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In the Supreme Court of the State of California

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

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

PETITION FOR REVIEW

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Warden Craig Koenig, respondent below, respectfully petitions for review of the published decision filed on January 28, 2019 by the Second District Court of Appeal, Division Five in *In re Gregory Gadlin*, case number B289852. (Exh. A, Slip opn., conc. opn. of Baker, J.) No petition for rehearing was filed. This petition for review is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

ISSUE PRESENTED

Proposition 57 amended the Constitution to provide parole consideration to nonviolent offenders incarcerated in state prison. It requires the Department of Corrections and Rehabilitation to promulgate a parole scheme to implement this mandate—one that the Secretary of the Department must certify as protecting and enhancing public safety. Proponents of Proposition 57, including its author former Governor Edmund G. Brown, Jr., told voters that this new parole scheme would not provide parole consideration for sex offenders. After Proposition 57's passage, upon concluding that sex offenders pose a unique public safety risk, the Department adopted regulations that excluded sex offenders from the nonviolent parole process.

This petition presents the following issue: did the Court of Appeal interpret article I, section 32 of the Constitution contrary to the voters' intent by holding that the Department must give parole consideration to offenders with a prior conviction of 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

Proposition 57, the Public Safety and Rehabilitation Act of 2016, amended the Constitution, adding article I, section 32 ("Amendment") to provide parole consideration to inmates convicted of nonviolent felony offenses. Proposition 57 sought to ease prison overcrowding and improve rehabilitation by providing parole review, and possibly early release, to nonviolent offenders. This marked a dramatic change to the determinate sentencing laws that had been in place over the past four decades.

In support of this sweeping reform, Proposition 57's proponents—led by former Governor Brown—informed voters of the public safety benefits of this parole process and emphasized that sex offenders, as defined under Penal Code section 290, would be excluded. The Department then adopted a regulatory scheme that excludes all registered sex offenders for public safety reasons, consistent with the proponents' assurances to the voters.

In its published decision, the Court of Appeal held the exclusion of inmates for past sex offenses is not consistent with Proposition 57's intent. (Slip opn., at pp. 7-8.) It found the Amendment's plain text "make[s] 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." (*Id.*, at p. 7.) The court deduced that the omission of any reference to an inmate's past convictions in article I, section 32, subdivision (a) of the Constitution forbids the Department from excluding any offenders based on past registrable sex crimes. (*Ibid.*)

As the first ruling of its kind in the appellate courts,[1] this decision raises important questions of law that warrant the Court's review. The

[1] A similar issue is pending before the Third District Court of Appeal in *Alliance for Constitutional Sex Offense Laws and John Doe v.*

appellate court's interpretation is based on the Amendment's purported plain language. But it would result in an application of the law that is contrary to the voters' intent when considered in the context of the Amendment's stated purpose, the textual provision granting the Department rulemaking authority to implement a regulatory scheme that protects and enhances public safety, the Department's exercise of that authority, and the ballot materials.

Indeed, the Court of Appeal's decision could have a substantial, deleterious impact on public safety by disregarding voter intent and granting parole review to thousands of sex offenders currently in prison. The Department determined sex offenders should be excluded from the parole process for public safety reasons and both the courts and the Legislature have historically acknowledged the acute risks to the public that sex offenders pose when released to the community. There is no indication the electorate intended to give sex offenders early opportunities for parole in the face of Governor Brown's declaration that the new parole process would exclude sex offenders.

The Court should therefore grant review to ensure the Amendment's parole reforms are achieved consistent with its public safety purpose and the voters' intent in enacting Proposition 57.

California Department of Corrections and Rehabilitation, et al., case number C087294, in which the court will address the validity of the Department's regulation excluding offenders convicted of past registrable sex offenses and those serving a current term of imprisonment for such an offense. (See also *In re Schuster* (C087276, app. pending) [appeal on procedural grounds of superior court's invalidation of regulatory exclusion of sex offenders from Proposition 57 parole].)

STATEMENT OF THE CASE

A. Passage of Proposition 57.

On November 8, 2016, the electorate passed Proposition 57, amending the California Constitution to create a parole process for state inmates convicted of nonviolent felony offenses. (Cal. Const., art. I, § 32, subd. (a).) As amended, article I, section 32 provides in relevant part:

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

(Cal. Const., art. I, § 32.)

In the Official Voter Information Guide, the proponents, including former Governor Brown, urged voters to vote in favor of Proposition 57 because it would reduce spending on prisons by making prisoners convicted of nonviolent felonies eligible for parole while keeping the most dangerous offenders incarcerated. (Ballot Pamp., General Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58.) The proposition's opponents argued that the nonviolent parole process would increase violent crimes in the community and endanger the public by authorizing early parole to sex offenders including those convicted of rape and child molestation. (*Id.*, rebuttal to argument in favor and argument against Prop. 57, pp. 58-59.)

