In the Supreme Court of the State of California

In re

GREGORY GADLIN,

On Habeas Corpus.

Case No. S254599

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

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Respondent California Department of Corrections and Rehabilitation submits this consolidated answer to the two amicus curiae briefs filed by Nineteen Social Science and Law Scholars (Scholar Amici) and Alliance for Constitutional Sex Offense Laws, Inc. (Alliance). Neither brief merits the relief requested in this habeas action: a writ mandating that Gregory Gadlin—who is required to register as a sex offender because of his previous convictions for forcible rape and forcible child molestation—be included in the nonviolent parole program established by the voters by Proposition 57 (Cal. Const., art. I, § 32). As set out in the Department's opening and reply briefs, the Department acted well within its authority in enacting a regulation excluding registered sex offenders like Gadlin.

Scholar Amici attempt to engage this Court in a debate about the wisdom of the Department's reasoned decision to exclude inmates who are required to register as sex offenders, citing data and opinions that might support a different or more narrow exclusion. Such evidence-based arguments are irrelevant to the issue before this Court, which is only whether the text of article I, section 32, subdivision (a), read in isolation, as a matter of law precludes the regulation at issue.

Alliance largely repeats arguments made in the answer brief on the merits, arguing that the analysis in this case must start and end with the bare text of subdivision (a). As set forth in detail in the opening and reply briefs, that constrained approach to construing voter initiatives finds no support in the case law and would work against the voters' intent. Here, 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; the initiative's charge to the Department's

Secretary to certify that the regulations "protect and enhance public safety"; and the Governor's promise to voters in the ballot materials that registered sex offenders would be excluded, together provide sufficient authority for the Department's regulation.

ARGUMENT

I. ANSWER TO SCHOLAR AMICI

A. Scholar Amici's Evidence-based Arguments Are Irrelevant to the Issues Before This Court

Scholar Amici dispute the necessity and wisdom of excluding all inmates who are required to register as sex offenders under Penal Code 290 from Proposition 57's nonviolent parole consideration program. Scholar Amici question the regulation's "factual premises." (Scholar Amicus Curiae Brief [Scholar ACB] 17; see also *id.* at 45 [challenging "factual basis"].) They marshal data and studies to support their position that California could, consistent with public safety, consider parole for at least some inmates who must register as sex offenders. (Scholar ACB 20-27, 28-39, 42-44; see also ABM 51-52.) And they attempt to make their case directly to this Court that this State must move beyond the view, "embedded in statutory and judicial language" (Scholar ACB 28), that the re-offense rate of sex offenders is "'frightening and high." (*Ibid.* at 28, quoting *McKune v. Lile* (2002) 536 U.S. 24, 33-34; see also Apr. 30, 2018 Final Statement of Reasons at p. 20, citing *McKune* [attached as Exh. 6 to the return to the order to show cause filed in the Court of Appeal].)[1]

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[1] Scholar Amici cite to an Initial Statement of Reasons dated April 19, 2019. (Scholar ACB 16, 20.) That document pertains to a different rulemaking, which was undertaken in response to the Court of Appeal's decision in *In re Edwards* (2018) 26 Cal.App.5th 1181, 1192-1193 (holding that Proposition 57 implementing regulations could not exclude nonviolent "Third Strike" offenders sentenced to indeterminate terms). That

(continued...)

Scholar Amici's factual arguments do not speak to the issues before this Court. Petitioner Gadlin filed a petition for writ of habeas corpus alleging that the Department's regulation was inconsistent with Proposition 57 (Cal. Const., art. 1, § 32, subd. (a)). His argument was and is based solely on Proposition 57's text and intent. Gadlin argues that *as a matter of law*, the Department is flatly precluded from excluding inmates from the nonviolent parole process who would otherwise be eligible, based only on the fact that they must register as sex offenders. His claim does not turn on evidence. He did not, for example, seek a writ of mandate under Code of Civil Procedure 1085, alleging that the Department violated the Administrative Procedure Act because the sex offender exclusion is "arbitrary, capricious, [or] entirely lacking in evidentiary support[.]" (See *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460-461 [noting the deferential nature of the standards for evaluating the validity of regulations].) And even if such a claim were part of this case—which it is not—absent unusual circumstances not present here, a challenger cannot present evidence for the first time to a reviewing court, but must point to defects that appear in the administrative record. (*American Coatings Assn.*, at p. 460.) "[E]xtra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision"—which is precisely

