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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Petitioner Gregory Gadlin argues that the plain text of Proposition 57—specifically, article I, section 32, subdivision (a)(1) of the California Constitution—"mandates[s]" that the California Department of Corrections and Rehabilitation provide early parole consideration to every person whose current conviction is for a nonviolent felony offense, and the Department has no power to exclude registered sex offenders from this process. (Answer Brief on the Merits [ABM] 8-10, 24-26.) But that bit of text, read in isolation, does not reflect former Governor Brown's promise to voters that Proposition 57 would "not change" the existing practice that "excludes sex offenders, as defined in Penal Code 290, from parole." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57, p. 59.) The textual ambiguity about the classes of inmates who may benefit from Proposition 57 parole consideration, the Department's broad rulemaking powers, the initiative's charge to the Department to promulgate implementing regulations, and the initiative's charge to the Department's Secretary to certify that the regulations "protect and enhance public safety" together provide sufficient authority for the Department's registered sex offender exclusion. That regulation ensures that the public's safety is maintained and the voters receive what they were promised.

ARGUMENT

Gadlin is currently serving a sentence for assault with a deadly weapon; based on that conviction, he is considered a nonviolent offender under the Department's Proposition 57 regulations. (See *In re Gadlin* (2019) 31 Cal.App.5th 784, 786; Cal. Code Regs., tit. 15, § 3490 [cross-referencing crimes and enhancements listed in Penal Code 667.5, subd.

(c)].)[1] Gadlin was previously convicted of forcible child molestation and forcible rape, convictions that require him to register as a sex offender and exclude him from Proposition 57 parole consideration. (*In re Gadlin*, at p. 786; Pen. Code, § 290, subd. (c); Cal. Code Regs., tit. 15, § 3491, subd. (b)(3).) The Department's registered sex offender exclusion serves the voters' intent and does not exceed the Department's rulemaking authority.

I. ELIGIBILITY FOR NONVIOLENT PAROLE CONSIDERATION CANNOT BE DETERMINED FROM THE TEXT OF PROPOSITION 57 ALONE

A. Legal Standard: Interpreting Initiatives

Just as courts must determine the Legislature's intent in interpreting statutes enacted by that body, so too must they discern the voters' intent in interpreting statutes and constitutional provisions enacted by initiative. (*People v. Valencia* (2017) 3 Cal.5th 347, 357.) The starting point is the enactment's text, "because it generally is the most reliable indicator" of intent. (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1232.) Where the meaning of the text of the statute or constitutional provision is clear and unambiguous, it controls. (*People v. Valencia*, at pp. 347, 357.) But courts should not rush to deem an initiative clear on its face by considering only isolated words and phrases. (See, e.g., *id.* at pp. 357-360.) A more searching approach to construction guards against instances in which a too-literal reading of the enactment's text would frustrate, rather than promote, the voters' intent and produce unintended consequences. (See, e.g., *id.* at pp. 358-360, citing *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, and *People v. Hazelton* (1996) 14 Cal.4th 101.)

[1] The regulatory definition of nonviolent offender is not at issue in this case.

To fully understand the voters' intent, courts regularly move beyond the enactment's text to consider extrinsic sources, such as ballot summaries and arguments. (*People v. Valencia, supra*, 3 Cal.5th at p. 364.) Courts "'cannot presume that . . . the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.'" (*Id.* at p. 364, quoting *Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857-858.) In addition, "[w]here uncertainty exists" about the voters' intent, "consideration should be given to the consequences that will flow from a particular interpretation." (*People v. Valencia*, at p. 358.) Intent always remains the lodestar: "'The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 979, quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

B. The Text of Article I, Section 32, Subdivision (a)(1) Does Not Preclude Consideration of Other Evidence of the Voters' Intent

Gadlin contends the text of subdivision (a)(1) of Section 32 is not merely the starting point, but the end of its analysis.[2] (See, e.g., ABM 25.) Again, subdivision (a)(1) states that inmates who are "convicted of a nonviolent felony offense" are eligible for parole consideration.[3] (Cal. Const., art. I, § 32, subd. (a)(1).) Gadlin contends this language imposes

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[2] References in this brief to Section 32 are to article I, section 32 of the California Constitution.

