In the Supreme Court of the State of California

In re **GREGORY GADLIN,** **On Habeas Corpus.**	Case No. S254599

Court of Appeal, Second Appellate District, Case No. B289852
Los Angeles County Superior Court, Case No. BA165439
The Honorable William C. Ryan, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the Court of Appeal interpret article I, section 32 of the Constitution contrary to voter intent by holding that the Department of Corrections and Rehabilitation must give parole consideration to offenders with a prior conviction for a registrable sex offense, despite the Department's regulatory public safety determination and the assurances to the voters that sex offenders would be excluded from parole consideration?

INTRODUCTION

Well over a decade ago, the State's prison system was placed under the supervision of a three-judge, federal court panel, which ordered the State to substantially reduce its prison inmate population. The State made significant progress, but the problem persisted. By 2014, the State faced the specter of federal courts ordering the release of state prisoners if the Department did not meet and maintain court-ordered caps on population.

Rather than allow the federal courts to control this important aspect of the state criminal justice system, then-Governor Edmund G. Brown Jr. authored Proposition 57, the Public Safety and Rehabilitation Act of 2016. The successful proposition added a constitutional provision that, among other things, 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." (Cal. Const., art. 1, § 32, subd. (a)(1).) This provision—Section 32—allows eligible inmates to be considered for parole before they have served additional time related to other crimes or sentencing enhancements. Section 32 also directs the Department of Corrections and Rehabilitation to "adopt regulations in furtherance of these provisions," and requires the Department's Secretary to certify that the regulations "protect and enhance public safety." (*Id.*, subd. (b).)

As the concurrence below correctly observed, precisely who would benefit from Proposition 57's parole consideration was left "fuzzy" and "ambiguous at the margins." (*In re Gadlin* (2019) 31 Cal.App.5th 784, 793, 796 (conc. opn. of Baker, J.).) It therefore fell to the Department to draw the law's outer boundaries by regulation, exercising its broad, quasi-legislative power to fill up the details left to the Department's discretion. In this effort, the Department was guided by the Governor's ballot-pamphlet assurances to the voters, including that "the most dangerous criminals" would be "[kept] behind bars"; that "sex offenders, as defined in Penal Code [section] 290," would continue to be excluded from parole consideration; and that protection of public safety would be paramount. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor and rebuttal to argument against Prop. 57, pp. 58-59.) In the Department's expert view, continuing to exclude all registered sex offenders from parole consideration under Proposition 57 was consistent with voter intent and best protected the public against this class of offenders whose release from prison presents unique risks to public safety.

The Court of Appeal held the text of subdivision (a)(1) of Section 32 prohibits this regulatory exclusion, as applied to registered sex offenders serving time for a non-sex-offense related conviction. (*In re Gadlin*, *supra*, 31 Cal.App.5th at pp. 789-790.) This was error for two reasons. First, the constitutional text cannot be read in isolation, but must be informed by the voters' understanding of Proposition 57, as set out in the ballot pamphlet. And the voters understood that all registered sex offenders would be excluded from this parole process. Second, Section 32 recognizes an overarching public safety objective. Considering the rulemaking provision of subdivision (b) in context of Section 32's overall public safety purpose, Section 32 is properly understood as authorizing the Department to exclude

all registered sex offenders from the nonviolent parole process to fulfill its constitutional obligation to protect public safety.

The Court should reverse the decision below and hold that the Department may apply the sex-offender exclusion to petitioner Gadlin and those similarly situated.

BACKGROUND

I. PRISON OVERCROWDING, FEDERAL INTERVENTION, AND THE STATE'S UNIFORM JUDGMENT REGARDING SEX OFFENDERS AND CRIMINAL JUSTICE REFORMS

In the decades following enactment of the state Uniform Determinate Sentencing Act of 1976, California's prisoner population surged. (See *Coleman v. Schwarzenegger* (E.D.Cal. 2009) 922 F.Supp.2d 882, 908.) Despite executive and legislative efforts to manage the prisoner population, state prisons became overcrowded. (See *id.* at pp. 484-485; *Brown v. Plata* (2011) 563 U.S. 493, 502-503 [131 S.Ct. 1910, 1923-1924, 179 L.Ed.2d 969].) In 2009, a three-judge panel of the federal court ordered the State "to reduce the prisoner population to 137.5% of the adult institution's total design capacity." (*Coleman v. Schwarzenegger*, at p. 962.) The State implemented measures that released approximately 9,000 prisoners, but the federal court's order required the release of up to 37,000 additional prisoners within a two-year window. (See *Brown v. Plata*, at pp. 501, 542.)

The Legislature endeavored to solve the overcrowding crisis at the state level to avert indiscriminate release orders from the federal courts. In 2011, it passed the Criminal Justice Realignment Act to implement community-based programs for certain felony offenders as an alternative to state-prison sentences. (Stats. 2011, ch. 15, § 1.) Under this reform, a defendant would still receive a state prison sentence, however, if he or she was convicted of a statutorily defined violent or serious felony offense or

had a current or prior conviction for a registrable sex offense. (Pen. Code, § 1170, subd. (h)(3).)