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(...continued)
rulemaking established a parole consideration process to provide indeterminately sentenced nonviolent offenders a mechanism to be considered for parole upon serving the full term of their primary offense. It is not at issue in this case.

what Scholar Amici attempt to do here. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 579.)[2]

Gadlin does question whether the exclusion is "reasonably necessary to effectuate the purpose of the statute," employing language from this Court's decision in *Yamaha*. (See ABM 23, 47-50; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11.) But that standard asks only whether the regulation has a "reasonable or rational basis"—not whether it is the wisest, best, or narrowest approach. (*Ibid.*) Here, the Department provided "several reasons" for the exclusion, which constitute a reasonable and rational basis for the regulations. (Department's Mot. for Jud. Not. [MJN], Exh. F, Apr. 30, 2018, Standard Response 15 at p. 23; see also Apr. 30, 2018 Final Statement of Reasons at pp. 20-21.) The Department highlighted that in the ballot materials, "voters were reassured" that sex offenders would continue to be excluded. (MJN, Exh. F, at p. 23.) The Department also pointed to the consistency of this exclusion with other law, listing the various places in statutes and case law reflecting significant public concern about recidivism among sex offenders. (*Ibid.*) And it made the practical case that of the approximately 22,400 state prison inmates required to register for a sex offense based on a prior or current felony conviction, over 80% stand convicted of a violent offense listed under Penal Code section 667.5, subdivision (c). (MJN, Exh. F, at p.

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[2] The Department notes that during the rulemaking, it responded to more than 41,000 comments from 12,000 individual commenters. (Apr. 30, 2018 Final Statement of Reasons at p. 1.) It specifically responded to arguments made by the California Public Defenders Association (CPDA) that mirror those made by Amici Scholars, though presented by CPDA in a more summary fashion. (MJN, Exhs. F-H [Standard Response 15; CPDA's comments; Department's response to CPDA's comments incorporating Standard Response 15].)

23.) Of the remaining 20%, the vast majority are convicted of crimes that are not listed under Penal Code section 667.5, but nonetheless involve violence, force, or coercion—such as rape of an unconscious person, sexual battery, or sexually trafficking a minor under fourteen. (MJN, Exh. F, at p. 23.) Taken together, the Department reasonably concluded 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." (*Id.* at p. 24; see also Apr. 30, 2018 Final Statement of Reasons at pp. 20-21.) While Scholar Amici may disagree with the Department's reasoning and conclusion, both are rational.[3]

B. Scholar Amici's Remaining Arguments Address Issues That Are Not Before This Court and Are Without Merit

Putting their evidence-based assertions to the side, the Department discerns two remaining arguments in Scholar Amici's brief. Each may be quickly dismissed.

First, Scholar Amici contend that because the regulation "denies registrants the protection provided by the California Constitution without either a textual *or factual basis*, it is also unconstitutionally arbitrary and irrational." (Scholar ACB at p. 20, italics added; see also *id.* at p. 19, citing *In re Taylor* (2015) 60 Cal.4th 1019.) To the extent that Scholar Amici are attempting to raise constitutional issues unrelated to the text of article I,

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[3] The Department does not rule out the possibility of exploring an even more nuanced approach in a future rulemaking, but notes that any modification to the registered sex offender exclusion must be consistent with the law and supported by substantial evidence in the rulemaking record.

section 32, such issues are not properly before this Court.[4] It is not the role of an amicus curiae to "launch out upon a juridical expedition of its own unrelated to the actual appellate record." (*E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 510-511.) "Under this rule, 'California courts will not consider issues raised for the first time by an amicus curiae.'" (*Cal. Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1048, fn. 12, quoting *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1154, fn. 7.) In any event, regulations challenged as being constitutionally irrational are "not subject to courtroom factfinding . . . ." (*In re Jenkins* (2010) 50 Cal.4th 1167, 1181, internal quotations omitted.)

