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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Warden Craig Koenig, respondent below, petitions for review to resolve the important question of whether the regulatory exclusion of sex offenders from the nonviolent parole process is consistent with the public safety and rulemaking provisions of article I, section 32 of the California Constitution ("Amendment"). In opposing review, Gregory Gadlin posits the Amendment guarantees him, and all similarly situated inmates, parole review despite his prior convictions of rape and child molestation that require registration under Penal Code section 290. Gadlin argues the voters anticipated giving parole review to a sex offender whose current offense is not a violent felony or a registrable sex offense. This view defies the drafters' intent for the Amendment and the voters' intent in enacting it.

The Amendment references, and was patterned after, a 2014 parole process created in response to a federal court order by which the California Department of Corrections and Rehabilitation offered parole review to certain nonviolent offenders as part of remedial measures to reduce the prison population. Inmates who were required to register as a sex offender for a prior or current conviction were not eligible. By assuring voters that the Amendment would not change this exclusion of sex offenders from parole, the proponents' meaning was clear: all sex offenders would remain ineligible for the nonviolent parole process.

The Amendment does not expressly exclude sex offenders but, by vesting the Department with rulemaking authority to protect and enhance public safety, the Amendment authorizes the Department to adopt regulations to achieve that outcome. The Department's exercise of its constitutional rulemaking authority to exclude sex offenders from the nonviolent parole process is consistent with both the Amendment's provisions and its public safety purpose. For this reason, the Court's review of the Court of Appeal's decision is necessary to define the scope of

the Department's quasi-legislative rulemaking under the Amendment and affirm the voters' intent to exclude sex offenders from parole review.

ARGUMENT

THE COURT'S REVIEW IS NECESSARY TO RESOLVE IMPORTANT, UNSETTLED QUESTIONS ABOUT THE DEPARTMENT'S AUTHORITY TO IMPLEMENT PAROLE REFORM TO EFFECTUATE THE VOTERS' INTENT AND PROTECT AND ENHANCE PUBLIC SAFETY.

As argued in the petition for review, this case presents important questions of law that will decide how the Amendment's parole reforms will be implemented throughout the state. (Petn. at pp. 13, 16-17.) This is an unsettled question of constitutional interpretation that, before the Court of Appeal's decision in this case, had not been addressed by any appellate court. And, because the Court of Appeal erred by interpreting subdivision (a)(1) of article I, section 32, of the Constitution in isolation without considering the Amendment's public safety provisions and voter intent as manifested from the ballot pamphlet, this is a case that warrants the Court's review. (See, e.g., *Vergara v. State of Cal.* (2016) 246 Cal.App.4th 619, 652 ["Because the questions presented have obvious statewide importance, and because they involve a significant legal issue on which the Court of Appeal likely erred, this court should grant review."].)

I. WHETHER THE AMENDMENT VESTS THE DEPARTMENT WITH RULEMAKING AUTHORITY TO EXCLUDE SEX OFFENDERS FROM PAROLE REVIEW IS AN IMPORTANT QUESTION OF LAW.

Gadlin argues the decision below correctly invalidated the regulatory exclusion of sex offenders from nonviolent parole because the Department lacks authority to make public-safety policy choices that are contrary to those made by the voters. (Answer, at 21-26.) The fallacy with Gadlin's view is that the Court of Appeal considered subdivision (a) of the Amendment without giving any effect to the public safety provisions in the

Amendment's preamble or in subdivision (b), which requires the Department to adopt regulations to implement the new parole process and protect and enhance public safety. (Slip opn., at p. 7.) The court below did not determine that the Department contradicted the voters' policy choices as to public safety; rather, it disregarded the Department's effort to effectuate the Amendment's public safety purpose as mere "policy considerations." (*Ibid.*)

Whether the Amendment authorizes the Department to exclude sex offenders from parole review is a question that deserves the Court's review because it implicates the People's initiative power to confer regulatory authority upon an administrative agency and the proper scope of that agency's rulemaking power. (See, e.g., *Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal.4th 1020, 1033, 1043-1044 [electorate through initiative process properly conferred additional regulatory authority upon the California Public Utilities Commission].) The People's legislative power through the initiative process "*is coextensive* with the power of the Legislature" (*id.* at pp. 1031-1032, quoting *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675, italics in original) and includes the power to delegate lawmaking power to the Department (see *Assn. of Cal. Insurance Cos. v. Jones* (2017) 2 Cal.5th 376, 396-397). The Department thereby shoulders the responsibility to protect public safety and to exercise its power as the voters intended which, here, is to create a parole process that excludes sex offenders.