The proponents rebutted these arguments, assuring voters that "sex offenders, as defined in Penal Code 290" would be excluded from parole and that Proposition 57 "will be implemented through Department of Corrections and Rehabilitation regulations developed with public and victim input and certified as protecting public safety." (*Id.* rebuttal to argument against Prop. 57, p. 59.)

After the voters adopted Proposition 57, the Department promulgated regulations defining the parole process for eligible inmates and excluding from eligibility any inmate "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." [2] (Cal. Code Regs., tit. 15, § 3491, subd. (b)(3).) As required by the initiative, the Secretary of the Department certified that the regulations would protect and enhance public safety.

B. Procedural History.

In 2007, Gregory Gadlin was convicted of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), with prior strike convictions in 1984 for forcible rape (*id.*, § 261, former subd. (2)) and in 1986 for forcible child molestation (*id.*, § 288, subd. (b)). (Slip opn., at p. 2.) Gadlin was sentenced under the "Three Strikes" law to a total term of 35 years to life in prison. (*Ibid.*) Gadlin's conviction and sentence were affirmed on direct appeal in an unpublished decision. (*People v. Gadlin* (May 21, 2009, B203647) [2009 WL 1415943].) Under the adopted regulations, Gadlin was ineligible for Proposition 57 parole based on his indeterminate

[2] As originally adopted, the regulations phrased this exclusion differently, but it had the same effect in excluding any inmate "[c]onvicted of a sexual offense that requires registration as a sex offender under Penal Code section 290." (Cal. Code Regs., tit. 15, former § 3490, subd. (a)(3) (Apr. 28, 2017).)

sentence under the "Three Strikes" law and his prior sex offense convictions. (Cal. Code Regs., tit. 15, former § 3490, subd. (a)(1), (3) (Apr. 28, 2017).)

On May 7, 2018, Gadlin filed a petition for writ of habeas corpus in the Second District Court of Appeal, Division Five. 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. On August 24, 2018, Gadlin's appointed counsel filed an amended petition and the court issued an order to show cause on August 31, 2018. Respondent filed a return and Gadlin filed a traverse.

C. The Court of Appeal's Decision.

On January 28, 2019, the Court of Appeal issued a published decision granting the writ of habeas corpus. (Slip opn., at p. 16.) The court found the Department mooted the issues related to Gadlin's exclusion from Proposition 57 parole based on his indeterminate sentence after its adoption of new regulations consistent with the decision in *In re Edwards* (2018) 26 Cal.App.5th 1181.[3] (Slip opn., at p. 4.) The court considered only the validity of the Department's exclusion of Gadlin from Proposition 57 parole based on his prior convictions for registrable sex offenses. (*Ibid.*) It 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. 7.)

Looking to Proposition 57's wording, the Court of Appeal found the references to "'convicted' and 'sentenced'" as well as "the singular form in 'felony offense,' 'primary offense,' and 'term'" all indicate Proposition 57 intended eligibility for its parole process to be based on the inmate's current

[3] The new regulations outline the parole review process for eligible inmates serving indeterminate terms for nonviolent felony offenses. (Cal. Code Regs., tit. 15, §§ 3495-3497.)

offense without regard to past convictions. (Slip opn., at p. 7.) The court held 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.*) However, the court expressed no opinion as to whether an inmate whose current offense requires registration under Penal Code section 290 may be excluded from Proposition 57 parole. (*Id.*, at p. 8.) The Court of Appeal 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 sex offenders is not, on its face, inconsistent with Proposition 57. (Conc. opn., at p. 1.) Justice Baker found no "clear textual indication that Proposition 57 was intended to bar regulatory exclusion of current-offense sex offenders," so the Department's exercise of its rulemaking authority to bar such offenders from parole was not inconsistent with the voters' intent. (*Id.*, at p. 2.) Given that Proposition 57 was "left fuzzy at the margins" as far as which inmates were meant to benefit from its parole process, Justice Baker opined 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 p. 7.) He reviewed the ballot materials and noted "Proposition 57's proponents assured votes that those required to register as sex offenders would not benefit from the initiative," but he concluded that assurance applied only to those inmates whose current offense was a registrable sex offense. (*Id.*, at p. 11.)

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

REASONS FOR GRANTING REVIEW

The interpretation of article I, section 32 of the Constitution raises important questions of constitutional construction affecting how the parole reforms intended by Proposition 57 will be implemented throughout the state. This will impact thousands of incarcerated sex offenders and decide how the executive branch exercises its rulemaking authority. Guidance from this Court will ensure the People's intent in passing Proposition 57 is fulfilled and that the Department establishes a parole scheme consistent with the Amendment's public safety purpose.

REVIEW IS NECESSARY TO EFFECTUATE THE VOTERS' INTENT TO ENACT PAROLE REFORMS IN A MANNER THAT PROTECTS AND ENHANCES PUBLIC SAFETY.

