulations are far down the spectrum of interpretive rules. On the other hand, the electorate did delegate to CDCR the power – indeed, the duty -- to promulgate regulations as to *how* to provide such consideration to those eligible for it. Thus, CDCR has it right when it argues that "as required by section 32, the Department adopted regulations establishing the nonviolent parole *process*." (OB 18, bold and capitalization deleted, emphasis added.) The regulations establishing the way CDCR would provide early parole consideration to nonviolent offenders thus fall on the opposite end of the continuum, far down the spectrum of quasilegislative rules. But those regulations are not at issue here.

In sum, the standard of review here is just as *Edwards* described it when it struck down CDCR's regulation that excluded nonviolent third strikers, where it stated:

> "[T]he rulemaking authority of the agency is circumscribed by the substantive provisions of the law governing the agency." [Citation.] "'The task of the reviewing court in such a case is to decide whether the [agency] reasonably interpreted [its]

> legislative mandate. … Such a limited scope of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise. … [T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute. … Whatever the force of administrative construction … final responsibility for the interpretation of the law rests with the courts. … Administrative regulations that alter or amend the statute or enlarge or impair its scope are void ….' [Citation.]" [Citation.]

(*In re Edwards*, *supra*, 26 Cal.App.5th at p. 1189.)

Argument

I. CDCR'S Regulatory Exclusion From Early Parole Consideration Of Nonviolent Offenders Like Gadlin Who Have A *Prior* Registrable Conviction Conflicts With Section 32(a)(1)'s Mandate That CDCR Provide Early Parole Consideration To "Any Person Convicted Of A Nonviolent Felony Offense And Sentenced To State Prison."

A. The Plain Language of Section 32 (a)(1) Unambiguously Reflects the Electorate's Intent to Include Nonviolent Felony Offenders in its Provision for Early Parole Consideration Regardless of Sex Registrant Status, so that CDCR's Contention that the Electorate Enacted Proposition 57 with the Intent to Exclude Sex Offenders Is Baseless.

The lower court's analysis on the issue is simple, short, and on point:

> California Constitution, article I, section 32, subdivision (a)(1) provides, "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." The reference to "convicted" and "sentenced," in conjunction with present eligibility for parole once a full term is completed, make clear that early parole eligibility must be assessed based on the conviction for which an inmate is now serving a state prison sentence (the current offense), rather than prior criminal history. This interpretation is supported by section 32, subdivision (a)(1)'s use of the singular form in "felony offense," "primary offense," and "term."

(*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 789; see also *In re Edwards*, *supra*, 26 Cal.App.5th at p. 1186 ["Parsing this language, it is obvious the electorate intended to establish a new rule: All nonviolent state prisoners are eligible for parole consideration, and they are eligible when they complete the full term for their primary offense."].)

The ordinary meaning of the plain language of Proposition 57 unambiguously provides that all those convicted of a nonviolent felony offense be granted early parole consideration. There is not a suggestion in the text of the initiative that the electorate had any concern about prior convictions at the qualification stage: the focus was exclusively on those offenders serving a term for a nonviolent felony offense, regardless of their criminal history. This properly ends the analysis, for "the language used in a … constitutional provision should be given its ordinary meaning, and if the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent

… of the voters (in the case of a provision adopted by the voters).' [Citation.]" (*People v. Valencia* (2017) 3 Cal.5th 347, 357, brackets deleted.)

CDCR resists the textual analysis of the court below, calling it a "narrow and literalist interpretation" based on an isolated rather than contextual reading of the provision for early parole that is contrary to the electorate's intent to delegate to CDCR the power to determine eligibility for early parole consideration based on its assessment of the danger to public safety that such consideration would pose. (OB 25–27.) Not so.

CDCR argues:

> [T]he meaning of the parole provision of subdivision (a)(1) must be read in a way that harmonizes it with the broad implementation authority conferred on the Secretary by subdivision (b) and that achieves the overall objective of Section 32 as intended by the voters. Such a reading effectuates voter intent by giving effect to Section 32's scheme as a whole and not merely to an isolated part.

(OB 27.) As will be shown below, Gadlin could not agree more.

In arguing that Section 32(b) authorized it to exclude nonviolent offenders with a prior registrant conviction from early parole consideration, CDCR paradoxically relies on Section 32 (a)'s clear mandate that CDCR provide early parole consideration to "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison." (OB 27.) According to CDCR, this language establishing who qualifies for early parole consideration is so imprecise and uncertain that the electorate defaulted or punted to CDCR to make the eligibility determination based on

its own determination of who was too dangerous to be considered for early parole. In so arguing, however, CDCR concedes that the phrase "sentenced to state prison" is one that "limits this provision to individuals currently incarcerated in state prison …." (OB 27.) Only by divorcing this phrase from its antecedent phrase "convicted of a nonviolent offense" -- which phrases are connected by the conjunctive "and" – can CDCR then contend that "[t]he word 'convicted'" comprehends in this case not just the current conviction but also any past or prior conviction. (OB 27–28.) That contention is nonsense.

The authority CDCR cites to support that proposition, *People v. Woodhead* (1987) 43 Cal.3d 1002, 1008, works against it. Instead, *Woodhead* supports Gadlin's position that when the word "convicted" is placed in the context of the entire phrase – "Any person convicted of a nonviolent offense and sentenced to state prison shall be eligible for parole consideration" – it refers to only the current conviction and does not include prior convictions.

To begin with, *Woodhead* emphasized that the word "convicted" cannot be isolated from the rest of the text but must be considered in the context in which it was written to determine its meaning. (See OB, quoting *People v. Woodhead*, *supra*, 43 Cal.3d at page 1008 ["The word 'convicted' conveys no self-evident meaning; its import must be gathered from the overall context in which it appears."].) *Woodhead* was a case, like this one, that concerned agency interpretation of an initiative. There the Youth Authority (YA), as CDCR here, promoted the view that the word "'convicted' means … *ever* convicted." (*Ibid.*, emphasis in original.)