[3] In full, it states: "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." (Cal. Const., art. I, § 32, subd. (a)(1).)

"an explicit duty" on the Department to consider for parole *every* inmate whose current conviction is not a violent felony as defined in Penal Code section 667.5, regardless of any prior convictions for registrable sex offenses. (ABM 8-9, 25, 34, 41.) He asserts that the meaning of subdivision (a)(1) is unambiguous and effectively self-executing. (ABM 9, 10, 33, 41.) But there are at least two cues in Proposition 57 itself that show that the analysis should not end with an isolated consideration of subdivision (a)(1)'s text.

First, Proposition 57 does not define who qualifies as "[a]ny person convicted of a nonviolent felony offense." A term is unambiguous only if it is "not reasonably susceptible of more than one meaning." (*Arias v. Superior Court*, *supra*, 46 Cal.4th at p. 979.) But "[t]he word 'convicted' has no singular meaning; its import must be gathered from the overall context in which it appears." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1008; see Opening Brief on the Merits [OBM] 27-28.) The term "nonviolent felony offense" is also subject to interpretation. (See OBM 27-28.) The legislative analyst, in fact, informed voters that "the measure and current law do not specify which felony crimes are defined as nonviolent[,]" for purposes of Proposition 57, but assumed for its analysis that it would include felony offenses not "specifically defined in statute as violent." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) analysis of Prop. 57, p. 56.)

Gadlin asserts that "convicted" necessarily means that only *current* convictions and their consequences for sex-offender registration can have a role in determining parole eligibility. (ABM 27-29, 41, citing *People v. Woodhead*, *supra*, 43 Cal.3d at p. 1011.) As discussed in the Opening Brief, this Court in *Woodhead* considered the proper interpretation of Welfare and Institutions Code section 1732.5.1, which provides that "'. . . (N)o person convicted of . . . any . . . serious felony, as defined in section 1192.7 of the

Penal Code, committed when he or she was 18 years of age or older shall be committed to Youth Authority.'" (*People v. Woodhead*, at p 1006.) This Court rejected an interpretation of "convicted" to mean "ever convicted," which would have precluded the Youth Authority placement of a minor who was previously convicted of a serious felony committed when he was 18, but who then stood convicted of a nonserious felony. (*Id.* at pp. 1010, 1014.) But the Department is not advancing the interpretation of "convicted" that the Court rejected in *Woodhead*, as Gadlin argues. Rather, the Department's point is that the terms used in subdivision (a)(1) warrant a wider-ranging examination of Proposition 57's context and of voter intent. Indeed, the Court in *Woodhead* considered extrinsic sources to discern that "the authors intended the words 'no person convicted of' in [Welfare and Institutions Code] section 1732.5 to refer exclusively to current convictions." (*People v. Woodhead*, at pp. 1008, 1010, emphasis removed.)

Similarly, this Court did not limit itself to the ballot initiative's bare text in determining the voter's intent in *Silicon Valley Taxpayers' Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 (*Silicon Valley*). In that case, this Court analyzed the word "burden" as used in section 4, subdivision (f) of article XIIID of the California Constitution. (*Silicon Valley*, at p. 444.) That provision restricted how local governments impose real property assessments and shifted the burden of proving the legality of an assessment to the local government in any legal action contesting the assessment's validity. (*Id.* at pp. 445, 448.) The Court explained that the Constitution "does not specify the scope of that burden" and, therefore, the term being "somewhat imprecise," it was necessary for the Court to review the ballot materials to discern voter intent. (*Id.* at p. 445.) The meaning of subdivision (a)(1) is also ambiguous and it is likewise necessary to review Proposition 57's ballot materials to understand what the voters intended.