The court below reviewed the Amendment's scope with a limited textual analysis, considering the wording of subdivision (a)(1) of article I, section 32 of the Constitution without considering the overall context of the Amendment's stated purpose, the rulemaking provision of subdivision (b), and the ballot materials. The court considered the text of subdivision (a)(1), alone, to be the best indicator of voter intent and eschewed any review either of the ballot materials or the Amendment's other provisions. (Slip opn., at pp. 6-7.) This approach led to an interpretation that does not serve the voters' intent or the Amendment's overall purpose.

A provision's text "is typically the best and most reliable indicator of [its] purpose." (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933, rehg. den. Nov. 1, 2017; *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321 ["we begin with the text as the first and best indicator of intent."].) And courts generally avoid extrinsic sources to ascertain intent unless "the provisions' intended purpose . . . remains opaque" from its plain meaning. (*Cal. Cannabis Coalition*, at p. 934.) But, courts must be mindful of the overall context of a provision and not constrain its review

to "a single word or sentence[.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (*Lungren*).) Indeed, the "spirit" of the law has primacy over a literal, formalistic reading of particular words: "[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." (*Ibid.*; see *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 ["The literal language of enactments may be disregarded to avoid absurd results and to fulfill the apparent intent of the framers."].)

This Court echoed this principle when reviewing the requirements imposed by Proposition 64 on representative actions under the Unfair Competition Law. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 978-979.) There, a literal reading of Proposition 64 seemed to support the plaintiff's contention that his representative action need not comply with class action requirements; however, the Court explained that "[a] literal construction of an enactment . . . will not control when such a construction would frustrate the manifest purpose." (*Id.*, at p. 979.) In that case, the Court turned to the ballot materials and found "strong evidence of voter intent" to impose class action requirements. (*Id.*, at pp. 979-980.)

In this case, the Amendment's purpose as a measure to protect and enhance public safety is clear. The measure was titled "the Public Safety and Rehabilitation Act of 2016." (Slip opn., at p. 4.) Its preamble pledges that "[t]he following provisions are hereby enacted to enhance public safety . . . ." (Cal. Const., art. I, § 32, subd. (a).) The Amendment commands the Secretary to certify the adopted regulations "protect and enhance public safety." (*Id.*, subd. (b).) And the ballot materials repeatedly emphasize the public safety purpose of the measure. (Ballot Pamp., General Elec. (Nov. 8, 2016) text of Prop. 57, p. 141; *id.*, argument in favor of Prop. 57, p. 58.) A plain-meaning interpretation must not be contrary to this overall public safety purpose.

A plain meaning interpretation must give effect to the public safety certification requirement. In requiring the Secretary to certify that the parole scheme adopted by the Department protects and enhances public safety, the Amendment entrusts the Secretary to enforce its public safety purpose. The People acknowledged and relied on the Secretary's experience and expertise to fashion a parole scheme consistent with this purpose, which necessarily confers on the Secretary the authority to do so. This requirement is not surplusage—it is the provision by which the Amendment achieves its public safety goals. An interpretation of the Amendment's intent must give effect to and be harmonized with this provision. (See *People v. Valencia* (2017) 3 Cal.5th 347, 357, citing *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) The Court of Appeal's interpretation failed to do so by considering subdivision (a)(1) in isolation without considering the public safety certification requirement.

And by certifying that the Department's sex-offender exclusion protects and enhances public safety, the Secretary achieved the Amendment's public safety goals in a manner consistent with what the voters were told in the ballot materials. (See, e.g., *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 431, 445 ["Because the language imposing a 'burden' on the agency is somewhat imprecise, we look to the ballot materials as further indicia of voter intent."].) The proponents, including Governor Brown, made a clear statement to the voters that the Department would implement a parole scheme with regulations "certified as protecting public safety" and that "sex offenders, as defined by Penal Code [section] 290" are excluded from parole. (Ballot Pamp., General Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) This assurance that sex offenders would be excluded relates to public safety and is reasonably read as applying to all

sex offenders not, as the court concluded, only to inmates whose current offense is a sex crime. (Slip opn. at p. 7.)

The definition of sex offender has never distinguished between past and present sex offenses or been limited to inmates whose current offense requires registration under Penal Code section 290. Instead, a sex offender is defined as any person who "has been" convicted of one of the enumerated sex crimes and registration as a sex offender is a lifetime requirement. (Pen. Code, § 290, subds. (b), (c).) Significantly, "[t]he registration provisions of the Act are applicable to every person described in the Act, *without regard to when his or her crime or crimes were committed* . . . ." (*Id.*, § 290.023, italics added.)

A reasonable voter would have understood that "sex offenders, as defined by Penal Code [section] 290" refers to all sex offenders and it is this understanding that shapes the Amendment's intent and public safety purpose. (See, e.g., *People v. Morales* (2016) 63 Cal.4th 399, 407 [concluding any reasonable voter would have understood the legislative analyst's meaning].) Indeed, the proponents' intent to exclude all sex offenders as a public safety matter may be presumed to be shared by the electorate in passing Proposition 57. (See *Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7 ["we have often presumed . . . that the drafters' intent and understanding of the measure was shared by the electorate."].)