As this Court there stated:

> In this case we must decide whether a statute which prohibits commitment to the Youth Authority of any person convicted of a serious felony when he or she was 18 years of age or older at the time of the offense, applies to defendant, who was previously convicted of a serious felony committed when he was 18, but who stands convicted of a nonserious felony in the instant proceeding. For the reasons set forth below, we conclude it does not.

(*People v. Woodhead*, *supra*, 43 Cal.3d at p. 1005.)

One reason the Court so decided is that the enacting body typically includes the adjective "prior" or "previous" when it seeks to refer to or otherwise include past convictions with current ones. (See *People v. Woodhead*, *supra*, 43 Cal.3d at p. 1009, citing Pen. Code, § 1203.06 [expressly distinguishing between persons "previously convicted" of a serious felony and currently "'convicted" of a nonserious felony].) Confirming this practice, the initiative itself in another part expressly distinguished between persons currently "'convicted' of serious felonies" and persons "who *previously* have been convicted of a serious felony." (*People v. Woodhead*, *supra*, at p. 1010, emphasis in original.) "Viewing section 1732.5 in statutory context thus furnishes a rather clear and compelling indication that the authors intended the words 'no person convicted of' in section 1732.5 to refer exclusively to *current* convictions." (*Ibid.*, emphasis in original.)

The Court soundly rejected the agency shibboleth of public safety to support a reading of "convicted" as including a prior

conviction, even where the overall purpose of that proposition – in stark contrast to Proposition 57 – was to increase punishment, stating:

> [T]he Attorney General relies on an excerpt from the preamble to Proposition 8 which states that the goals of criminal justice are to protect the "public safety" and to provide "deterrents" to crime.... Each of these goals, the Attorney General contends, would be better served by a construction of section 1732.5 which denied Youth Authority eligibility on the basis of prior as well as current serious felony convictions.
>
> We are not persuaded. While the preamble's references to "public safety" and criminal "deterrents" may reflect the public concerns that gave rise to Proposition 8, they provide no meaningful clues to the purposes underlying specific substantive sections of the initiative.... The phrase "public safety" does not constitute a blank check for interpretation of specific statutory language in any manner that would appear to advance the policy objectives identified by the Attorney General. Section 1732.5 is a *penal* statute, and it is an established rule of construction that ambiguities in penal statutes are to be construed most favorably to the accused. [Citation.] This rule applies to enactments by initiative as well as legislative enactments. [Citation.]

(*People v. Woodhead*, *supra*, 43 Cal.3d at p. 1011, emphasis in original.)

In any event, CDCR's argument that "convicted" here means "ever convicted" would convert the language under consideration to "Any person ever convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole

consideration." That language broadens rather than narrows qualification for early parole, and makes no sense. CDCR's argument here that the imprecision of the word "convicted" in this context gave it license to deny early parole consideration for a person ever convicted of any offense, such as a registrant misdemeanor, runs in illogical circles. Indeed, CDCR does not otherwise interpret "convicted" here as meaning "ever convicted," for it does not deny early parole consideration for any prior felony conviction no matter how violent it was.

CDCR's submission that the phrase "nonviolent felony" similarly "lacks a firm definition" here (typ. 28) is almost as faulty. That argument fails in the face of the fact that the Penal Code already defines "violent felony," which effectively defines "nonviolent felony" as the remainder of felonies in the Penal Code. (See *ante*, pp. 13-14 [discussing Pen. Code, § 667.5's impact, along with the discussion of that section in the voter guide, on the electorate's understanding of what "nonviolent felony" meant and the crimes to which it referred].) Indeed, as explained earlier, CDCR ultimately defined "nonviolent felony" in terms of felonies not listed as violent in Penal Code section 667.5, properly assessing the nonviolent nature of a felony against that section's list of violent offenses to determine whether the individual was a "nonviolent offender." (See *ante*, pp. 16-17.)

CDCR's claim that the "rulemaking power" that Section 32(b) delegated to it gave it additional license "to define which inmates qualify for parole consideration" notwithstanding the nonviolent nature of the offender's current conviction (OB 28) reads entirely too much into that power. As already discussed, CDCR's characterization of that power as a "quasi-legislative" one that

authorized its "sex-offender exclusion" (OB 28) mischaracterizes the nature of this eligibility regulation. (See also OB 11 [invoking a "broad, quasilegislative power to fill up the details left to the Department's discretion" to justify its regulatory exclusion of nonviolent offenders with a prior registrant conviction].)

This regulatory exclusion is much more in the nature of an interpretive regulation detailing what exactly the electorate meant by "nonviolent felony offense" in Proposition 57. Thus, even if the electorate left the meaning of that phrase a little "'fuzzy and ambiguous at the margins" (OB 11, quoting *In re Gadlin*, *supra*, 31 Cal.App.5th at pp. 790–791, 793, 796 (conc. opn. of Baker, J.)), thus permitting it "to 'fill up the details' and gaps of section 32's parole scheme" in this regard (OB 28, quoting *ACIC*, *supra*, 2 Cal.5th at p. 391), the exclusion of current nonviolent offenders due to a prior registrant felony or misdemeanor conviction is well beyond even the fuzziest margins of the electorate's scheme for early parole consideration. Rather than using its rulemaking power for "clarifying the margins of what constitutes a nonviolent felony offense" (OB 22, quoting *In re Gadlin*, *supra*, at pp. 793–794 (conc. opn. of Baker, J.)), the CDCR ignored those margins to establish a regulatory exclusion well beyond "the law's outer boundaries." (OB 9).