In 2014, the voters approved Proposition 47, the Safe Neighborhoods and Schools Act, to reduce certain felony offenses to misdemeanors. (Pen. Code, § 1170.18.) Proposition 47, like the sex-offender exclusion in this case, disqualifies from its provisions "a person who has one or more prior convictions . . . for an offense requiring registration pursuant to subdivision (c) of Section 290." (Pen. Code, § 1170.18, subd. (i).)

Despite these reforms, in 2014, the federal court ordered the State to implement additional measures to reduce the prison population. (Mot. for Jud. Not. Exhs. A, B [federal court's orders in consolidated cases *Coleman v. Brown* (E.D.Cal., No. 2:90-cv-00520) and *Plata v. Brown* (N.D.Cal., No. C01-1351)].) The federal court authorized the Department to "[c]reate and implement 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." (Mot. for Jud. Not. Exh. A at p. 3.)

The Department then established a parole process for "non-violent, *non-sex-registrant*, second-strike offenders who have served 50 percent of their sentence."[1] (Mot. for Jud. Not. Exh. C [Department's report to three-judge court], italics added.) In its report to the federal court, the Department was clear that an inmate who "is required to register pursuant to Penal Code section 290 based on a current or prior sex-offense

[1] The plaintiffs in that case did not appear to have contested this exclusion of sex offenders from parole.

conviction" is not eligible for this parole process.[2] (*Id.* at p. 6.) The Department explained the "[exclusionary] criteria are designed to prevent the release of inmates who pose an unreasonable risk to public safety." (*Id.* at p. 7.)

After Proposition 57 passed, the *Coleman*/*Plata* parties stipulated that Proposition 57's parole process "mirrors the existing court-ordered nonviolent second-strike parole process . . . [and] will utilize the same public safety screening criteria." (Mot. for Jud. Not. Exh. D at p. 25.) The three-judge court accepted the parties' stipulation, suspended its order relating to the court-ordered parole process, and authorized the Department to "implement the nonviolent offender parole process [under Proposition 57]." (Mot. for Jud. Not. Exh. E at p. 30.)

II. PROPOSITION 57'S BALLOT MATERIALS ASSURED VOTERS THAT SEX OFFENDERS WOULD BE EXCLUDED FROM NONVIOLENT PAROLE

Having achieved the benchmarks required by the federal court's order in the *Coleman/Plata* cases, Governor Brown sought to forestall recurrence of the prison-overcrowding problem. (See Ballot Pamp., Gen. Elec. (Nov.

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[2] The Sex Offender Registration Act, as codified in Penal Code section 290, defines a sex offender as a person who was convicted in California of an enumerated sex offense (Pen. Code, § 290, subd. (c)), was convicted in another court of an offense that would be punished as an enumerated sex offense (*id.*, § 290.005), was adjudicated to be a sexually violent predator or a mentally disordered sex offender (*id.*, §§ 290.001, 290.004), or was ordered by a court to register as a sex offender (*id.*, § 290.006). Because of his previous convictions, Gadlin is required to register under Penal Code section 290, subdivision (c). (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 786.)

8, 2016) argument in favor of Prop. 57, p. 58.)[3] He authored Proposition 57 to provide a durable solution to prison overcrowding and refocus the criminal justice system on rehabilitation by offering inmates additional credits for rehabilitative programming and, for low-risk inmates, an opportunity for parole. (*Ibid.*) Governor Brown patterned Proposition 57's signature parole reform in part after the existing parole process for nonviolent offenders, which, as discussed, excluded registered sex offenders. (See Mot. for Jud. Not. Exh. D at p. 25 [parties' stipulation to three-judge court that the "[Proposition 57 parole] process mirrors the existing court-ordered nonviolent second-strike parole process"].)

Governor Brown and Proposition 57's proponents explained the parole reform would reduce wasteful spending on prisons but would "[k]eep[] the most dangerous offenders locked up." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.) And, they noted that, to secure public safety, Proposition 57 "requires the Secretary of the Department of Corrections and Rehabilitation to certify that these policies [for credits and parole] are consistent with protecting and enhancing public safety." (*Ibid*.)

Opponents of Proposition 57 argued that Governor Brown's parole reforms would endanger public safety by authorizing parole release for "dangerous criminals" like sex offenders. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument in favor of Prop. 57, p. 58.) The opponents claimed, for example, that Proposition 57 would offer parole "to criminals who are convicted of many violent and horrible crimes, including . . . rape

[3] Exhibit 3 to the return to the order to show cause filed in the Court of Appeal.

of an unconscious victim, human sex trafficking" (*id.*, rebuttal to argument in favor of Prop. 57, p. 58) as well as to inmates convicted of rape by intoxication, human trafficking involving sex acts with minors, lewd acts against a child, and failing to register as a sex offender (*id.*, argument against Prop. 57, p. 59). The opponents also claimed that inmates "previously convicted of murder, rape and child molestation would be eligible for early parole." (*Id.*, rebuttal to argument in favor of Prop. 57, p. 58.)