The exercise of the initiative power has been called "'one of the most precious rights of our democratic process'" whereby the People submit legislation for a direct vote. (*Amador Valley Joint Union High Sch. Dist.*, *supra*, 22 Cal.3d at p. 245, quoting *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591, fn. omitted.) This precious right is abridged if the People's intent for passing the law is not realized in the course of its interpretation.

There are substantial public safety implications in affording sex offenders early opportunities to be released into society. As the Court has noted, "the Legislature deemed [sex offenders] likely to commit similar offenses in the future" and, having committed a registrable sex offense in the past, those offenders "pose a continuing threat to society and require constant vigilance." (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527, internal quotations and citations omitted; see *In re Alva* (2004) 33 Cal.4th 254, 279 fn. 12 ["'[s]ex offenders pose a high risk of engaging in further offenses . . . . and protection of the public from these offenders is a paramount public interest.'"].)

Absent a clear expression by the voters of an intent to give sex offenders opportunities for parole, a court should decline to adopt an interpretation contrary to what the voters were told, especially where that interpretation would be contrary to regulations adopted by the Department (as directed by the initiative itself) and would raise significant policy concerns regarding the correctional management and rehabilitation of offenders who commit serious sex offenses. (See *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 118 ["Nothing in the legislative history of the initiative suggests that the voters intended that result. In the absence of a clear expression of such intent, we decline to adopt a broad literal interpretation of the initiative that would raise such 'substantial policy concerns.'"].) The Court should therefore grant review to address this matter of great public importance.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for review.

Dated: March 11, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 3,330 words.

Dated: March 11, 2019

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EXHIBIT A

Filed 1/28/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re GREGORY GADLIN,	B289852
on Habeas Corpus.	(Los Angeles County Super. Ct. No. BA165439)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. William C. Ryan, Judge. Petition granted.

Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Phillip J. Lindsay, Senior Assistant Attorney General, Julie A. Malone, Supervising Deputy Attorney, Charles Chung, Deputy Attorney General, for Respondent.

I. INTRODUCTION

In 2016, voters approved Proposition 57, which added a provision to the California Constitution that significantly expanded parole consideration to all state prisoners convicted of a nonviolent felony offense. (Cal. Const., art. 1, § 32, subd. (a)(1) (section 32(a)(1).) Petitioner Gregory Gadlin, a third-strike offender with two prior convictions that render him a sex-offender registrant, contends the regulations of the California Department of Corrections and Rehabilitation (CDCR) invalidly exclude him from Proposition 57 relief. We agree and grant the petition.

II. PROCEDURAL HISTORY

In 2007, a jury convicted Gadlin of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).[1] The jury sustained allegations of two prior serious felony convictions (§ 667, subd. (a)(1)). Those priors were: (1) a 1984 conviction for forcible rape (§ 261, former subd. (2)); and (2) a 1986 conviction for forcible child molestation (§ 288, subd. (b)), each of which is a registrable offense under the Sex Offender Registration Act (§ 290, subd. (c)). Gadlin was sentenced to 25 years to life pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12), plus an additional 5-year term for each of his prior serious felony convictions, for a total of 35 years to life in state prison. On appeal, this court

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[1] All further statutory references are to the Penal Code unless otherwise stated.

affirmed the judgment. (*People v. Gadlin* (May 21, 2009, B203647) [nonpub. opn.].)[2]

On November 22, 2017, Gadlin filed a habeas corpus petition in the superior court, challenging his exclusion from early parole consideration by CDCR. On March 2, 2018, the superior court denied the petition, concluding that under the then-applicable regulations, Gadlin was not entitled to early parole consideration because he had been sentenced as a third-strike offender.

On May 7, 2018, Gadlin filed a habeas corpus petition in this court. We appointed counsel for Gadlin and directed counsel to file an amended petition addressing the validity of CDCR's regulations. Appointed counsel thereafter filed an amended petition challenging CDCR's regulations. We issued an order to show cause why the relief requested in the petition should not be granted. CDCR filed a return to the order to show cause, arguing that the following two factors render Gadlin ineligible for early parole consideration: (1) his status as an inmate serving an indeterminate Three Strikes sentence with the possibility of parole; and (2) his prior convictions for sex offenses that require him to register as a sex offender.

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[2] In 1998, Gadlin was previously convicted of identical charges, resulting in the same 35 years to life sentence. This court affirmed the judgment on appeal. (*People v. Gadlin* (2000) 78 Cal.App.4th 587.) In 2006, the United States District Court for the Central District of California granted Gadlin's petition for writ of habeas corpus, and directed the State of California to provide Gadlin with a new trial. (*Gadlin v. Woodford* (C.D.Cal. May 2, 2006, Case No. CV-02-7759-PA (AJW)) 2006 U.S. Dist. LEXIS 101656.)