Further, Scholar Amici's reliance on *Taylor* is misplaced. In that case, four representative individuals who were required to register as sex offenders and paroled to San Diego County brought an as-applied challenge to the Department's enforcement of Proposition 83—commonly referred to as "Jessica's Law." (60 Cal.4th at p. 1023.) Jessica's Law amended Penal Code section 3003.5 to impose residency restrictions on paroled registered sex offenders, excluding them from areas near schools, parks, and places where children gather. (*Ibid.*) This Court determined that the practical, cumulative effect of these restrictions in San Diego County was to "severely restrict[] [parolees'] ability to find housing in compliance with the statute, [and] greatly increase[] the incidence of homelessness among them," among other various harms. (*Ibid.*) The Court held that "[b]lanket

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[4] In his habeas petition, Gadlin alleged a due process violation. (Amended Petn. (Aug. 24, 2018), at pp. 26, 41.) But Gadlin premised this claim solely on the assertion that the regulation is inconsistent with Proposition 57 (see Amended Petn., at pp. 26-27, 41). The Court of Appeal opinion did not address due process, and Gadlin did not raise due process in his answer to the petition for review.

enforcement" of section 3003.5 "has infringed [San Diego parolees'] liberty and privacy interests, however limited, while bearing no rational relationship to advancing the state's legitimate goal of protecting children from sexual predators, and has violated their basic constitutional right to be free of unreasonable, arbitrary, and oppressive official action." (*Ibid.*) The Court determined that in these circumstances, the petitioner parolees and all others similarly situated in San Diego County were entitled to an exception from the plain text of section 3003.5, with one qualification. (*Ibid.*) The Department was free "to impose special restrictions on registered sex offenders in the form of discretionary parole conditions . . . based on, and supported by, the particularized circumstances of each individual parolee." (*Ibid.*)

This case, in contrast, does not raise the analogous question of whether there may be some inmates whose disqualifying sex offense is so remote from concerns about recidivism and violence as to warrant an exception from the Department's sex-offender exclusion regulation. Here, Gadlin was convicted of forcible rape and forcible child molestation, both of which are clearly violent. (See OBM 21.) While in theory, constitutional principles outside of article I, section 32, might require some exceptions from the sex-offender exclusion regulation in extreme and unusual circumstances, that question should be decided only in a properly presented, as-applied challenge, which is not this case.[5]

Second, Scholar Amici suggest that the Department's construction of Proposition 57 must be in error, because, they assert, there would be no limit to the Department's ability to exclude inmates from the program.

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[5] Scholar Amici are also free, of course, to petition for the adoption, amendment, or repeal of a regulation, or apply for an agency's declaration as to a particular application of a regulation. (Gov. Code, §§ 11340.6, 11465.20.)

(Scholar ACB 44; see also Alliance Amicus Curiae Brief [Alliance ACB] 18-19.) They suggest that the Department could "adopt an irrebuttable presumption of elevated risk" for other classes of inmates, such as for "those required to be on the arson registry" or "for anyone who has committed multiple felonies of any kind, rendering Proposition 57 largely inoperative." (Scholar ACB 44.) But as noted above and in the opening brief, the category of registered sex offenders is different and distinguishable: Voters were expressly promised by then-Governor Brown that registered sex offenders would not be included in the nonviolent parole program, and the parole program in existence at that time excluded them. (OBM 15-16.)

In addition, the Department's regulations must work to meet the twin overarching objectives of Proposition 57: reducing the State's prison population while protecting public safety. It is not free to adopt indiscriminate and broad regulatory exceptions from the nonviolent parole program, which neither decrease prison overcrowding nor protect public safety. (See OBM 12-14, 30-32.) Scholar Amici's speculation that upholding the regulation at issue will lead inexorably to future "indefensible" regulatory exceptions is thus unfounded. (Scholar ACB 44.)

II. ANSWER TO ALLIANCE AMICUS

The Department will not here restate every argument made by Gadlin and repeated by Alliance, as the merits of this case are fully addressed in the parties' briefs. Rather, the Department focuses on two of Alliance's main contentions: that the text of article I, section 32, subdivision (a) forecloses the Department's sex offender exclusion regulation, and that the same text also precludes the Department (and the courts) from considering the ballot materials in determining voter intent. As the Department has previously briefed, both arguments are without merit.