The proponents and Governor Brown refuted these assertions, emphasizing that Proposition 57 "[d]oes NOT and will not change the federal court order that excludes sex offenders, as defined in Penal Code 290, from parole." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) The reference to "the federal court order" was to the parole process that the Department established to comply with the federal-court-ordered population caps.[4] (See Mot. for Jud. Not. Exhs. A, B.) As noted, the Department excluded sex offenders from this parole process for public safety reasons. (Mot. for Jud. Not. Exh. C at pp. 14-16.) Governor Brown assured voters that if Proposition 57 passed, sex offenders would continue to be excluded, consistent with existing policy. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.)

To reaffirm to the voters that Proposition 57 promotes public safety, the proponents stated that the proposition's reforms would "be

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[4] The Department created the parole process as authorized by the federal court's orders, but there is no federal court order excluding sex offenders from parole. (See Mot. for Jud. Not. Exhs. A at p. 3, B at p. 8.) Rather, it was the Department's policy, for public safety reasons, to exclude sex offenders from the court-ordered parole process. (See pp. 8-9, *infra*.)

implemented through Department of Corrections and Rehabilitation regulations developed with public and victim input and certified as protecting public safety." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.)

III. THE VOTERS APPROVED PROPOSITION 57, ADDING ARTICLE I, SECTION 32 TO THE CONSTITUTION

On November 8, 2016, California voters approved Proposition 57. The proposition added article I, section 32 to the California Constitution, which 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 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.)

IV. AS REQUIRED BY SECTION 32, THE DEPARTMENT ADOPTED REGULATIONS ESTABLISHING THE NONVIOLENT PAROLE PROCESS

Following Proposition 57's passage, the Department initiated a rulemaking process.[5] The Secretary certified the proposed regulations as protecting and enhancing public safety, and the Department filed them with the Office of Administrative Law. (Certif. of Operational Necessity.)[6] The proposed regulations described the nonviolent parole process to carry out Proposition 57 and, consistent with the Department's longstanding policies and practices, excluded any inmate "[c]onvicted of a sexual offense that requires registration as a sex offender under Penal Code section 290." (Former Cal. Code Regs., tit. 15, § 3490, subd. (a)(3), Register 2017, No. 15 (Apr. 13, 2017).)

Following several public comment periods and a public hearing, the Department submitted a final statement of reasons in support of the regulations on April 30, 2018. (Apr. 30, 2018 Final Statement of Reasons, at pp. 1-3.)[7] The Department stated, "Public safety requires that sex offenders be excluded from nonviolent parole consideration." (*Id.* at p. 20.)

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[5] The Secretary of the Department exercises plenary authority over "the supervision, management and control of the state prisons" as well as "the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ." (Pen. Code, § 5054.) To these ends, the Legislature vests the Secretary with broad power to "prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons . . . ." (*Id.*, § 5058, subd. (a).)

[6] Exhibit 4 to the return to the order to show cause filed in the Court of Appeal.

[7] Exhibit 6 to the return to the order to show cause filed in the Court of Appeal.

The Department noted that the crimes triggering sex-offender registration under Penal Code section 290 "reflect the determination of the People of the State of California (through initiatives and the Legislature) that '[s]ex offenders pose a potentially high risk of committing further sex offenses after release from incarceration or commitment, and [the] protection of the public from reoffending by these offenders is a paramount public interest.'" (*Id.*, quoting Pen. Code, § 290.03, subd. (a)(1), second bracketed insertion added.)

The Department also noted that a sex offense outside the statutory definition of a violent felony nevertheless "involves some degree of physical force, coercion, or duress with the victim, often a minor." (Apr. 30, 2018 Final Statement of Reasons, at p. 20.) Regarding the recidivism risk of sex offenders, the Department quoted a United States Supreme Court opinion that stated, "'When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.'" (*Id.*, quoting *McKune v. Lile* (2002) 536 U.S. 24, 33 [122 S.Ct. 2017, 2025, 153 L.Ed.2d 47].)

On May 11, 2018, the Department filed amended regulations that revised the sex-offender exclusion. (Cal. Code Regs., tit. 15, § 3491, Register 2018, No. 18 (May 1, 2018).) The revised regulation provided that an inmate is ineligible for parole consideration if "[t]he 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." (*Id.*, subd. (b)(3).)

On December 26, 2018, the Department filed supplemental amendments to the regulations as required by *In re Edwards* (2018) 26

Cal.App.5th 1181 (*Edwards*), which held indeterminately sentenced inmates are also eligible for parole consideration under Proposition 57.[8] (Cal. Code Regs., tit. 15, §§ 3490 et seq., Register 2018, No. 52 (Jan. 1, 2019).) Together, these amendments establish the procedures for inmates who qualify as a "determinately-sentenced nonviolent offender" (*id.*, § 3490, subd. (a), internal quotations omitted) and those who qualify as an "indeterminately-sentenced nonviolent offender" (*id.*, § 3495, subd. (a), internal quotations omitted).