The CDCR then adopted emergency regulations, effective January 1, 2019, to comply with our holding in *In re Edwards* (2018) 26 Cal.App.5th 1181, 1192-1193 (*Edwards*). (Cal. Code Regs., tit. 15, § 3491, subd. (b)(1), Register 2018, No. 52 (Dec. 26, 2018).) Those modified regulations moot CDCR's argument that Gadlin is ineligible for early parole consideration based on his status as a Three Strikes offender. We thus consider only CDCR's second argument, that Gadlin's two prior convictions for registrable sex offenses render him ineligible for consideration for early release.

III. DISCUSSION

A. *Proposition 57*

On November 8, 2016, California voters passed Proposition 57, also known as the Public Safety and Rehabilitation Act of 2016, adding section 32, article I, to the California Constitution. "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. [¶] 4. Stop the revolving door of crime by emphasizing rehabilitation, especially for juveniles.' (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141.)" (*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." 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." CDCR was directed to "adopt regulations in furtherance of these provisions, and the Secretary of [CDCR] shall certify that these regulations protect and enhance public safety." (Cal. Const., art.1, § 32, subd. (b).)

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 under the Sex Offender Registration Act, codified in sections 290 through 290.024 of the Penal Code." (Cal. Code Regs., tit. 15, §3491, subd. (b)(3) (section 3491(b)(3).) In a Final Statement of Reasons accompanying the adopted regulations, CDCR stated, "these sex offenses demonstrate a sufficient degree of violence and represent an unreasonable risk to public safety to require that sex offenders be excluded from nonviolent parole consideration." (Cal. Dept. of Corrections, Credit Earning and Parole Consideration Final Statement of Reasons, Apr. 30, 2018, p. 20.)

B. *Standard of Review*

"'In order for a regulation to be valid, it must be (1) consistent with and not in conflict with the enabling statute and (2) reasonably necessary to effectuate the purpose of the statute. (Gov. Code, § 11342.2.)' (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982 . . .; see *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 757 . . . (*Henning*).) Therefore, 'the rulemaking authority of the agency is circumscribed by the

substantive provisions of the law governing the agency.' (*Henning, supra,* at p. 757.) '"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.]' (*Id.* at pp. 757-758.)" (*Edwards, supra*, 26 Cal.App.5th at p. 1189.)

"When construing constitutional provisions and statutes, including those enacted through voter initiative, '[o]ur primary concern is giving effect to the intended purpose of the provisions at issue. [Citation.] In doing so, we first analyze provisions' text in their relevant context, which is typically the best and most reliable indicator of purpose. [Citations.] We start by ascribing to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme. [Citations.] If the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials. [Citation.] Moreover, when construing initiatives, we generally presume electors are aware of existing law. [Citation.] Finally, we apply independent judgment when construing constitutional and statutory provisions. [Citation.]' (*California Cannabis Coalition*

v. City of Upland (2017) 3 Cal.5th 924, 933-934 . . . .)" (*Edwards, supra*, 26 Cal.App.5th at p. 1189.)

C. *Analysis*

Section 32(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(a)(1)'s use of the singular form in "felony offense," "primary offense," and "term."

Gadlin's current offense triggering his Three Strikes sentence is assault with a deadly weapon (§ 245, subd. (a)(1)), which does not require registration as a sex offender. 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(a)(1).

CDCR's application of section 3491(b)(3) to exclude Gadlin and all similarly situated inmates from early parole consideration runs afoul of section 32(a)(1). Gadlin is entitled to early parole

consideration.[3]

We express no opinion on whether CDCR's application of its regulations to exclude inmates whose current offense requires registration as a sex offender similarly violates section 32(a)(1).

IV. DISPOSITION

The petition for habeas corpus is granted. The California Department of Corrections and Rehabilitation is directed to consider Gadlin for early parole consideration within 60 days of remittitur issuance.

KIM, J.

I concur:

MOOR, J.

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[3] 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. (§ 3041, subd. (b); Cal. Code Regs., tit. 15, § 2449.32, subd. (c).)

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BAKER, Acting P. J., Concurring

The opinion of the court resolves the appeal before us on narrow grounds, correctly concluding that regulations promulgated by the California Department of Corrections and Rehabilitation (CDCR) are unconstitutional as applied to bar early parole consideration for petitioner Gregory Gadlin (petitioner) based on two prior sex offenses committed in the 1980s for which petitioner has already been imprisoned and released.

Almost always, the wise choice is to refrain from saying more than necessary to dispose of an appeal. But under the unusual circumstances here where the parties have briefed the issue in broader terms—effectively, whether the regulatory prohibition of early parole consideration for sex offender registrants is facially consistent with the pertinent provisions of Proposition 57, the Public Safety and Rehabilitation Act of 2016—and where all concerned would benefit from knowing sooner rather than later what regulatory approaches are permissible, I believe there is good reason to say a bit more than strictly necessary. I therefore write separately to outline my view that the regulatory provisions in question are not inconsistent on their face with the provisions added to the constitution by Proposition 57.