A. The Sex Offender Exclusion Regulation Does Not "Re-write"—But Rather Implements—Proposition 57

Alliance contends that the Department cannot exclude inmates from the nonviolent parole program for reasons related to public safety because, it contends, Proposition 57's plain text makes "nonviolence" the sole criterion for parole eligibility. (Alliance ACB 16-19.) Ignoring the public safety certification requirement, Alliance relies on the text of California Constitution, article I, section 32, subdivision (a)(1), which provides in relevant part that "[a]ny person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." It asserts that the Department's sex offender exclusion regulation effectively "re-write[s]" Proposition 57's text. (Alliance ACB 19; see ABM 48.) But Alliance's argument focuses too literally on the text of subdivision (a)(1), viewed in isolation. This Court has rejected such a formal approach to interpreting legislative and constitutional enactments, to the exclusion context and intent. (OMB 26, citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 and *Calatayud v. State of Cal.* (1998) 18 Cal.4th 1057, 1065 (*Calatayud*); RBM 8, citing, e.g., *People v. Valencia* (2017) 3 Cal.5th 347, 357; RBM 21, citing e.g., *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567.)

Alliance ignores that, in fact, Proposition 57 describes only a framework for the nonviolent parole program; the initiative is not self-executing. (OBM 11, 18-20, 27-30; see RBM 12.) As noted, the Department possesses broad rulemaking authority predating Proposition 57. (OBM 28; see *In re Cabrera* (2012) 55 Cal.4th 683, 688.) And Proposition 57 expressly directs that the Department "shall adopt regulations in furtherance of these provisions" because the program cannot operate without them. (Cal. Const., art. I, § 32, subd. (b).) While subdivision (a)

does make "[a]ny person convicted of nonviolent offense" eligible, "convicted" and "nonviolent" are not defined. (RBM 20-23.) Further, the word "any" does not necessarily mean "each and every" inmate without exception—as Alliance's argument implies—particularly when read together with subdivision (b). (RBM 20-23; see, e.g., *Calatayud, supra*, 18 Cal.4th at p. 1064-1065, 1068 [rejecting literal interpretation of "any person"].) As subdivision (b) makes clear, the Department's implementing regulations must allow the Secretary to certify that they "protect and enhance public safety." (Cal. Const., art. I, § 32, subd. (b); OBM 32-34; RBM 19.) Clarifying the meaning of ambiguous terms and construing them in context is not a "re-writing" of the law—it is a necessary and appropriate exercise of an agency's rulemaking power. (OBM 28-30; RBM 11-13.)[6]

In re Lucas (2012) 53 Cal.4th 839, 850 does not aid Alliance's text-based argument. (Alliance ACB 19.) *Lucas* involved the proper construction of certain provisions of the Sexually Violent Predator (SVP) Act. Under that Act, a petition to commit a person as a SVP can be filed only while the person is in custody. (*In re Lucas, supra*, 53 Cal.4th at p. 843.) The Act allowed the Board of Parole Hearings for "good cause" to issue a 45-day hold to extend custody in order to evaluate whether a commitment petition is supported. (*Id.* at p. 844.) The Department's regulation defined "good cause" to focus on the reasons to believe the person was a SVP. (*Ibid.*) The Court held this to be error. Considering extrinsic evidence, this Court held that the Department was required to define "good cause" in relation to the reasons that the evaluation could not

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[6] Nor is it an improper "re-writing" of a law to look beyond the text's strict or literal meaning, where, as in this case, doing so effectuates the legislative or voters' intent. (OBM 25-27; RBM 17-20; see pp. 14-16, *post*.)

have been completed before the inmate's scheduled release date. (*Id.* at pp. 849-852.)

Here, moving beyond the bare text of subdivision (a), the larger statutory context—specifically, the public safety charge of subdivision (b)—and other indicia of the voters' intent—in particular, the promises made in the ballot materials concerning the exclusion of sex offenders (discussed in the next section)—show that the Department's regulation is reasonable and consistent with Proposition 57's text and purpose. (RBM 16-17, 20.)

B. The Department and the Courts Are Not Precluded from Considering Proposition 57's Ballot Materials, Which Show the Voters' Intent to Exclude Registered Sex Offenders

In construing initiatives, courts commonly consider ballot materials—as the Department did in this case. (See OBM 30, citing *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 306); RBM, citing *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 445.) Alliance asks the Court to disregard Proposition 57's ballot materials, and in particular the proponents' rebuttal arguments. In support, Alliance cites this Court's observation in *Delaney* that "a possible inference based on the ballot argument is an insufficient basis on which to ignore the unrestricted and unambiguous language of the measure itself." (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 803; Alliance ACB 26.) Alliance takes *Delaney*'s holding out of context.