The final, approved regulations identify inmates eligible for nonviolent parole consideration through lists of exclusionary criteria. For example, the regulations exclude an inmate who is condemned to death, serving a life sentence without the possibility of parole, or serving a sentence for a violent felony. (Cal. Code Regs., tit. 15, §§ 3490, subd. (a), 3495, subd. (a).) They also exclude any inmate who has been scheduled for a youth-offender parole hearing or an elderly parole hearing or will be eligible for such a hearing within one year. (*Id.*, § 3491, subd. (b)(2).) And the regulations exclude from the nonviolent parole process any inmate who "is convicted of a sexual offense that currently requires or will require registration as a sex offender under the Sex Offender Registration Act . . . ." (*Id.*, §§ 3491, subd. (b)(3), 3496, subd. (b).) Inmates who do not fall into one of the excluded categories are eligible for parole consideration by the Board of Parole Hearings. (*Id.*, §§ 3491, subd. (a), 3496, subd. (a).)

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[8] Under the Three Strikes law, a defendant with two or more qualifying felony convictions is sentenced to an indeterminate term of life in prison for a current conviction of a serious or violent felony offense. (Pen. Code, § 667, subd. (e)(2)(A).) Before *Edwards*, inmates serving an indeterminate sentence for a nonviolent felony offense were not eligible for parole consideration.

STATEMENT OF THE CASE

In 2007, Gregory Gadlin was convicted of assault with a deadly weapon. (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 786.) Gadlin was previously convicted of forcible rape and forcible child molestation, which subjected him to sentencing under the Three Strikes law to an indeterminate term of 35 years to life in prison. (*Id.* at pp. 786-787.) Gadlin's convictions for forcible rape in violation of Penal Code section 261 and forcible child molestation in violation of Penal Code section 288 required him to register as a sex offender. (Pen. Code, § 290, subd. (c); *In re Gadlin*, at p. 786.)

On May 7, 2018, Gadlin filed a petition for writ of habeas corpus in the Second District Court of Appeal, Division Five. (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 787.) On May 25, 2018, the Court of Appeal appointed counsel and ordered counsel to file an amended petition addressing the validity of the regulations adopted under Proposition 57. (*Ibid.*) On August 24, 2018, Gadlin, through his appointed counsel, filed an amended petition claiming his exclusion from the nonviolent parole process was inconsistent with Proposition 57. (*Ibid.*)

The Court of Appeal issued an order to show cause on August 31, 2018. (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 787.) Respondent filed a return and Gadlin filed a traverse. (*Ibid.*)

On January 28, 2019, the Court of Appeal issued a published decision granting the petition. (*In re Gadlin*, *supra*, 31 Cal.App.5th at pp. 786-790.) The court determined that the Department's adoption of new regulations, to address the decision in *Edwards*, mooted the issues related to Gadlin's exclusion from Proposition 57 parole based on his indeterminate sentence. (*In re Gadlin*, at p. 787.) The court thus considered only Gadlin's argument that Section 32 prohibits the Department from excluding him from the nonviolent parole consideration process based on his prior convictions for

registrable sex offenses. (*Ibid.*) The court concluded that "exclud[ing] Gadlin and all similarly situated inmates from early parole consideration runs afoul of section 32(a)(1) [of the California Constitution]." (*Id.* at p. 790.)

Focusing only on Proposition 57's text, the Court of Appeal held that the references to "'convicted' and 'sentenced'" as well as "the singular form in 'felony offense,' 'primary offense,' and 'term'" all indicated that Proposition 57 intended parole eligibility to be based on the inmate's current offense without regard to past convictions. (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 789.) The court held that the Department's "policy considerations [related to the public safety risks posed by sex offenders] . . . do not trump the plain text of section 32(a)(1)." (*Ibid.*) The court expressed no opinion as to whether the exclusion of an inmate whose *current* offense requires registration under Penal Code section 290 is consistent with Proposition 57. (*Id.* at p. 790.) It directed the Department "to consider Gadlin for early parole consideration within 60 days of remittitur issuance." (*Ibid.*)

Concurring in the disposition, Justice Baker expressed his view that the regulatory exclusion of current sex offenders is not, on its face, inconsistent with Proposition 57. (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 790-791 (conc. opn. of Baker, J.).) Justice Baker reasoned that the Department's exercise of rulemaking authority to bar current-offense sex offenders from parole appeared consistent with voter intent "because a clear textual indication that Proposition 57 was intended to bar regulatory exclusion of current-offense sex offenders is absent . . . ." (*Id.* at p. 791.) In his view, Proposition 57 was "fuzzy at the margins" as to which inmates could receive parole consideration, so the "textually explicit grant of authority [to the Department] must at least extend to clarifying the margins of what constitutes a nonviolent felony offense." (*Id.* at pp. 793-794.) The

concurrence noted that "Proposition 57's proponents assured voters that those required to register as sex offenders would not benefit from the initiative," but concluded that assurance referred only to inmates whose current offense was a registrable sex offense and not to those inmates with a prior sex offense conviction. (*Id.* at p. 796.)