Second, subdivision (a)(1) must be read in context of Proposition 57's other provisions, which includes subdivision (b). That subdivision provides that "[t]he 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." This part of Proposition 57 reasonably signaled to voters that the Department would continue to have an important role in shaping the implementation of the nonviolent parole consideration process, as it had done in response to the federal court order in *Coleman v. Schwarzenegger* (E.D.Cal. 2009) 922 F.Supp.2d 882. (See OMB 12-14; see also Cal. Const., art. I, sec. 32, subd. (a) [stating that Proposition 57's purposes include "avoid[ing] the release of prisoners by federal court order"].) The subdivision also indicated to the voters that the Secretary would ensure that the implementing regulations—however they might operate and whatever their scope—would keep the public safe. Subdivision (b) makes clear that the Proposition's text is not itself the whole of the nonviolent parole program, but only the framework for that program.

Under these circumstances, it is essential to turn to Proposition 57's ballot materials to fully ascertain what the voters understood they were enacting by voting "yes."

II. THE BALLOT MATERIALS ESTABLISH THAT THE VOTERS INTENDED THAT ALL REGISTERED SEX OFFENDERS WOULD BE EXCLUDED FROM THE NONVIOLENT PAROLE PROCESS

Based on the ballot materials, a reasonable voter would have understood that Proposition 57 would continue to exclude from parole consideration all inmates who are required to register as sex offenders based on prior or current convictions.

As noted in the Opening Brief, under the federal court's supervision, the Department established a parole process for nonviolent second-strike inmates. (OBM 13-15, 34; Mot. for Jud. Not. [MJN] Exhs. A, C, D.) That process excluded all registered sex offenders—those with past or current convictions. (OBM 13-14; MJN Exh. C at pp. 6, 14-16.) However, the specter of more intrusive measures by the federal court to reduce state prison populations still loomed. (*Brown v. Plata* (2011) 563 U.S. 493, 501-502, 511-512 [131 S.Ct. 1910, 1923, 1929, 179 L.Ed.2d 969]; see Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.) A major piece of Governor Brown's solution to the prison overpopulation problem was Proposition 57's parole reform. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.) The nonviolent, second-strike parole process applied only to qualifying inmates serving a "second-strike" sentence, under Penal Code sections 667 and 1170.12, for an offense that is not a violent felony. (MJN Exh. C at p. 19.) Proposition 57 was designed to increase the number of inmates eligible for nonviolent parole consideration. (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.) But the ballot materials did not suggest that Proposition 57 would change the existing policy that excluded all sex offenders from nonviolent parole consideration (OBM 16; Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59).

Starting with the proponents' argument in favor of Proposition 57, Governor Brown, as the lead proponent, urged a "yes" vote to reduce spending on prisons by making nonviolent offenders eligible for parole while "[k]eep[ing] the most dangerous offenders locked up." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.) The opponents argued in their rebuttal that Proposition 57 would endanger public safety by giving parole to "dangerous criminals" like "[t]hose previously convicted of . . . rape and child molestation" (*id.*, rebuttal to

argument in favor of Prop 57, p. 58) and those currently convicted of crimes like lewd acts against a child, rape of an unconscious person, human trafficking involving sex act with minors, and failing to register as a sex offender (*id.*, argument against Prop. 57, p. 59).

Governor Brown directly refuted these contentions. He opened the proponents' rebuttal with this emphatic statement: "Opponents of Prop. 57 are wrong." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) He emphasized that Proposition 57 benefits "deserving" inmates but "keeps dangerous criminals behind bars." (*Ibid.*) The Governor told voters that "dangerous" offenders would be excluded from parole: "Violent criminals as defined in Penal Code 667.5(c) are excluded from parole." (*Id.*, rebuttal to argument against Prop. 57, p. 59.) Further, he reassured voters 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." (*Ibid*.) As discussed in the Opening Brief, this statement was Governor Brown's assurance that the Department's existing policy—formulated in response to the federal court order—of excluding sex offenders from parole consideration would continue if Proposition 57 was enacted. (OBM 15-16, 31-32; see MJN Exh. C at pp. 6, 14-16.) Under these circumstances, the Court should not presume that the voters intended the initiative to jettison the well-established practice to exclude all sex offenders, because that change "was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet." (*See People v. Valencia, supra*, 5 Cal.5th at p. 364, internal quotations omitted.) The change was in fact disavowed by the Governor.