In my view, Proposition 57 authorizes the Secretary of the CDCR to adopt rules that exclude from early parole consideration

those inmates who are currently in custody as a result of an offense that would require registration as a sex offender. Succinctly put, I believe the Secretary has that authority because he acts pursuant to an express grant of authority to promulgate regulations to implement an initiative with an undefined term, because a clear textual indication that Proposition 57 was intended to bar regulatory exclusion of current-offense sex offenders is absent (which distinguishes this case from our holding in *In re Edwards* (2018) 26 Cal.App.5th 1181 (*Edwards*)), and because the ballot materials for Proposition 57—including a ballot argument signed by the then-sitting Governor that addresses whether early parole consideration for nonviolent felony offenses extends to sex offenders—illuminate an ambiguity about the intended scope of the initiative and illustrate why CDCR's regulatory approach cannot be deemed inconsistent with the voters' intent.

I

Two provisions that Proposition 57 added to our state Constitution are important in this appeal. The first is the provision enacted as Article I, section 32, subdivision (a)(1) (hereafter section 32(a)). It reads: "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 second is the provision in the next subdivision: "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, subd. (b) (hereafter section 32(b).)

In regulations promulgated pursuant to section 32(b), the Secretary adopted the Penal Code's definition of a "violent felony" for use in defining what "nonviolent felony offense" means as used in section 32(a). (Cal. Code Regs., tit. 15, §§ 3490, subds. (a)-(c) [with additional qualifications not relevant here, an inmate is a nonviolent offender if the inmate is not serving a determinate sentence for a crime listed in the Penal Code's definition of a violent felony], 3495, subds. (a)-(b) [same for indeterminate sentences]; see also Pen. Code, § 667.5, subd. (c) [defining "violent felony"].) As relevant here, the Penal Code definition includes a significant number of sex crimes: specified forms of rape, sodomy, oral copulation, and committing a lewd or lascivious act; sexual penetration by a foreign object; assault with intent to commit specified sex crimes (including rape, sodomy, and oral copulation), continuous sexual abuse of a child, and specified sex crimes committed in concert. (Pen. Code, § 667.5, subds. (c)(3)-(6), (11), (15)-(16), (18).) Inmates currently serving a sentence as a result of these sex crimes are ineligible for early parole consideration (Cal. Code Regs., tit. 15, §§ 3491, subd. (a), 3496, subd. (a)) and there is no dispute about that.

What is disputed by the parties is a further step taken by the CDCR regulations promulgated pursuant to section 32(b), a step that makes offenders who have committed other sex-related offenses ineligible for early parole consideration. Specifically, the regulations bar early parole consideration for any inmates "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." (Cal. Code Regs., tit. 15, §§ 3491, subd. (b)(3), 3496, subd. (b).) To understand the significance of this regulatory exclusion, we must compare the crimes that trigger mandatory sex offender registration with those sex offenses defined as violent felonies under Penal Code section 667.5; where there is no overlap between the two is where the regulations' sex offender registration exclusion is operative.

Penal Code section 290 is the principal statutory provision that defines the crimes for which a convicted defendant must register as a sex offender. The statute's list of crimes (as it existed at the time of Proposition 57's passage) is long. It provides: "Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 [murder] committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286 [sodomy], 288 [lewd or lascivious conduct], 288a [oral copulation], or 289 [forcible penetration], Section 207 or 209 [kidnapping] committed with intent to violate Section 261 [rape], 286, 288, 288a, or 289, Section 220 [assault with intent to commit rape, sodomy, or oral copulation], except assault to commit mayhem, subdivision (b) and (c) of Section 236.1 [human trafficking], Section 243.4 [sexual battery], paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261 [rape, except rape by false impersonation of a person known to the victim], paragraph (1) of subdivision (a) of Section 262 [spousal rape] involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1 [rape in concert], 266 [enticement of a minor for prostitution], or 266c [fear-induced sex acts], subdivision (b) of Section 266h [pimping a minor], subdivision (b) of Section 266i [pandering a minor],

Section 266j [procuring a minor for lewd and lascivious conduct], 267 [abduction for prostitution], 269 [aggravated child sexual assault], 285 [incest], 286, 288, 288a, 288.3 [contacting a minor to commit a sex offense], 288.4 [arranging a meeting with a minor to engage in lewd or lascivious conduct], 288.5 [continuous sexual abuse of a child], 288.7 [sex or sodomy with a child under ten years old], 289, or 311.1 [sale of child pornography], subdivision (b), (c), or (d) of Section 311.2 [production and distribution of child pornography], Section 311.3 [child sexual exploitation], 311.4 [employing a minor in sale or distribution of child pornography], 311.10 [advertising child pornography], 311.11 [possession of child pornography], or 647.6 [annoying or molesting children], . . . , subdivision (c) of Section 653f [solicitation of rape by force or violence, sodomy by force or violence, or oral copulation by force or violence], subdivision 1 or 2 of Section 314 [indecent exposure], any offense involving lewd or lascivious conduct under Section 272 [contributing to the delinquency of a minor], or any felony violation of Section 288.2 [sending "harmful matter," i.e. patently offensive sexual matter, to a minor] . . . ." (Former Pen. Code, § 290, added by Stats. 2007, ch. 579, § 8.)