The Court of Appeal's decision became final on February 27, 2019.

STANDARD OF REVIEW

The Court reviews a regulation, as with any action by a state agency, with a presumption of validity. (*Assn. of Cal. Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 389 (*ACIC*), citing *Credit Ins. General Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657 (*Payne*) and Gov. Code, § 11343.6.) "[T]he burden of proof is on the party challenging the regulation." (*Payne*, at p. 657.)

Where an agency exercises "a portion of [the Legislature's] lawmaking power," the resulting quasi-legislative regulations have "the dignity of statutes[.]" (See *ACIC, supra*, 2 Cal.5th at pp. 396-397, citations and quotations omitted.) Accordingly, when reviewing a quasi-legislative regulation's validity, a court undertakes a limited review to determine whether the regulation is within the rulemaking authority conferred by legislative mandate and, if so, whether the regulation is reasonably necessary to effectuate the legislation's purpose. (*Id.* at p. 397; *In re Cabrera* (2012) 55 Cal.4th 683, 688, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11.) To this end, courts consider "whether the agency reasonably interpreted its power" or "whether the regulation is 'reasonably designed to aid a statutory objective.'" (*Payne, supra*, 16 Cal.3d at p. 657, quoting *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal.App.3d 177, 187.) As this Court has cautioned, "a court may not substitute its independent judgment for that of

the administrative agency on the facts or on the policy considerations involved." (*Payne*, at p. 657.) Where an agency exercises delegated "responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only where the agency has clearly overstepped its statutory authority or violated a constitutional mandate." (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356.)

An interpretive rule, in contrast, "represents the agency's understanding of the statute's [or constitutional provision's] meaning and effect—consequential, but not an exercise of delegated lawmaking power." (See *ACIC, supra*, 2 Cal.5th at p. 397.) In that case, "a court must also consider whether the administrative interpretation is a proper construction . . . ." (*Ibid.*) In answering that question, while a court takes ultimate responsibility for construing the statute or provision, exercising independent judgment, it "'accords great weight and respect to the administrative construction.'" (*Id.*, quoting *Yamaha*, 19 Cal.4th at p. 12.)

Some regulations "defy easy categorization." (*ACIC, supra*, 2 Cal.5th at p. 397.) "[I]n certain circumstances, a regulation may have both quasi-legislative and interpretive characteristics—'as when an administrative agency exercises a legislatively delegated power to interpret key statutory terms.'" (*Id.*, quoting *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 799.) In such cases, "[i]t may be helpful instead to imagine 'quasi-legislative' and 'interpretive' as the outer boundaries of a continuum measuring the breadth of the authority delegated" to the agency, with greater deference afforded to agency rules at the quasi-legislative end. (*Id.* at p. 397.)

ARGUMENT

In carrying out its obligation under Section 32, the Department did not err in enacting a nonviolent parole regulation that excludes inmates previously convicted of sex offenses requiring registration. The Department was charged with filling up the details of the law by subdivision (b) of Section 32 and, in particular, with defining who qualifies for parole consideration under subdivision (a)(1) and ensuring that the regulatory parole scheme protects public safety. It reasonably considered not just the words of subdivision (a)(1), but also what voters were told in Proposition 57's ballot pamphlet. Based on those materials, the Department concluded that the voters intended to exclude all registered sex offenders from parole consideration, as was the longstanding practice. Further, the Department and the Secretary, exercising judgment and discretion, determined under the authority granted by subdivision (b) that continuing to exclude all registered sex offenders from parole consideration served to "protect and enhance public safety." For these reasons, the Court should uphold the regulatory sex-offender exclusion as applied in this case.

I. THE DEPARTMENT PROPERLY CONSTRUED SECTION 32, SUBDIVISION (a)(1) TO GIVE EFFECT TO THE VOTERS' INTENT TO EXCLUDE ALL SEX OFFENDERS FROM PAROLE CONSIDERATION

The court below considered the wording of Section 32, subdivision (a)(1), alone, to invalidate the sex-offender exclusion. (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 789.) This Court has often discouraged this type of narrow and literalist interpretation where it would work against intent. (See, e.g., *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th

707, 726 [explaining that literal construction cannot prevail over contrary legislative intent].)[9]

The Department, in contrast, properly approached the interpretation of Section 32's definition of eligible inmates. It interpreted Section 32 to "'determine and effectuate the intent of those who enacted the constitutional provision at issue.'" (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445, quoting *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418.) "Where a law is adopted by the voters, 'their intent governs.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 879, quoting *People v. Jones* (1993) 5 Cal.4th 1142, 1146.) Indeed, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act[.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; *Calatayud v. State of Cal.* (1998) 18 Cal.4th 1057, 1065 (*Calatayud*), quoting *People v. Pieters* (1991) 52 Cal.3d 894, 898-899.)