Gadlin suggests that the motive of the voters to exclude sex offenders from Proposition 57 parole consideration cannot be gleaned from the ballot pamphlet. (ABM 36-40.) According to Gadlin, the voters could not have

reasonably understood Governor Brown's reference to the federal court order to mean that all registered sex offenders would be excluded from Proposition 57's expanded parole consideration. (ABM 40-41.) Further, he argues that statements made in the argument section of the ballot pamphlet are "unhelpful" in evaluating voter intent because voters tend to discount them. (ABM 40-43.) Gadlin's objections fall short.

As a practical matter, voters rely heavily on the analysis and argument in the ballot materials to understand how an initiative will work. (See *People v. Morales* (2016) 63 Cal.4th 399, 406 [observing the "realistic assumption" is that voters "read and were guided by the ballot materials concerning the proposition"].) This is why courts often consider a ballot pamphlet's analysis and arguments to discern what the voters intended. (See, e.g., *ibid.*; *People v. Arroyo* (2016) 62 Cal.4th 589, 593; *Legislature v. Eu* (1991) 54 Cal.3d 492, 505.) Common sense tells us that this is particularly true if the enactment is either extremely long and complex, or, as in this case, concise and highly dependent on future regulatory implementation. It also seems reasonable that voters would give special weight to the arguments and assurances of government experts—here, of the Governor of the State of California. And, ultimately, Gadlin's arguments prove too much. "[T]he assertion that the voters' motivation cannot be determined from the ballot argument could be made in every case involving a measure adopted by vote of the people." (*Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 741.) It is enough, for discerning voter intent, that a court finds the voters had reasonably shared the intent and understanding of the measure by its drafters. (See *People v. Hazelton*, *supra*, 14 Cal.4th at p. 123, quoting *Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7.)

As it did in *Provigo Corporation v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561 (*Provigo Corp.*), the Court should

construe Section 32 and the Department's regulations in light of the "probable intent of the framers," (*id.* at p. 567), which is to create a nonviolent parole process that excludes certain "dangerous" offenders like registered sex offenders. (See *People v. Valladoli* (1996) 13 Cal.4th 590, 603 [noting the intent of the framers expressed in a report to the Legislature was probative of legislative intent]; cf. *Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 743 [rejecting committee reports that "did not represent either the intent of the drafters or of the electorate in approving the measure"].) The Governor's promise to the voters should guide the Court's interpretation here.

III. THE DEPARTMENT IS AUTHORIZED TO EXCLUDE INMATES FROM NONVIOLENT PAROLE CONSIDERATION BASED ON PRIOR SEX-OFFENSE CONVICTIONS

As discussed in the Opening Brief (OBM 25-29, 32-34), and as summarized below, subdivision (b) of Section 32 confers sufficient rulemaking authority on the Department to effectuate the voters' intent to exclude all registered sex offenders from nonviolent parole consideration.

A. The Department Has Broad Rulemaking Authority, and Proposition 57 Charged the Department and the Secretary to Exercise It

At set out in the Opening Brief, subdivision (b) of Section 32 expressly charged the Department to "adopt regulations in furtherance of these provisions"—which the Department understands to mean the letter and the spirit of Proposition 57, taking into account voter intent. Further, subdivision (b) required the Secretary to certify that, at the end of the day, the parole regulations did not endanger public safety. Given the Governor's promise to the voters that sex offenders would be excluded, and given the special recidivism risk posed to the public by this class of offenders, the Department elected by regulation to exclude all registered

sex offenders from nonviolent parole consideration. It was within the Department's authority to do so. (See OBM 25-29, 32-34.)

Gadlin argues that Section 32, subdivision (a) does not confer rulemaking authority on the Department to define the categories of inmates who are eligible for parole consideration. (ABM 9-10, 33.) He believes the Department "arrogate[d] to itself the electorate's policy determination of *who* qualifies for early parole consideration" when its authority is limited only "to determine how that early parole consideration program should work, not who qualified for it." (ABM 9-10, 26-27, italics in original.) And he asserts that the voters would not have "defaulted or punted" to the Department to make determinations about inmate eligibility. (ABM 26.)