Comparing this list of registrable offenses to the categories of crimes statutorily deemed violent, there are many offenders who will be barred from early parole consideration under the CDCR regulations even though those offenders have not been convicted of a violent felony as defined by the Penal Code. Among them are those convicted of human trafficking, sexual penetration accomplished when the victim is prevented from resisting by an intoxicating or anesthetic substance, solicitation of another to commit rape by force or violence, pimping a minor,

and various child sexual exploitation offenses.[1] (Pen. Code, §§ 236.1, 289, subd. (e), 653f, subd. (c), 266h, subd. (b); see also, e.g., Pen. Code, § 311.3.) The question is whether we can discern an intent by California voters to preclude the Secretary from exercising the regulatory authority they conferred upon him in the manner he has.

II

The fundamental objective when interpreting constitutional provisions and statutes is "is giving effect to the intended purpose of the provisions at issue." (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933.) "In doing so, we first analyze provisions' text in their relevant context, which is typically the best and most reliable indicator of purpose. [Citations.] We start by ascribing to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme. [Citations.] If the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials." (*Id.* at pp. 933-934; see also *People v. Valencia* (2017) 3 Cal.5th 347, 358 ["A reason to further explore the meaning of statutory language and to consider extrinsic evidence of legislative intent is where statutory language is ambiguous when considered 'in the context of the statute and initiative as a whole'"] (*Valencia*).)

Examining Article I, Section 32 of our constitution as a whole, the precise scope of who is meant to benefit from early

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[1] Also among them are those convicted of indecent exposure. (Pen. Code, § 314.)

parole consideration relief is left fuzzy at the margins. Section 32(a) states the rule—that those convicted of a "nonviolent felony offense" and sentenced to state prison are eligible for parole consideration—but the key term, nonviolent felony offense, is noticeably left undefined (see *Brown v. Superior Court* (2016) 63 Cal.4th 335, 360 (dis. opn. of Chin, J.)) even though it cannot be applied in practice without further definition. That is where section 32(b) comes in, directing the Secretary to "adopt regulations in furtherance of these provisions." That direction is a textually explicit grant of authority that must at least extend to clarifying the margins of what constitutes a nonviolent felony offense.

As we know, the Secretary makes reference to the Penal Code section 667.5 definition when crafting a regulatory definition of "nonviolent offender." That choice was not constitutionally compelled, but it is consistent with the ballot arguments authored by the proponents of Proposition 57. (Cal. Code Regs., tit. 15, §§ 3490, subds. (a)-(c), 3495, subds. (a)-(b); Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59 ["Violent criminals as defined in Penal Code [section] 667.5(c) are excluded from parole"].) Although the regulations make use of Penal Code section 667.5 in defining "nonviolent offender" (Cal. Code Regs., tit. 15, §§ 3490, subds. (a)-(c), 3495, subd. (a)), I do not believe we are required, when undertaking a holistic review of the constitutional provisions and the regulations themselves, to understand sections 3490, subdivision (c) and 3495, subdivision (b) in isolation, i.e., as the only means by which CDCR sought to flesh out the relevant constitutional term—"nonviolent felony offense." Rather, CDCR was entitled, consistent with the text of Article I, Section 32 of

our Constitution, to conclude that it was appropriate to make use of the Penal Code's definition of "violent felony" *only concomitant with* a regulatory exclusion for those subject to sex offender registration.

That conclusion is fully consistent with our decision in *Edwards*, *supra*, 26 Cal.App.5th 1181 because we were not there asked to decide the meaning and scope of "nonviolent felony offense." Rather, CDCR conceded Edwards was imprisoned for a nonviolent felony offense and the issue for our decision was whether CDCR's formerly adopted regulations "validly exclude admittedly nonviolent 'Third Strike' offenders sentenced to indeterminate [prison] terms from Proposition 57 relief." (*Id.* at pp. 1184, 1186, 1191.) We, of course, held the answer was no, and importantly, that was our answer because there was an explicit textual basis in the constitutional provisions added by Proposition 57 that revealed barring relief for those serving indeterminate Three Strikes sentences was inconsistent with the voters' intent. (*Id.* at p. 1190 ["There is no question that the voters who approved Proposition 57 intended Edwards and others serving Three Strikes indeterminate sentences to be eligible for early parole consideration; the express exclusion of alternative sentences when determining the full term is dispositive"]; see also § 32(a)(1)(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*"], italics added.) *Edwards* therefore does not answer the question I take on here because absent from the text of section 32 is any

explicit direction as to whether sex offenders should be eligible for Proposition 57 relief.[2]