The boundaries of eligibility for early parole consideration that Proposition 57 established has been described as follows:

> (2) **Current crime.** Eligibility for parole will be based solely on the crimes that result in the current prison commitment: "any person convicted of a non-violent felony offense and sentenced to state prison shall be eligible for parole consideration. . . ." The

> person's past criminal record is irrelevant to statutory eligibility for early release on parole. Accordingly, so long as the current offense is not a "violent felony," the person will be eligible for early release on parole on that offense, even though he or she has previously been convicted of a violent felony.
>
> Unlike Propositions 36 and 47, the Act does not exclude from its benefits any persons required to register as a sex offender, unless the commitment is for a sex crime designated as a violent felony.

(Couzens & Bigelow, Proposition 57: "The Public Safety and Rehabilitation Act of 2016" *supra* at pp. 8–9.) CDCR's regulatory exclusion of nonviolent offenders due to a prior registrant offense does not even purport to address the meaning of "nonviolent felony conviction," except to provide that the exclusion is made "notwithstanding" the meaning of that phrase.

As the *McGhee* court stated about CDCR's regulations that excluded certain nonviolent offenders from early parole consideration based on their prison misconduct: "While Proposition 57 delegated rulemaking authority to the department to 'fill up the details,' as the Attorney General argues, the exclusion of otherwise eligible inmates from board consideration is hardly a detail." (*In re McGhee*, *supra*, 34 Cal.App.5th at p. 911.") Here, as well, CDCR's exclusion of nonviolent offenders based on their prior convictions for a registrant offense no matter how old or how minor is hardly a detail. Rather, CDCR's carve-out of such registrants "is at odds with the clear language of the constitutional amendment," which gives a right to early parole consideration to all those whose convictions are nonviolent. (*Id.* at p. 905.)

CDCR asserts that this Court "has upheld on a number of occasions regulations that, like this one, clarif[y] an imprecise statute." (OB 18, citing *ACIC*, *supra*, 2 Cal.5th at pp. 384–385 and *Moore v. California State Bd. of Accountancy* (1992) 2 Cal.4th 999.) The regulations, and more fundamentally, the enabling statutes in those cases were not at all like the enabling statute and consequent regulation here at issue. For example, the statute in *ACIC* used "open-ended language that implicates policy choices of the sort the agency is empowered to make." (*ACIC*, *supra*, at p. 393,) In contrast, the provision here is a closed one that concerns only a current "nonviolent felony conviction." That language hardly licenses the CDCR to substitute its own policy choice to enlarge disqualification based on a prior felony or misdemeanor conviction. Likewise, the statute in *Moore* used "catchall language" that gave the agency a broad field within which to regulate. (See *Moore v. California State Bd. of Accountancy*, *supra*, at p. 1012.)

If Proposition 57's early parole provision provided early parole consideration to any person convicted of a nonviolent felony *except where CDCR finds that the offender's prior convictions are too dangerous to afford him early parole consideration*, or disqualified any person convicted of a violent offense *or any prior offense CDCR finds too dangerous for early parole consideration*, we would have a very different case. We have a case where under the guise of regulation CDCR has substituted its view for that of the electorate as to who is too dangerous to qualify for early parole consideration. Our constitutionally-required separation of powers does not permit this. (See, e.g., *In re Lucas* (2012) 53 Cal.4th 839, 849–850 [general "public safety" purpose underlying

the sexually violent predator (SVP) commitment statutes did not permit the Department to adopt an expansive definition of the phrase "good cause" that conflicted with the terms and function of other statutes in the SVP framework]; see also *Blue v. Bonta* (2002) 99 Cal.App.4th 980, 989 [agency not permitted to adopt "its own specialized and restrictive meaning" of the term "medical" that conflicted with commonsense definition].)

In short, the plain language of the proposition reflects the electorate 's explicit charge to the CDCR to extend early parole consideration to any and all of its prisoners committed to prison for a nonviolent felony, and its implicit charge to do so regardless of that offender's prior criminal history. The electorate's further charge to CDCR to promulgate regulations that implement this parole scheme was by its nature a subordinate charge. It did not authorize regulatory pull-back from that scheme; rather, in Section 32(b)'s words, it authorized regulations only "in furtherance of" that scheme.

Moreover, the rulemaking power and certification requirement in Section 32(b) extended as well to the electorate's charge to CDCR to implement a credit-earning scheme to award greater credits than the law already allowed to advance release from prison. In short, the electorate made the policy determination of *who* would qualify for early parole consideration in Section 32 (a)(1), with the rulemaking and certification requirement largely directed as to *how* the Department would provide that early parole consideration. This understanding of Section 32, gives effect to and harmonizes its two subdivisions that 1) establish its

early parole and sentence credit programs (Section 32(a)) and 2) authorize the CDCR to promulgate regulations that carry them out in a way that enhances public safety (Section 32(b)).

B. The Official Ballot Material Reinforces Rather Than Undermines the Amendment's Plain Text Reflecting the Electorate's Intent to Include Nonviolent Offenders with a Prior Registrable Conviction in its Provision for Early Parole Consideration.

CDCR claims that "[t]he question of whether the voters intended to provide parole consideration to sex offenders cannot be answered by looking to subdivision (a)(1)'s text alone." (OB 30.) But Gadlin demonstrated in his preceding argument that the text of Section 32(a), in the context of the entire proposition, including Section 32(b), unambiguously discloses an intent to extend early parole consideration to all persons committed to prison pursuant to a nonviolent felony conviction regardless of their prior criminality, including a prior felony or misdemeanor conviction for a registrant offense. Assuming the text of Proposition 57 leaves the electorate's intent ambiguous on this question, however, Gadlin agrees with CDCR that it is appropriate and necessary to consult the ballot material to see what light that material may shed on the question. (OB 30.) That further inquiry only serves to confirm the textual indications that the electorate intended to include in its program for early parole consideration all those committed to prison for a nonviolent felony regardless of their criminal history, including any past conviction for a registrable offense.