To discern voter intent for Section 32, its "words or phrases are not to be viewed in isolation; instead, each is to be read in the context of the other

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[9] See also *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 444-445 (rejecting literal construction that Legislature did not intend); *Arias v. Superior Court* (2009) 46 Cal.4th 969, 979 ("A literal construction of an enactment, however, will not control when such a construction would frustrate the manifest purpose of the enactment as a whole"); *Webster v. Superior Court* (1988) 46 Cal.3d 338, 344 (observing "[t]hat legislative intent must prevail over literal interpretation"); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 401-402 (rejecting literal interpretation that contravenes legislative intent); *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105 (same); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 (same).

provisions of the Constitution bearing on the same subject." (*Fields v. Eu* (1976) 18 Cal.3d 322, 328; see *Calatayud*, *supra*, 18 Cal.4th 1057, 1064-1065.) This means the 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. (See *Calatayud*, at p. 1065; see also *People v. Buycks*, *supra*, 5 Cal.5th at p. 880 ["the statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme"]; *People v. Cooper* (2002) 27 Cal.4th 38, 45 ["we seek to discern the sense of [the statutory] language, in full context, in light of its purpose"].)

A. The Secretary Was Charged with Defining Which Inmates Qualify for Nonviolent Parole Consideration

Subdivision (a)(1) of Section 32 provides parole consideration to "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison." The broadest qualifier—"sentenced to state prison"—limits this provision to individuals currently incarcerated in state prison, rather than in a county jail or other facility. (Cal. Const., art. I, § 32, subd. (a)(1); see Pen. Code, § 1170, subd. (h)(1) [specifying imprisonment in a county jail for certain felony convictions].) Within the sphere of all state prisoners, this provision narrows parole eligibility to those "convicted of a nonviolent felony offense." (Cal. Const., art. I, § 32, subd. (a)(1).) Which state prisoners meet this criterion is not clear from the subdivision (a)(1)'s text alone.

Section 32 does not define "convicted" or "nonviolent felony offense." "The word 'convicted' conveys no self-evident meaning; its import must be gathered from the overall context in which it appears."

(*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008.) And "nonviolent" similarly lacks a firm definition. (See, e.g., Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57, p. 56 ["the measure and current law do not specify which felony crimes are defined as nonviolent"].)

Because the Secretary has "substantive lawmaking power" to adopt quasi-legislative rules (*In re Cabrera*, *supra*, 55 Cal.4th at p. 688), the rulemaking power conferred on him by subdivision (b) necessarily includes the authority to "fill up the details" and gaps of Section 32's parole scheme. (See *ACIC*, *supra*, 2 Cal.5th at p. 391, citing *Ford Dealers Assn.*, *supra*, 32 Cal.3d at pp. 362-363; Gov. Code, § 11342.600 [defining regulation as a rule or regulation "adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure"].)

Looking at Section 32 as a whole, the imprecision of subdivision (a)(1)'s text indicates the Secretary properly exercises his quasi-legislative authority, conferred by subdivision (b), to define which inmates qualify for nonviolent parole consideration. The sex-offender exclusion accomplishes this. It is a regulation that, in part, identifies the inmates who are eligible for parole consideration. (See Cal. Code Regs., tit. 15, §§ 3491, subd. (b)(3), 3496, subd. (b).) An inmate who does not fall into one of the excluded categories is eligible to be considered for parole by the Board of Parole Hearings. (*Id.*, §§ 3491, subds. (a)-(b), 3496, subds. (a)-(b).)

The Court has upheld on a number of occasions regulations that, like this one, clarifies an imprecise statute. For example, in *ACIC*, the Court considered a regulation adopted by the Insurance Commissioner, who is charged with administering the Unfair Insurance Practices Act. (*ACIC*, *supra*, 2 Cal.5th at p. 384-385.) The regulation imposed specific requirements on an insurer when providing an estimate of the replacement cost of a home. (*Id.*, at p. 384.) In affirming the regulation, the Court

determined the Commissioner's authority included the power to "interpret or make specific" the statutory bar on deceptive or misleading statements. (*Id.* at p. 393.) This was in part because the statute vesting the Commissioner with rulemaking authority used "open-ended language that implicates policy choices of the sort the agency is empowered to make." (*Ibid*.)

And in *Moore v. California State Board of Accountancy* (1992) 2 Cal.4th 999, the Court considered a regulation that prohibited individuals who were unlicensed by the State Board of Accountancy from using certain titles and designations reserved for licensed accountants. (*Moore*, at p. 1004.) The Business and Professions Code barred certain designations as likely to be confused with licensed accountants and the regulation was challenged as exceeding the scope of the statute. (*Id.* at pp. 1008-1009.) The Court upheld the regulation, holding that the Legislature "delegated to the Board the authority to determine whether a title or designation not identified in the statute is likely to confuse or mislead the public." (*Id.* at p. 1014.) The statute's use of a non-exclusive list of prohibited designations left to the Board of Accountancy's discretion whether to bar additional designations in its enforcement of the statute. (*Id.* at p. 1013-1014, 1020.) To deprive the board of this power, the Court observed, would contravene the statute's intent and purpose. (*Id.* at p. 1014.)