In *Delaney*, this Court considered whether the newsperson's shield law, which protects a journalist against contempt for "refusing to disclose any unpublished information," applies only to information obtained by the journalist in confidence. (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 796-797, 799-800.) In holding the shield law applies to both

confidential and nonconfidential information, the Court was persuaded by the text's use of the word "any." (*Id.* at pp. 798-799.) But the Court did not stop at the text; it also considered the absence of any "compelling" indication to the contrary in the ballot materials. (*Id.* at pp. 801-803; see also RBM 20, discussing *Calatayud, supra*, 18 Cal.4th at p. 1064-1065, 1068.)

Indeed, *Delaney* supports the Department's position: that the fundamental purpose of construing a law "is to determine the lawmakers' intent," that the text should be read in context of the law as a whole, and that ballot materials are "relevant to determining *the voters*' intent . . . ." (*Delaney v. Superior Court*, *supra*, 50 Cal.3d at pp. 798-799, 802, italics in original.) Unlike the ballot materials in *Delaney*, Proposition 57's ballot pamphlet presents compelling evidence that the proponents intended, and the voters understood, that registered sex offenders would be excluded from the nonviolent parole program. (See OBM 11, 14-17; RBM 4, 13-14.) Indeed, when the opponents raised concerns that sex offenders currently convicted of nonviolent felonies would be eligible for parole, Governor Brown told the voters that the opponents "are wrong" and promised that Proposition 57 "excludes sex offenders, as defined in Penal Code 290, from parole." (RBM 11, quoting Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.)[7]

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[7] Keeping the promise that the Governor explicitly made to voters cannot fairly be characterized as "obduracy." (Alliance ACB 7.) And, further, keeping that promise has not interfered with the objectives of Proposition 57. Continued, steady decreases in the adult prisoner population of 0.6 percent to 1.4 percent are projected for each year through 2023, with a net total decrease of 4.8 percent or 6,275 inmates over the next five years. (Cal. Dept. of Corrections and Rehabilitation, Spring 2019 Population Projections Report, pp. 9, 13, 15, at <https://www.cdcr.ca.gov/wp-content/uploads/sites/174/2019/06/Spring-

(continued...)

Alliance asks the Court to disregard the Governor's assurances to voters because the Governor also included what Alliance calls an "oblique reference" to a federal court order. According to Alliance, the voters cannot be presumed to understand the relevance of an order in a federal court proceeding. (Alliance ACB 23, 25; see ABM 41.) But the reference did not take away from the clarity of the Governor's promise. As the Department explained, this shorthand reference to the federal court order represented Governor Brown's assurance to the voters that an existing policy of excluding sex offenders from parole—relating to a federal court proceeding—would continue if Proposition 57 was enacted. (OBM 15-16, 31-32; RBM 11.)[8] The Governor intended to continue the sex-offender exclusion for the parole process established under the federal court's supervision and the Governor communicated this to the voters. (OBM 13-15; RBM 9-12.) This is certainly relevant for discerning the voters' intent. (RBM 5; *People v. Hazelton* (1996) 14 Cal.4th 101, 123, quoting *Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7 [applying presumption that "drafters' intent and understanding of the measure was shared by the electorate" if electorate is aware of that intent].)

Alliance next contends that arguments by the proponents and opponents of a ballot initiative can lead to no conclusive inference about the exclusion of sex offenders, and that it is just as likely that the voters approved Proposition 57 despite or because of the opponents' warnings that

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(...continued)
2019-Population-Projections.pdf> [as of Feb. 18, 2020]. This is despite an expected increase in court commitments from 2019 through 2023. (*Id.* at p. 22.)

[8] Explaining the federal litigation, the resulting court order, and the Department's policy response in detail would be impractical, given the 250-word limit for rebuttal arguments in a ballot pamphlet. (See Elec. Code, § 9069.)

sex offenders would be considered for parole. (Alliance ACB 23-24; see ABM 40-43.) This is unpersuasive. Virtually every ballot pamphlet will have competing views presented by those who support the initiative and those who oppose it. This does not make the ballot pamphlet irrelevant for discerning voter intent. (See *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 741 [observing that "the 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"]; RBM 12.)