CDCR submits that first "[i]t is necessary to consider … Proposition 57's ballot materials to discern the 'purpose and the intent' for the nonviolent parole process …." (OB 30.) Consideration of the stated "purpose and intent" in the preamble of the proposition is superfluous here, however, since the text of section 32(a) itself states the purposes of the early parole process – "to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order" -- which in any event largely reiterates the substance of the preamble. (See *ante*, pp. 11-12.) Secondarily, CDCR submits that consultation of the voter material is necessary "to discern …. the 'spirit' of Section 32." (OB 30.) But the obvious spirit of Section 32 – whether disclosed by its text alone or further revealed by the voter material -- is to shorten the sentences of as many nonviolent offenders as the Board determines can safely be released to free up needed space and resources for its more violent and dangerous prisoners.

CDCR submits that "Proposition 57's ballot pamphlet clearly expresses an intent to exclude registered sex offenders from parole" – even if their current felony conviction is a nonviolent one, their registrable conviction was decades ago, and that registrant conviction was so minor and devoid of violence that it was a misdemeanor. (OB 30.) Review of the voter material reveals that CDCR's contention cannot be sustained. Rather, the ballot material reinforces the proposition's textual message that qualification for early parole consideration depends solely on the nonviolent nature of the prisoner's current felony conviction.

To begin with, the summary of Proposition 57 prepared by the Attorney General explained that, among other things, the proposition "allows parole consideration for persons convicted of

nonviolent felonies, upon completion of prison term for their primary offense as defined." (Voter Information Guide, *supra*, Prop. 57, Official Title and Summary prepared by the Attorney General, p. 54.) The Attorney General did not indicate that there was any exception to that allowance for those convicted of registrant offenses, let alone prior ones.

In addition, the Legislative Analyst advised the voters of the assumption that "a nonviolent felony offense would include any felony offense that is not specifically defined in statute as violent." (Voter Information Guide, *supra*, Prop. 57 analysis by the Legislative Analyst, p. 57.) Again, there was no suggestion in the analysis that there was any kind of exception to this qualification standard that could be made for a prior conviction.

Perhaps most obviously reinforcing the text and informing the voters that prior convictions did not impact a nonviolent offender's qualification for early parole consideration were the arguments of the opponents, who urged the electorate to vote against Proposition 57 for this very reason. In this regard, the opponents argued that Proposition 57 provided that those serving sentences for nonviolent offenses with even the most serious or violent prior offenses – including prior registrable offenses -- were eligible for early parole consideration, advising the voters: "Those previously convicted of MURDER, RAPE and CHILD MOLESTATION would be eligible for early parole." (Voter Information Guide, *supra*, rebuttal to argument in favor of Proposition 57, p. 58, capitalization in original.) In their own argument against Proposition 57, the opponents inveighed against the proposition's disregard of prior convictions in the eligibility determination, informing the voters that it "*permits the*

worst career criminals to be treated the same as first time offenders." (Voter Information Guide, *supra*, argument against Proposition 57, p. 59, emphasis in original.)

In like vein, the opponents argued that the "poorly drafted measure deems the following crimes 'non-violent' and makes the perpetrators eligible for EARLY PAROLE and RELEASE into local communities," and included certain registrable offenses in that list. (Voter Information Guide, *supra*, argument against Proposition 57, p. 59, capitalization in original.) The prominent list of nonviolent sex-registrable offenses in the ballot materials that the opponents thereupon set forth, asserting that such *current* offenders would be eligible for early parole consideration because the law did not deem these offenses "violent," could only have reinforced the voters' understanding that those with *prior* convictions for those offenses inarguably qualified for early parole consideration. (See also *id*., rebuttal to argument in favor of Proposition 57, p. 58, capitalization in original ["FACT: Prop. 57 authorizes EARLY PAROLE for a RAPIST who drugs and rapes a victim, because its authors call him non-violent."].)

While the list of violent offenses in Penal Code section 667.5 includes many if not most registrable sex offenses, it does not include all of them. (See, e.g., *In re Gadlin*, *supra*, 31 Cal.App.5th at p. 793.) (conc. opn. of Baker, Acting P.J.). It is in the context of "answer[ing] the charge that those convicted of [and serving sentences for] sex crimes like human trafficking would benefit from Proposition 57," that the "proponents asserted Proposition 57 'does not and will not change the federal court order that

excludes sex offenders, as defined in Penal Code section 290, from parole.'" (*Id.* at p. 795, quoting the ballot pamphlet's rebuttal to argument against Prop. 57, p. 59, brackets in quote omitted.)

CDCR relies first and foremost – exclusively, really[5] -- on this single statement in the rebuttal argument to support its claim that the ballot pamphlet makes clear the electorate's intent to exclude sex offenders from early parole consideration (despite the absence of any such suggestion in the text). (See OB 30, quoting

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[5] CDCR claims that such further references in the ballot material to the federal court order requiring the state to release prisoners as the Legislative Analyst's (see Voter Information Guide, *supra*, Prop. 57, Analysis by the Legislative Analyst, p. 54 [mis-cited as p. 58 in OB 31]) establish that "the voters approved Proposition 57 with the understanding and the intent that sex offenders would not be considered for parole consistent with existing policy." (OB 32) That contention cannot be squared with the Legislative Analyst's subsequent analysis of CDCR's emergency regulations implementing Proposition 57, which found they were inconsistent with Section 32 in this regard, reporting:

> **Exclusion of Certain Nonviolent Offenders Appears to Violate Measure**. We find that the administration's plans to exclude nonviolent third strikers and sex registrants from the new parole consideration appears to violate the language of Proposition 57. This is because the proposition specifies that all inmates serving a prison term for a nonviolent offense shall be eligible for parole consideration. By automatically excluding nonviolent sex registrants and third strikers, the administration would not provide parole consideration to this subset of these offenders.