Gadlin's limited view of the Department's rulemaking authority is unsupported. The Department has broad, quasi-legislative authority that preexisted Proposition 57. (See *In re Cabrera* (2012) 55 Cal.4th 683, 688.) The Legislature has recognized the Department's "primary objective" is to maintain "public safety," meaning "public safety achieved through punishment, rehabilitation, and restorative justice." (Pen. Code, §§ 1170, subd. (a)(1), 5000.) The initiative itself in subdivision (b) charges the Department with filling in the details of Proposition 57, which the Department understood to include reasonable exclusions consistent with the voters' intent and public safety. (OBM 27-29.) It is the core job of expert administrative agencies like the Department to "to implement, interpret, or make specific the law enforced" in addition to make rules that "govern its procedure." (Gov. Code, § 11342.600; see, e.g., *Assn. of Cal. Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 393 (*ACIC*); *Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1013-1014.) Agencies must exercise their rulemaking power to resolve ambiguities in a law that the agency is charged with implementing. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-247

(*Amador Valley*) [observing that subsequent legislative and regulatory definitions "resolved" the alleged uncertainties in the constitutional provision].)

In many cases, as with Proposition 57, the lawmaking body outlines the "fundamental policy determinations" and vests an agency with "reasonable grants of power" to promote and implement the legislation. (*People v. Wright* (1982) 30 Cal.3d 705, 712.) This is what Proposition 57 does here, and its scheme depends on the exercise of agency discretion. In addition to charging the Department to establish the nonviolent parole process, Proposition 57 provides for additional custody credits that the Secretary, in his judgment, may award. (See Cal. Const., art. I, § 32, subds. (a)(2), (b).)

There is no infirmity in the electorate's delegation of legislative authority to the Department in this instance. (See, *People v. Wright*, *supra*, 30 Cal.3d at pp. 713-714 [stating that "broad delegations to public agencies enjoying the expertise to implement the legislative policy have been upheld"].) In *Credit Insurance General Agents Association v. Payne* (1976) 16 Cal.3d 651 (*Payne*), for example, the Court considered the scope of the Insurance Commissioner's rulemaking power to regulate the amount of compensation that insurance companies pay to agents for the sale of credit life and credit disability insurance. (*Id.* at p. 653.) The Insurance Code grants the Commissioner broad rulemaking authority, but includes no express provision relating to insurance agent compensation. (*Id.* at p. 656.) The absence of such a provision, this Court explained, was not a signal that the Commissioner lacked the power to regulate agent compensation; rather, "it indicate[d] only that the Legislature did not itself desire to determine the proper relationship between this compensation and the effective regulation of the credit insurance market." (*Id.* at p. 656.) The Legislature, in that

case, elected to rely on the Commissioner to regulate that aspect of the insurance market. (*Ibid.*)

Here, similarly, Proposition 57 relies on the Department to regulate the parole consideration process consistent with the voters' intent and public safety. As noted, the voters intended to exclude all sex offenders, as shown by the ballot materials. Further, subdivision (b) expressly ensures that the regulations will protect public safety. Proposition 57 calls upon the Secretary's expertise in this regard, tasking "the Secretary of the Department . . . to certify that these policies [of nonviolent parole] are consistent with protecting and enhancing public safety." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.) The existing policy of excluding sex offenders from parole that Proposition 57 intended to continue was one of these policy considerations. The Secretary evaluated it and ultimately certified the sex-offender exclusion from nonviolent parole consideration as protecting and enhancing public safety.[4]

Certifying that Proposition 57's policies promote public safety is no ministerial act, as Gadlin suggests. (ABM 21.) It is an exercise of the Secretary's quasi-legislative judgment and expertise to ensure the implementing regulations conform to public safety goals. (OBM 18-20; see Cal. Code Regs., tit. 15, §§ 3490-3492, 3495-3497; see also, e.g., *Bell v.*

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[4] Gadlin attempts to refute the Department's and Secretary's (and indeed the Legislature's) conclusions about the recidivism risk posed by registered sex offenders. (See ABM 50-52.) Gadlin's policy disagreements are not relevant to the issues before this Court. Those with differing policy views had the opportunity to air them during the rulemaking process. (See Apr. 30, 2018 Final Statement of Reasons, at pp. 1-2; Gov. Code, § 11346.8, subd. (a).) Now that the Department has made its regulatory decision, however, the question is whether the Department "reasonably" exercised its rulemaking authority or adopted a regulation "reasonably designed" to promote a Proposition 57 objective. (*Payne, supra*, 16 Cal.3d at p. 657.)