Alliance cites three cases for the view that the opponents' arguments are equally or more persuasive than the proponents' arguments. (Alliance ACB 24, citing *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, *Legislature v. Eu* (1991) 54 Cal.3d 492, and *People v. Superior Court (Cervantez)* (2014) 225 Cal. App. 4th 1007.) These cases are inapt.[9]

Robert L. concerned a voter initiative that increased the punishment for gang-related crimes. (30 Cal. 4th at pp. 897-899.) The opponents warned voters of the initiative's possible overreach, in elevating minor crimes like misdemeanor vandalism to a felony offense. (*Id.* at pp. 906-907.) The Court held that "the voters passed the initiative despite these warnings," which "clearly show[ed]" voter intent to increase punishment for all gang-related crimes. (*Ibid.*) But there, unlike this case, the proponents' rebuttal statement did not contradict the opponents' claims. Proponents and opponents did not dispute that the initiative would turn some misdemeanors, like vandalism, into felonies. (See *ibid.*) Here, the

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[9] In *Cervantez*, the court of appeal considered the ballot materials to decide if the voters intended a firearm enhancement to be a disqualifier for an inmate's resentencing under the Three Strikes Reform Act. (225 Cal.App.4th at pp. 1010-1011, 1016-1017.) The court did not consider any arguments by the opponents to the initiative, so this case is irrelevant to Alliance's argument.

proponents plainly and directly disputed the opponents' assertion that registered sex offenders would be considered for parole. *Robert L.* does not support disregarding the Governor's assurances in asking the People of California to vote "yes" on Proposition 57.

Eu similarly supports the Department's position. There, this Court considered whether a voter initiative intended to impose a "lifetime ban" on politicians who have served a certain number of terms in office. (54 Cal.3d at 503.) In determining voter intent, this Court relied significantly on the opponents' arguments that the initiative would impose a lifetime ban rather than limit the number of consecutive terms an office-holder may serve, and held, critically, that it was "significant that the proponents failed to contradict the opponents' 'lifetime ban' argument." (*Legislature v. Eu*, *supra*, 54 Cal.3d at p. 505.) On that basis, the Court concluded that "the average voter, reading the proposed constitutional language as supplemented by the foregoing analysis and arguments, would conclude the measure contemplated a lifetime ban against candidacy for the office once the prescribed maximum number of terms had been served." (*Ibid.*) Here, Proposition 57's proponents directly contradicted the opponents' argument that registered sex offenders might be considered for parole, and made no statement in support of parole for sex offenders. (See Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 5.) Indeed, *Eu* supports the Department's position that the proponents' views are persuasive to the voters, because "ballot measure opponents frequently overstate the adverse effects of the challenged measure, and . . . their 'fears and doubts' are not highly authoritative in construing the measure." (*Legislature v. Eu*, at p. 505, quoting *DeBartolo Corp. v. Fla. Gulf Coast Trades Council* (1988) 485 U.S. 568, 585.) The "average voter" would read Governor Brown's assurance that the opponents were incorrect and

conclude that the ballot measure would maintain the current sex offender exclusion as promised.

None of these cases contradicts the rule that, as the Department explained in its briefs, courts look to the ballot materials for what a reasonable voter intended or the "probable intent of the framers." (RBM 12-13, quoting *People v. Valladoli* (1996) 13 Cal.4th 590, 603.) It is reasonable for a voter to view the Governor's promises refuting the opponents' statements as a definitive declaration of how Proposition 57 would be implemented. (See *People v. Morales* (2016) 63 Cal.4th 399, 406; *People v. Hazelton*, *supra*, 14 Cal.4th at p. 123.) This is reinforced in the ballot pamphlet's declaration that the proposition's reforms would "be implemented through Department of Corrections and Rehabilitation regulations developed with public and victim input and certified as protecting public safety." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59; OBM 16-17.) A reasonable voter is aware that the Governor is the head of the State's executive branch and that the Governor oversees the agency charged with implementing Proposition 57. (Gov. Code, § 12801.) Such a voter would reasonably give special weight to the Governor's assurances that sex offenders would be excluded from the nonviolent parole process. (See RBM 12, citing *People v. Hazelton*, at p. 123 [holding drafters' intent is shared by the voters absent contrary evidence].)

CONCLUSION

This Court should reverse the judgment of the Court of Appeal and uphold application of California Code of Regulations, title 15, section 3496, subdivision (b) to petitioner Gadlin and those similarly situated.

Dated: March 4, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS uses a 13 point Times New Roman font and contains 4,176 words.

Dated: March 4, 2020

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

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for 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 March 4, 2020, I served the attached

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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 March 4, 2020, at Los Angeles, California.

S. Figueroa
Declarant

A. Figueroa
Signature

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