(Legis. Analyst, *The 2017-18 Budget: Implementation of Proposition 57* (April 2017) , p. 10, found online at https://lao.ca.gov/Publications?Year=2017&CategoryID=3&Type=&phrase=Impleme as of October 30, 2019].)

that rebuttal statement, brackets omitted ["Governor Brown and the proponents plainly stated that Proposition 57 'excludes sex offenders, as defined in Penal Code section 290, from parole.'"].)

CDCR's submission that "[t]he proponents unequivocally rebutted the opposition's assertions that any sex offender, whether previously or currently convicted of a registrable sex offense, would be eligible for parole" (OB 31) is overstated. First, the proponents' statement was not made to rebut the opponents' argument that nonviolent offenders with prior offenses as serious as murder and rape would qualify for early parole consideration, or that the proposition treated the worst offenders like first offenders; it was made in response to the opponent's argument that certain serious felony sex offenses are nonviolent within the meaning of Proposition 57. CDCR here isolates that single statement from the rest of the rebuttal and from all the other arguments in the ballot material that make clear the early parole provision applies regardless of an individual's criminal history, and ignores the context of this sentence that shows it was in reference to current sex offenders. There may have been debate among the proponents and opponents as to which current felony sex offenders were eligible for early parole consideration under Proposition 57, but there was no debate that a prior sex offense affected the nonviolent offender's eligibility for early parole consideration. (See, e.g., *In re Gadlin*, *supra*, 31 Cal.App.5th at pp. 795–796 (conc. opn. of Baker, Acting P.J.).)

Not only is "[t]he 'federal court order' referenced by the proponents … left unspecified" (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 795 (conc. opn. of Baker, Acting P.J.)), but there was no explanation how or even if the federal court order affected

sex offenders. Indeed, as far as the voters knew (and as actually is the case), the federal court order did not mention sex offenses, sex offenders, or Penal Code section 290; rather, it merely proposed that an early parole process be set up for nonviolent second-strike offenders to reduce the prison population – and it was CDCR that established the registrant exclusion in meeting that proposal. (See CDCR's Motion for Judicial Notice, Exhs. B &C). The proponents' oblique reference to the federal order hardly told the electorate, let alone clearly, that the early parole consideration provision of Proposition 57 excluded all nonviolent offenders with registrable convictions. The lower court here unanimously found that reference unhelpful to determination of whether the electorate intended those with past registrant convictions to be excluded from consideration for early parole, for that reference simply did not bear on that issue. This Court should similarly so find, for that single sentence in the voter material is much too slender a reed to bear the weight of CDCR's argument here.

Section 32(a)(1), after all, concerns "any person convicted of a nonviolent felony offense." It applies independent of any court order or implementation of such by CDCR. Moreover, the term "nonviolent felony offense," which the section sets forth as the only criterion for eligibility for early parole consideration, is a term that necessarily must be seen in contrast to the statutory list of violent offenses in Penal Code section 667.5. There is nothing in the text of Proposition 57 that either obligates or authorizes CDCR to bend or stretch the meaning of "nonviolent felony" to conform to the parameters of any separate program it may have established under compulsion of a court order for the

early parole of second-strikers. After all, one of the electorate's purposes in establishing its program for early parole consideration was to replace the court-ordered one. Indeed, the reference to a federal court order in the Voter Information Guide that CDCR relies on here directly follows the proponents' statement that "[v]iolent criminals as defined by Penal Code 667.5(c) are excluded from parole." (Voter Information Guide, *supra*, rebuttal to argument against Proposition 57, p. 59.)

Any suggestion by the proponents that the early parole consideration provision excluded nonviolent offenders if they were subject to registration as a sex offender cannot be squared with the language of Section 32(a)(1) itself. This stark fact overcomes the ordinary "presumption 'that the drafters' intent and understanding of the measure was shared by the electorate.'" (See OB 31, quoting *People v. Hazelton* (1996) 14 Cal.4th 101, 123, in turn quoting *Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7, internal quotation marks omitted.) As noted in *Rossi* in the cited footnote, the presumption does not apply where there are "other indicia of the voters' intent … or contrary evidence." Here, there is evidence of a contrary intent from the strongest source imaginable: namely, the language of the initiative itself, which unambiguously discloses a contrary intent.

Because the ballot arguments by the proponents and opponents of the measure are partisan and thus may serve to mislead a voter about an initiative's purpose, intent, and effect, the Secretary of State includes the following warning about these advocates' claims in his running foot to their arguments: "*Arguments printed on this page are the opinions of the authors, and have not been checked for accuracy*." (See Voter Information

Guide, *supra*, arguments, pp. 58–59.) Here, the proponents' rebuttal statement was accurate insofar as many if not most felony sex offenses that require registration are violent ones so that such offenders would be excluded from early parole consideration. Otherwise, the voters were properly warned to take the arguments of both the proponents and opponents of the measure with a grain of salt when comparing them to the actual text of the proposition. Here, the proponents and opponents made diametrically opposed arguments about whether nonviolent offenders with a prior registrant offense were entitled to early parole consideration. (See, e.g., Voter Information Guide, *supra*, rebuttal to argument in favor of Proposition 57, p. 58 ["The authors of Prop. 57 are not telling you the truth."].) The overriding presumption is that the voters resolved those competing arguments by considered reference to the text. "[I]in accordance with our tradition, '*we ordinarily should assume that the voters who approved a constitutional amendment 'have voted intelligently upon an amendment to their organic law, the whole text of which was supplied each of them prior to the voter inf and which they must be assumed to have duly considered*.' [Citations.]" (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252, emphasis added by Court, ellipsis and inside quotation marks omitted.)