Wolfish (1979) 441 U.S. 520, 547-548 [acknowledging "wide-ranging deference" to the prison administrators' exercise of expert judgment over policies and practices relating to order, discipline, and security].) Granted, the sex offender exclusion may also have interpretive aspects. As this Court has noted, many rules "defy easy categorization." (*ACIC, supra*, 2 Cal.5th at p. 397; see also *Christensen v. Lightbourne* (2019) 7 Cal.5th 761, 772.) But the Department's sex offender exclusion regulation does not merely interpret particular terms, such as "nonviolent" or "nonviolent felony offense." Instead, it reflects the Secretary's public safety determinations and makes specific the process by which parole-eligible inmates are identified and considered for parole. As a regulation that is more on the quasi-legislative end of the spectrum, the Court should accord the sex offender exclusion—and the interpretive decisions embedded in it—great weight. (See OMB 23-24; see also *ACIC, supra*, 2 Cal.5th at p. 397).)

B. The Use of the Phrase "Any Person Convicted of a Nonviolent Felony Offense" in Section 32, Subdivision (a)(1) Does Not Preclude the Department's Registered Sex Offender Exclusion

Gadlin contends the Department's sex-offender exclusion regulation "cannot be squared with the language of Section 32(a)(1) itself" because "[n]othing in the language of the proposition even hints at such disqualification," and the regulation acts as an improper revision of Section 32's text. (ABM 42, 47-48.) But in fact Section 32 does contemplate the disqualification of certain inmates. Subdivision (a)(1) provides parole consideration to "[a]ny person convicted of a nonviolent felony offense" which plainly excludes certain inmates based on how those terms are ultimately defined. (See *Amador Valley, supra,* 22 Cal.3d at pp. 245-247.) Moreover, there does not need to be an express provision in subdivision

(a)(1) authorizing the Department to disqualify sex offenders from parole consideration. Section 32 is reasonably interpreted as conferring that authority on the Department to promote public safety.

When construing a constitutional amendment, courts do not adhere to "a strict, literal interpretation of its words," they instead strive for "a practical, commonsense construction consistent with the probable intent of the framers." (*Provigo Corp.*, *supra*, 7 Cal.4th at p. 567; *Amador Valley*, *supra*, 22 Cal.3d at p. 245.) The Court's analysis in *Provigo Corp.* is instructive.

In that case, the Court interpreted article XX, section 22 of the Constitution, which proscribes the sale of alcohol to minors. (*Provigo Corp.*, *supra*, 7 Cal.4th at p. 564.) Several store owners disputed the suspension of their liquor licenses claiming that law enforcement had illegally used minors to purchase alcoholic beverages from their grocery stores. (*Id.* at pp. 564-565.) The store owners complained that the use of these underage decoys was unlawful under the Constitution and therefore created a defense to their license suspensions. (*Id.* at p. 565.) The appellate court agreed. (*Ibid.*) It applied the plain-meaning rule to article XX, section 22 of the Constitution and, in finding no textual indication of any exception allowing law enforcement's use of underage decoys, declared the practice illegal and reversed the license suspensions. (*Ibid.*)

On review, this Court disagreed. It emphasized that "the plain meaning rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose . . . ." (*Provigo Corp.*, *supra*, 7 Cal.4th at pp. 566-567, internal quotations and citations omitted.) The appellate court's failure was its strict adherence to the text of the constitutional provision without considering whether using underage decoys promoted the overall purpose of article XX, section 22 of the Constitution. (See *id.* at p. 567.)

This Court pointed out that "the likely purpose" of the law "is to protect [minors] from exposure to the 'harmful influences' associated with the consumption of [alcoholic] beverages." (*Provigo Corp., supra*, 7 Cal.4th at p. 567, quoting *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 188.) And law enforcement's use of underage decoys (who did not consume the alcoholic beverages they purchased) "clearly *promotes* rather than hinders the foregoing salutary purpose." (*Provigo Corp.*, at p. 567, italics in original.) Affirming the license suspensions was therefore appropriate despite the absence in the Constitution of any exception allowing the use of underage decoys. (*Id.* at pp. 568-571.)