Likewise, subdivision (a)(1) has an undefined scope. Denying the Secretary the power to define which inmates qualify for parole consideration would contradict established precedent governing agency rulemaking and contravene the intent and purpose of subdivision (b) in delegating quasi-legislative authority to the Secretary.

Indeed, the aim of interpreting a law's plain meaning is to illuminate the underlying intent—not to apply a formalistic, textual analysis. (See *Calatayud*, *supra*, 18 Cal.4th at p. 1064.) As this Court has observed,

legislative enactments "'are not inert exercises in literary composition. They are instruments of government, and in construing them "*the general purpose is a more important aid to the meaning* than any rule which grammar or formal logic may lay down."'" (*Webster v. Superior Court, supra*, 46 Cal.3d at p. 344, quoting *United States v. Shirey* (1959) 359 U.S. 255, 260 [79 S.Ct. 746, 749, 3 L.Ed.2d 789] quoting *United States v. Whitridge* (1905) 197 U.S. 135, 143 [25 S.Ct. 406, 408, 49 L.Ed. 696], italics added.) The same is true of ballot initiatives.

B. The Department's Construction of Section 32, Subdivision (a)(1) Reflects the Voters' Intent to Exclude All Sex Offenders from Nonviolent Parole Consideration

The 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. It is necessary to consider subdivision (b) and Proposition 57's ballot materials to discern the "purpose and the intent" for the nonviolent parole process (*People ex rel. Lungren v. Superior Court, supra*, 14 Cal.4th at p. 306) as well the "spirit" of Section 32 (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735).

Proposition 57's ballot pamphlet clearly expresses an intent to exclude registered sex offenders from parole, and that the restriction was not limited to persons serving a term for a current sex offense conviction. Governor Brown and the proponents plainly stated that Proposition 57 "excludes sex offenders, as defined in Penal Code [section] 290, from parole." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) This was in response to the opposing arguments that claimed Proposition 57 would authorize parole consideration not only for inmates currently convicted of certain sex crimes, but also for those currently convicted of "[f]ailing to register as a sex offender" and "previously

convicted of . . . rape and child molestation." (*Id.*, rebuttal to argument for Prop. 57 and argument against Proposition 57, pp. 59-60.)

The 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. Indeed, by refuting that an inmate convicted of failing to register as a sex offender would be eligible for parole consideration, the proponents made explicit Proposition 57's intent to exclude from parole a sex offender in Gadlin's situation: a sex offender whose current conviction is not a violent felony but is required to register for a past sex-offense conviction.

The proponents also emphasized that the Secretary would adopt regulations that implement this parole process "with public and victim input and [that are] certified as protecting public safety." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) A reasonable voter thereby understood that the Secretary would ensure that the adopted regulations would exclude sex offenders from parole, just as the proponents indicated. The presumption "'that the drafters' intent and understanding of the measure was shared by the electorate'" therefore applies. (*People v. Hazelton* (1996) 14 Cal.4th 101, 123, quoting *Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7.)

These are not the only indications in the ballot pamphlet of the intent to exclude sex offenders. The Legislative Analyst identified the existing parole process the Department created to comply with the federal order to reduce the prison population. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57, p. 58.) The proponents did as well, emphasizing the need for an enduring solution to prison overcrowding or else "risk a court-ordered release of dangerous prisoners." (*Id.*, argument in favor of Prop. 57, p. 54.) This is repeated as one of the purposes of the proposition: "Prevent federal courts from indiscriminately releasing prisoners." (*Id.*, text of Prop.

57, § 2, p. 141.) From the ballot pamphlet's repeated references to the federal court order and the Governor's assurance that the policy of excluding sex offenders would continue, the voters approved Proposition 57 with the understanding and the intent that sex offenders would not be considered for parole consistent with existing policy.

The Court should give great weight to the Department's interpretation and, in any event, should not adopt an interpretation that leads to results unintended by the voters. (See, e.g., *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 118 [rejecting interpretation because "[n]othing in the legislative history of the initiative suggests that the voters intended that result"].) The intended result of Proposition 57 is parole reform for nonviolent inmates who are not sex offenders. (See Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor and rebuttal to argument against Prop. 57, pp. 58-59.) The indications in the ballot pamphlet that support the sex-offender exclusion are tantamount to express declarations of voter intent, and the Court should interpret Section 32 to further that intent. (See *City of Alhambra v. County of Los Angeles*, *supra*, 55 Cal.4th at p. 726, quoting *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 716 ["'[w]hen the Legislature has expressly declared its intent, we must accept the declaration'"].)