Contrary to CDCR's assertion that mere "indications in the ballot pamphlet that support the sex-offender exclusion are tantamount to express declarations of voter intent" (OB 32), "a possible inference based on the ballot argument is an insufficient basis on which to ignore *the unrestricted and unambiguous language of the measure itself*. (*Delaney v. Superior Court* (1990)

50 Cal.3d 785, 803, emphasis in original.) As this Court said about another initiative whose language was clear and unambiguous, "it was the Three Strikes law that was enacted, not any of the documents within its legislative or initiative history." (*In re Cervera* (2001) 24 Cal.4th 1073, 1079.) Likewise, here, it was Proposition 57, including its key provision providing for early parole consideration for nonviolent offenders, Section 32(a)(1), that the voters approved -- not any of the ballot arguments about it.

Finally, CDCR relies on the proponents' rebuttal argument that noted CDCR "would adopt regulations that implement this parole process 'with public and victim input and that are certified as protecting public safety.'" (OB 31, quoting Voter Information Guide, *supra*, rebuttal to argument against Proposition p. 59, brackets deleted.) According to CDCR, "[a] reasonable voter thereby understood that the Secretary would ensure that the adopted regulations would exclude sex offenders from parole …." (OB. 23.) CDCR's conclusion does not follow.

Ultimately, whatever public safety concerns the electorate had about application of the early parole provision to nonviolent offenders are reflected in the fact that the provision conditioned release pursuant to it on the Board's finding that the inmate could be safely paroled. As the proponents of the measure advised the voters:

> *No one is automatically released, or entitled to release from prison, under Prop. 57.*
>
> 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.

(Voter Information Guide, *supra*, argument in favor of Proposition 57, p. 58, emphasis in original.)

The whole "spirit" and design of Proposition 57 is to mitigate the extraordinary punishment mandated by alternative sentences and enhancements and consecutive sentences and other pile-ups of the DSL, so that current nonviolent offenders can be released as the Board of Parole finds fit to free up space and concentrate resources on the confinement of more dangerous prisoners. (See, e.g., Voter Information Guide, *supra*, Prop. 57 analysis by the Legislative Analyst, p. 56 ["This measure makes changes to the State Constitution to increase the number of inmates eligible for parole consideration ...."].) As the proponents of the initiative further advised the voters:

> Prop. 57 focuses resources on keeping dangerous criminals behind bars, while rehabilitating juvenile and adult inmates and saving tens of millions of taxpayer dollars.
>
> Over the last several decades, California's prison population explored by 500% and prison spending ballooned to more than $10 billion every hear. Meanwhile, too few inmates were rehabilitated and most re-offended after release.
>
> Overcrowded and unconstitutional conditions led the U.S. Supreme Court to order the state to reduce its prison population. Now, without a common sense, long-term solution, we will continue to waste billions and risk a court-ordered release of dangerous

> prisoners. This is an unacceptable outcome that puts Californians in danger – and that is why we need Prop. 57.)

(Voter Information Guide, *supra*, argument in favor of Proposition 57, p. 58, italics in original.)

The electorate consequently endorsed the "common sense, long-term solution" of early parole consideration for nonviolent offenders – whether determinately or indeterminately sentenced, and whether convicted of past registrable felonies or current registrable misdemeanors – to carry out each and all of Proposition 57's stated goals and purposes. Granting Gadlin consideration for early parole effectuates all the provision's purposes. This fact is particularly persuasive in interpretation of the parole provision because the proposition is a remedial one that the electorate directed be liberally and broadly construed to effectuate its purposes. It was the electorate's choice to sacrifice an outdated philosophy of mass incarceration in favor of the network of purposes it specifically set forth in the provision establishing the early parole consideration program, and to carry out each and all of its stated goals based on the nature of the individual's current felony offense rather than the nature of his past offenses.

C. CDCR's Blanket Exclusion from Early Parole Consideration of Nonviolent Offenders Who Have a Prior Registrable Conviction Is Not a Reasonable Exercise of the Rulemaking Authority that Section 32(b) Granted CDCR to Implement the Scheme for Early Parole Consideration Set Forth in Section 32(a).

CDCR argues that its "sex-offender exclusion is a valid exercise of [the] quasi-legislative rulemaking authority" that Section 32(b) granted it "to protect public safety" in implementation of Section 32(a). (OB 32–33.) This is just another way of saying that Section 32 authorized CDCR to except from early parole consideration any class of nonviolent offenders that it deemed too dangerous to provide such consideration. As already argued, CDCR's interpretation of Section 32(b) as giving it license to limit the provision of early parole consideration to nonviolent offenders in any way that it wants in the name of public safety cannot withstand analysis.

First, CDCR's submission requires rewriting of Section 32(a) to add such an exception, so that the provision would read: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration, except such persons whose eligibility CDCR finds for any reason would pose an unreasonable risk to public safety" Or, "except such persons whose eligibility CDCR finds based on their [criminal history] [in-prison misconduct] [conviction of a registrant offense] [etc.]" would pose an unreasonable risk to public safety. Section 32(a) says none of those things, and nothing in Section 32(b) enables CDCR to add that language.

Again, CDCR cannot under the guise of regulation, even quasilegislative ones, rewrite the legislation enabling its regulation. To be valid, CDCR's regulations must be consistent with Proposition 57 and reasonably necessary to implement its purposes. (See, e.g. *ACIC, supra*, 2 Cal.5th at p. 397; Gov. Code, § 11342.2.) Gadlin has already detailed how to this point the courts have invalidated regulations that curtailed under the banner public safety the right of nonviolent inmates to early parole consideration as inconsistent with Proposition 57. (See *ante*, pp. 14-20.) The regulatory exclusion of Gadlin from early parole consideration based on his prior commission of a registrant offense is just one more regulation inconsistent with Proposition 57.