Proposition 57's ballot materials, however, were anything but silent on that score. In the argument against Proposition 57, the opponents of the initiative warned "[t]he authors of Proposition 57 claim it only applies to 'non-violent' crimes, but their poorly drafted measure deems the following crimes 'non-violent' and makes the perpetrators eligible for EARLY PAROLE and RELEASE into local communities: [¶] ● Rape by intoxication

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[2] Those voting for Proposition 57 could have reasonably thought the term "nonviolent felony offense" would not encompass sex crimes against adults and children, many of which involve what are at least arguably elements of violence as popularly conceived. (See, e.g., Pen. Code, §§ 236.1, subd. (b) ["A person who deprives or violates the personal liberty of another with the intent to effect or maintain a violation of Section 266, 266h, 266i, 266j, 267, 311.1, 311.2, 311.3, 311.4, 311.5, 311.6, or 518 is guilty of human trafficking and shall be punished by imprisonment in the state prison for 8, 14, or 20 years and a fine of not more than five hundred thousand dollars ($500,000)"].) That is true even as to child pornography offenses, where some have argued such offenses are linked to crimes of violence, if not crimes of violence themselves. (See, e.g., *American Booksellers Ass'n, Inc. v. Hudnut* (7th Cir. 1985) 771 F.2d 323, 328-329 & fns. 1 & 2; *United States v. Cocco* (M.D. Pa. 1985) 604 F.Supp. 1060, 1062.) Indeed, CDCR's statement of reasons accompanying the formerly adopted regulations relied on just such a broad understanding of violence. (Cal. Dept. of Corrections, Credit Earning and Parole Consideration Final Statement of Reasons, April 30, 2018, p. 20 ["The department has determined that these sex offenses demonstrate a sufficient degree of violence and represent an unreasonable risk to public safety to require that sex offenders be excluded from nonviolent parole consideration"].)

● Rape of an unconscious person ● Human Trafficking involving sex act with minors . . . ." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument against Prop. 57, p. 59.) The proponents—including California's sitting Governor at the time (who was identified as such in the ballot pamphlet)—answered the charge that those convicted of sex crimes like human trafficking would benefit from Proposition 57. In their rebuttal argument, they asserted Proposition 57 "[d]oes not and will not change the federal court order that 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.) The "federal court order" referenced by the proponents was left unspecified, but the import of their assertion was clear enough to everyday voters: do not be alarmed, those sex offenders specified in Penal Code section 290 will be excluded from benefitting from early parole consideration.

The ballot arguments are highly significant in my view because they help establish how voters expected, and we can infer intended, CDCR to more precisely define the group of offenders who would benefit from Proposition 57 that the text of the initiative left ambiguous at the margins.[3] (See generally

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[3] It appears CDCR framed its overall approach to defining "nonviolent felony offense" by relying on the ballot arguments that provide helpful clues to voter intent where the text of the initiative does not. Just as the proponents of the measure argued "[v]iolent criminals as defined in Penal Code [section] 667.5(c) are excluded from parole," CDCR's regulations exclude from early parole consideration those convicted of a violent felony within the meaning of that Penal Code provision. And just as the proponents assured sex offenders within the meaning of Penal

Valencia, *supra*, 3 Cal.5th at p. 364 [courts examine the materials before the voters to resolve questions of purpose and ambiguity].) Proposition 57's proponents assured voters that those required to register as sex offenders would not benefit from the initiative, and that assurance leaves me convinced voters did not intend to preclude CDCR from promulgating regulations that preclude relief for state prison inmates incarcerated for a current crime that requires registration as a sex offender.

The problem in this case, of course, is that section 3496, subdivision (b) of CDCR's regulations was applied to bar early parole consideration for petitioner based not on an offense for which he is now incarcerated but on older crimes for which he was long ago released from prison. That is why I concur in the result reached by the majority.[4]

BAKER, Acting P. J.

Code section 290 would be excluded from parole, the regulations enforce that exclusion.

[4] Although I have said more than the majority does, there are still questions I too leave for another day, among them the question of whether an inmate incarcerated for indecent exposure could successfully challenge the sex offender regulatory exclusion as unconstitutional under Proposition 57 as applied to him or her.

DECLARATION OF ELECTRONIC SERVICE

Case Name: **In re Gregory Gadlin**
No.: **B289852**

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.

On March 11, 2019, I electronically served the attached

PETITION FOR REVIEW

by transmitting a true copy via this Court's TrueFiling system, addressed as follows:

Michael Satris
satris.eservice@gmail.com
Attorney for Petitioner Gregory Gadlin

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 March 11, 2019, at Los Angeles, California.

S. Figueroa
Declarant

Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Gregory Gadlin**
Case Number: **TEMP-GEV3ZLM8**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Charles.Chung@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
PETITION FOR REVIEW	Petition for Review

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3/11/2019
Date

/s/Charles Chung
Signature

Chung, Charles (248806)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
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