II. THE DEPARTMENT AND SECRETARY REASONABLY CONCLUDED UNDER SECTION 32, SUBDIVISION (b) THAT EXCLUDING SEX OFFENDERS FROM NONVIOLENT PAROLE CONSIDERATION PROTECTS PUBLIC SAFETY

Section 32 requires the Secretary to exercise his rulemaking authority to protect public safety. (Cal. Const., art. I, § 32, subd. (b).) Specifically, he is required to "certify that these regulations protect and enhance public safety." (*Id.*) The Department and Secretary reasonably interpreted this mandate to mean that even if a class of inmates could theoretically be

included in Section 32's parole program, that class should be excluded if it would otherwise present a public safety risk. The sex-offender exclusion is a valid exercise of this quasi-legislative rulemaking authority. (See *Payne*, *supra*, 16 Cal.3d at p. 657.)

As noted in the final statement of reasons supporting the regulations, the Department identified the well-established risks that sex offenders—because of their recidivism—pose to the public and the restrictions imposed on sex offenders as a result of those risks. (Apr. 30, 2018 Final Statement of Reasons, at p. 20.) It is recognized that, in general, sex offenders pose a "high risk" of reoffense when released from prison (Pen. Code, § 290.03, subd. (a)(1)), and the Legislature requires individuals convicted of a registrable sex offense to register as a sex offender (*id.*, § 290, subds. (b), (c)). A sex offender is subject to this lifetime registration requirement "without regard to when his or her crime or crimes were committed" (*Id.*, § 290.023) and must do so whenever he or she is released from prison (*id.*, § 290.015). The Legislature imposes these requirements because it deems a sex offender to "pose a 'continuing threat to society.'" (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527, quoting *United States v. Bailey* (1980) 444 U.S. 394, 413 [100 S.Ct. 624, 636, 62 L.Ed.2d 575].) The Department and Secretary reasonably concluded that such risk is present whenever the sex offender is released into the community, even if the current offense is not sex-offense related.

There are historical analogues for the regulatory sex-offender exclusion. In 2009, the Legislature enacted Senate Bill 18, which provided a temporary increase in the rate at which prisoners in local custody earned conduct credits for good behavior, but not "[i]f the prisoner is required to register as a sex offender." (Former Pen. Code, § 4019, subds. (b)(2), (c)(2), added by Stats. 2009, 3d Ex. Sess. 2009, ch. 28, § 50 and repealed by Stats. 2010, ch. 426, § 2; see *People v. Brown* (2012) 54 Cal.4th 314,

318, fn. 5.) The same year, the Legislature enacted non-revocable parole and rehabilitative credits to reduce the prisoner population, but excluded from both any person "required to register as a sex offender." (Pen. Code, §§ 2933.05, subd. (e)(3), 3000.03, subd. (a), added by Stats. 2009, 3d Ex. Sess. 2009, ch. 28, §§ 38, 48.) Similarly, when approving Proposition 47 to reduce certain felonies to misdemeanor offenses, the voters barred any inmate from the resentencing provisions who has a previous conviction for a registrable sex offense. (Pen. Code, § 1170.18, subd. (i).) And the Secretary was mindful that the then-existing parole process for non-violent, non-sex-registrant, second-strike inmates excluded inmates with past convictions for registrable sex offenses. (Mot. for Jud. Not. Exh. C at pp. 14-15.)

The voters left the duty to establish regulations that protect public safety to the Secretary's discretion and his judgment. Weighing these risks, in the process of promulgating rules that protect and enhance public safety, invokes the Secretary's expertise in the administration of prisoners, which is subject to deference absent substantial evidence to the contrary. (*Bell v. Wolfish* (1979) 441 U.S. 520, 547-548 [99 S.Ct. 1861, 1878-1879, 60 L.Ed.2d 447]; see *Turner v. Safley* (1987) 482 U.S. 78, 92 [107 S.Ct. 2254, 2263, 96 L.Ed.2d 64] [acknowledging judicial deference to expertise of prison officials]; *In re Jenkins* (2010) 50 Cal.4th 1167, 1175 [same].) Under these circumstances, the Secretary's reasonable, regulatory judgment that inclusion of registered sex offenders posed too great a risk to public safety must be upheld. (See *Payne*, *supra*, 16 Cal.3d at p. 657; *In re Cabrera*, *supra*, 55 Cal.4th at p. 688, quoting *Pitts v. Perluss* (1962) 58 Cal.2d 824, 835 ["The substitution of the judgment of a court for that of the administrator in quasi-legislative matters would effectuate neither the legislative mandate nor sound social policy"].)

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: August 13, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 6,799 words.

Dated: August 13, 2019

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **In re Gregory Gadlin** No.: **S254599**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 13, 2019, I electronically served the attached

OPENING BRIEF ON THE MERITS

by transmitting a true copy via this Court's TrueFiling system. 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 August 13, 2019, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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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 August 13, 2019, at Los Angeles, California.

S. Figueroa
Declarant

Signature

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