Putting aside the fact that the regulatory exclusion at issue here is inconsistent with Proposition 57, CDCR otherwise abused its discretion when it concluded that the blanket exclusion of persons otherwise eligible for early parole consideration – who CDCR calls "inmates [who] could theoretically be included in Section 32's parole program" (OB 32– 33) – was reasonably necessary to carry out the purposes of the early parole consideration program. That determination was decidedly an unreasonable exercise of its discretionary authority.

Section 32(a) expressly specified the mutually-reinforcing purposes of the programs for early parole consideration and credit-earning that its provisions established in its subsections – namely, "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." Section 32(b) then required CDCR to "adopt regulations in

furtherance of these provisions ....” This limitation required CDCR to promulgate regulations that advanced this network of purposes. This network of purposes could best be advanced by regulations that, indeed, made all those convicted of a nonviolent felony eligible for parole after they had served the lesser time the proposition required, so that as many of them as could be safely released through parole board action would be released to free up space and resources for more dangerous dangerous. The proposition’s grant of regulatory power to the Department under Section 32(b) and the Secretary’s duty to certify that it has carried out that power consistent with public safety are subordinate to Section 23(a)’s grand scheme to release as many persons convicted of a nonviolent felony as soon as they can be safely released after they have served their specified time.

Inarguably, CDCR’s exclusion of otherwise qualified nonviolent offenders because of their past registrant offense impedes and undermines rather than furthers and advances those purposes and that goal. To be sure, simply warehousing Gadlin and those like him to mete out prison terms imposed upon them for punishment and incapacitation purposes is contrary to the proposition’s reform purposes. This is most obviously revealed by the blanket nature of the ban, which disqualifies a nonviolent sex offender no matter how old and how minor was the registrant offense. Under that ban, people like Gadlin, who was convicted of his felony registrant offenses decades ago, and Bertram, who was convicted of a single *misdemeanor* registrant offense even longer ago, must serve many more years in prison before they will be paroled. That serves none of the stated purposes of the program for early parole consideration – all of which are designed to save

money, mitigate the punishment for nonviolent felony convictions, and focus imprisonment and resources on the imprisonment of violent felony offenders and others that *the Board upon individual consideration* finds too dangerous to be released; not broad categories of others that CDCR finds too dangerous even to be considered for early parole.

CDCR's categorical finding is based only on outdated declarations that, "*in general*, sex offenders pose a 'high risk' of reoffense when released from prison." (OB 33, quoting Pen. Code, § 290.03, subd. (a)(1), emphasis added.) For example, the declaration referenced above was made in connection with the Sex Offender Punishment, Control and Containment Act of 2006, which was enacted "to enhance public safety and reduce the risk of recidivism posed by these offenders." (§ 290.03, subd. (a)(1).) Moreover, the registration requirement itself is a regulatory measure that concerned offenders "after release from incarceration" and is unrelated to either their punishment or continued imprisonment. (See, e.g., *People v. Castellanos* (1999) 21 Cal.4th 785, 796 [the registration requirement is not punitive in intent or effect, but rather is designed to serve only the regulatory purpose of surveillance of sex offenders *after* their release].)

The 2006 Act likewise concerns sex offenders *after* their release, modifying both the sex registry statutes and CDCR supervision of sex registrants. That comprehensive legislation had successfully achieved its goal of reduced recidivism by the time of enactment of Proposition 57. The Act created the California Sex Offender Management Board (CASOMB) to analyze current practices and recommend improvements. (Pen.

Code, § 9001.) CASOMB issued a report whose recommendations were largely adopted by the Legislature in the Chelsea King Child Predator Prevention Act of 2010 (Chelsea's Law). (Stats. 2010, ch. 219, § 1 et seq. (See *People v. Garcia* (2017) 2 Cal.5th 792, 797–798.) CASOMB concluded that the increased supervision and associated-specific treatment for sex offenders mandated by Chelsea's Law reduced recidivism by up to 40 percent. (*Ibid.*)

CDCR's reliance in promulgating its blanket regulatory exclusion on other similar declarations, such as that in *McKune v. Lile* (2002) 536 U.S. 24, 33, falls short for the same reasons: those declarations were both general and outdated. More recent research reveals recidivism rates of low risk sex offenders are consistently low (1%-5%) ten years after release. (Hanson, R. Karl, et al., *High Risk Sex Offenders May Not Be High Risk Forever*, 29 J. of Interpersonal Violence, no. 15, at 2792–2813 (Oct. 2014).) Even high-risk offenders who have not reoffended after substantial time in the community are at no higher risk to commit a new sex crime than any other type of offender. (*Id.*)

Indeed, in 2016 CASOMB released an annual report in which it noted "the reduction in sex offender recidivism for parolees." (See CASOMB Annual Report (2016), found at http://www.casomb.org/docs/2016_CASOMB_Annual_Report-FINAL.PDF.) Even more recently, CDCR reported that for the fiscal year of 2016–17 the one-year conviction rate for its high risk registrant parolees receiving treatment was 9.7 percent, significantly lower than that for the general offender, and more often than not concerned misdemeanors and overwhelmingly consisted of nonviolent non-sex-related offenses. (CDCR Division

of Correctional Policy Research and Internal Oversight Office of Research: 2019 SEX OFFENDER TREATMENT PROGRAM OUTCOME EVALUATION REPORT, An Evaluation of Sex Offender Management Program Participants in Fiscal Year 2016-17, found at https://sites.cdcr.ca.gov/research/.) That report shows that recidivism for sex registrants now is less than half that for the general offender. (*Ibid*.)