The Court engaged in a similar analysis in *Calatayud v. State of California* (1998) 18 Cal.4th 1057, in which the Court considered whether the phrase "any person" as used in Civil Code section 1714.9, subdivision (a)(1) literally means any person or means any person other than public safety members, such as police officers, firefighters, and first responders. (*Calatayud*, at p. 1064.) The statute at issue in that case provided that "any person" is liable for injury caused willfully or negligently to peace officers, firefighters, or emergency service personnel in certain situations. (Civ. Code, § 1714.9, subd. (a); *Calatayud*, at pp. 1059-1060.) On its face, this reference to "any person" has an apparent, unambiguous meaning. But this Court determined the Legislature intended the phrase to exclude jointly involved public safety members. (*Calatayud*, at pp. 1064-1065, 1068.)

Looking beyond the strict wording of the statute, the Court considered its legislative history, including the decisional law that prompted the legislation, to identify "the object to be achieved and the evil to be prevented by the legislation." (*Calatayud*, *supra*, 18 Cal.4th at p. 1065, internal quotations and citations omitted.) From this, the Court found no evidence the Legislature intended the phrase "any person" to include jointly

involved public safety members so as to impose liability on them. (*Id.* at p. 1068.) As such, "whatever literal meaning 'any person' may have in other contexts, applying it to fellow officers involved in the performance of their duties does not '"conform to the spirit of the act."'" (*Id.* at p. 1068, quoting *People v. Pieters* (1991) 52 Cal.3d 894, 899.)

And, in *Arias*, this Court held that "[a] literal construction of an enactment . . . will not control when such a construction would frustrate the manifest purpose." (*Arias v. Superior Court*, *supra*, 46 Cal.4th at p. 979.) There, the Court considered whether an initiative measure that amended the Unfair Competition Law and limited representative actions by private plaintiffs also imposed class action requirements on those representative actions. (*Id.* at pp. 977-979.) The plaintiff argued that the initiative's text plainly did not do so, but the Court reviewed the ballot materials and found "strong evidence" indicating the voters understood that representative actions would be subject to class action requirements. (*Id.* at pp. 989-980.) The Court thereby interpreted the initiative in that way, despite the absence of an express provision to that effect. (*Id.* at p. 980.)

These cases illustrate that the plain text of a law and the plain-meaning rule do not bar a court from considering the overall context of the law, its purpose, and, for initiative measures, the ballot materials. (See *People v. Valencia*, *supra*, 3 Cal.5th at p. 360.) Yet that is what Gadlin urges. Focusing solely on the text of subdivision (a)(1) is the type of analysis that this Court disfavored in *Provigo Corp.*, *Calatayud*, and *Arias.* The meaning of subdivision (a)(1) is only properly understood by considering the scope of the rulemaking provision of subdivision (b) and the voters' reasonable understanding, as discerned from the ballot pamphlet, that the Department would exclude sex offenders from parole consideration. The Department's regulation fulfills the voters' expectation.

CONCLUSION

The Department's regulation excluding registered sex offenders from nonviolent parole consideration is consistent with Proposition 57 and does not exceed the Department's authority. The judgment of the Court of Appeal should be reversed.

Dated: December 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,005 words.

Dated: December 24, 2019

XAVIER BECERRA
Attorney General of California

/S/ **CHARLES CHUNG**

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DECLARATION OF SERVICE BY E-MAIL and 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 collection and processing of correspondence for mailing with the United States Postal Service. 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.

On December 24, 2019, I e-Submitted the attached **REPLY BRIEF ON THE MERITS** by transmitting a true copy via the California Courts website e-Submissions system. In addition, I placed one original copy and eight true copies thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Supreme Court of the State of California
Supreme Court California S.F.
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San Francisco, CA 94102-4797

On December 24, 2019, I served the attached **REPLY BRIEF ON THE MERITS** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, 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 December 24, 2019, at Los Angeles, California.

S. Figueroa
Declarant


Signature

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