CDCR also points to "historical analogues for the regulatory sex-offender exclusion" (OB 33), but those analogues notably consisted of explicit exceptions written into the law. (See OB 33–34.) Significantly, the electorate in the Three Strikes Reform Act of 2012 disqualified from its reforms not all sex offenders or registrants, but only those whose prior convictions were particularly serious or violent and whose eligibility hence would compromise the proposition's purposes. (See, e.g., Pen. Code, § 1170.126, subd. (e) (3).) That was the electorate's decision there, too. CDCR's substitution of a blanket ban on registrants for the more considered ban of them the electorate chose with its disqualification only of current violent registrant offenders treads to close to the constitutional limits of legislation to permit CDCR's administrative view of the matter.

For the same reasons that the court in *People v. Edwards* (2019) 34 Cal.App.5th 183 found that the legislative carve-out of One Strike offenders from early parole consideration under the Youthful Offender Act violated the Equal Protection Clause, CDCR's interpretation of Proposition 57 that provides a similar carve-out from early parole consideration for those with prior registrant convictions raises a substantial question of its constitutionality under the due process and equal protection

clauses of our federal and state constitutions. That arbitrary and irrational differential treatment is strikingly illustrated by the cases before this Court. For example, Gadlin is deprived of early parole consideration based on his registrant status for long-ago felony registrant offenses, while all other persons convicted of nonviolent felonies are granted early parole consideration no matter how recent or numerous or violent their prior convictions may be. Likewise, Bertram is deprived of early parole consideration based on his registrant status for a misdemeanor conviction even longer ago, when all other persons convicted of a nonviolent *felony* – no matter how serious that felony may be -- are granted early parole consideration. The Department's interpretation that produces such aberrations and irrational treatment should be avoided at all costs. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1374, quoting *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548, inside quotation marks and brackets deleted ["When a question of statutory interpretation implicates constitutional issues, we are guided by the precept that 'if a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.'"]; accord, *People v. Leiva* (2013) 56 Cal.4th 498, 506–507.)

The lower court's opinion here again provides the short answer to CDCR's argument:

> … CDCR argues that its application of the regulations to exclude inmates who have sustained prior registrable convictions is consistent with its determination that registrable sex offenses involve a sufficient degree of violence and registrable inmates represent an unreasonable risk to public safety. These policy considerations, however, do not trump the plain text of section 32, subdivision (a)(1).

(*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 789; see also *In re McGhee*, *supra*, 34 Cal.App.5th at p. 905 ["Despite the policy considerations advanced by the department, section 32, subdivision (a)(1) mandates that these prisoners receive parole consideration if they have been convicted of a nonviolent felony and have served the full term of their primary offense"].)

In the final analysis, the electorate endorsed a provision that provided all nonviolent offenders with early parole consideration, but that conditioned any actual grant of early parole on a Board determination that parole of the individual was consistent with public safety. Just as the lower court advised in this case:

> We note that this holding only permits Gadlin early parole consideration, not release. The Board of Parole Hearings will be permitted to consider his full criminal history, including his prior sex offenses, in deciding whether a grant of parole is warranted. (Pen. Code, § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2449.32, subd. (c).).

(*In re Gadlin*, *supra*, 31 Cal.App.5th 784.)

The *McGhee* court was even more forceful on this point:

> We unequivocally reject the assertion that compliance with Proposition 57 will undermine public

> safety. Before granting parole the board will continue to review the record of an eligible inmate to determine whether the inmate presents a risk to public safety. (Cal. Code Regs., tit. 15, § 2449.4, subd. (b).) In doing so, the board must consider "all relevant and reliable information." (*Ibid.*) There is no reason to assume that the board will be insensitive to the concern for public safety or will grant parole to those who present a public danger. By enforcing the mandate of section 32, subdivision (a)(1), we hold that McGhee and similar inmates are entitled to parole consideration, not that they are necessarily entitled to release.

(*In re McGhee*, *supra*, 34 Cal.App.5th at p. 913.)

Conclusion

For the reasons set forth above, the Court should affirm the judgment of the Court of Appeal.

Respectfully submitted,

Dated: November 14, 2019 By: /s/ Michael Satris

Attorney for Petitioner
Gregory Gadlin

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **11,668** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: November 14, 2019 By: /s/ Michael Satris

DECLARATION OF SERVICE

Case Name: In re Gadlin

No.: S254599 / B289852

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause. I am employed in the County of Marin, State of California. My business address is P.O. Box 337, Bolinas, California 94924. My electronic service address is satrislaw.eservice@gmail.com. On November 14, 2019, I electronically served the attached ANSWER BRIEF ON THE MERITS either by transmitting a true copy via this Court's TrueFiling system or by direct email as indicated. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 14, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Law Office of Michael Satris, addressed as follows:

Gregory Gadlin, C-23429 CTF Fac. C, GW-203L P.O. Box 689 Soledad, CA 93960-0689 (Petitioner) Served via U.S. Mail	Clerk of the Court California Court of Appeal Second Appellate District, Division 5 2dl.clerk5@jud.ca.gov Served by the California Supreme Court and via email
Sherri R. Carter, Clerk of the Court Attn: Hon. William C. Ryan, Judge Los Angeles County Superior Court 111 North Hill Street Los Angeles, CA 90012 Served via U.S. Mail	California Appellate Project capdocs@lacap.com served via email
Attorney General of the State of California Served via TrueFiling	Charles Chung, Deputy Attorney General Served via TrueFiling

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct, and that this declaration was executed on November 14, 2019, at Bolinas, California.

/s/ Sarah Bruce
Signature