II. WHETHER THE VOTERS INTENDED TO EXCLUDE SEX OFFENDERS FROM PAROLE IS AN IMPORTANT QUESTION OF CONSTITUTIONAL INTERPRETATION.

Understanding the proponents' expressed intent to exclude sex offenders from parole is central to discerning voter intent for the Amendment's parole process. (See *People v. Hazelton* (1996) 14 Cal.4th

101, 123, quoting *Rossi v. Brown* (1995) 9 Cal.4th 688, 700, fn. 7 [presumption, absent contrary indication, "'that the drafters' intent and understanding of the measure was shared by the electorate.'"].) Contrary to Gadlin's assertion, the voters did not make the policy decision to grant parole review to certain sex offenders.

Gadlin points to the ballot materials and what the Amendment's opponents proffered in their attempt to defeat the measure. (Answer, at 14-15.) This is not evidence of voter intent because, while courts are to consider the arguments made by both the proponents and the opponents of a ballot measure when ascertaining voter intent, the Court has observed that "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* (1991) 54 Cal.3d 492, 505.) The opposing arguments of a measure bear significance where they are not contradicted in the measure's supporting arguments. (*Ibid*.)

Here, however, the proponents, including former Governor Edmund G. Brown, Jr., explicitly contradicted the assertions that any sex offender would be eligible for parole review, stating that the Amendment's nonviolent parole process "[d]oes NOT and will not change the federal court order that excludes sex offenders, as defined in Penal Code 290, from parole." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.)

The referenced "federal court order" is the order from the three-judge court (see *Coleman v. Brown* (E.D. Cal. & N.D. Cal. 2013) 922 F.Supp.2d 1004, 1009) that required the Department to establish a parole process for nonviolent offenders. (See, e.g., *In re Ilasa* (2016) 3 Cal.App.5th 489, 501-502.) The resulting parole process excluded <u>all</u> sex offenders, whether they were required to register under Penal Code section 290 for a prior or current

sex offense. (*Id.* at p. 502.) The proponents' intent to exclude all sex offenders by preserving the existing categorical exclusion of all sex offenders is reasonably clear. The logical inference, therefore, is that the electorate shared the intent and understanding of the measure by the proponents and not the overstated views expressed by the measure's opponents. (See *Hazelton*, *supra*, 14 Cal.4th at p. 123.)

As argued in the petition, the distinction drawn by the court below between sex offenders required to register for a current sex crime and those required to register for a prior sex crime is novel. (Petn. at pp. 15-16.) No such distinction existed at the time the Amendment was enacted nor has such a distinction been drawn outside of the decision below. And it is far from clear that the voters intended to bifurcate the class of registered sex offenders in this manner. Instead, the voters intended to create a parole process for nonviolent offenders that, for public safety reasons, excludes registered sex offenders. The Court's intervention is necessary to effectuate this intent for the Amendment.

III. *EDWARDS* DOES NOT PROHIBIT THE REGULATORY EXCLUSION OF AN INMATE FROM THE NONVIOLENT PAROLE PROCESS BASED ON A PRIOR CONVICTION OF A REGISTRABLE SEX OFFENSE.

Gadlin contends the court below applied settled precedent that prohibits the Department from excluding all sex offenders from parole review and the Court's review would disturb that precedent and result in confusion in the lower courts. (Answer, at pp. 7-8, 10-11.) Gadlin is mistaken.

Before the court below issued its decision, no appellate court had addressed the question whether the Amendment prohibits the Department from excluding sex offenders from the nonviolent parole process. The Court of Appeal's prior decision in *In re Edwards* (2018) 26 Cal.App.5th 1181 addressed an entirely different question, relating to offenders

sentenced to indeterminate terms under the "Three Strikes" law and has no bearing on the issues in this case.

There, the Court of Appeal considered whether an indeterminately sentenced inmate can meet the Amendment's eligibility criteria of completing the full term for the offender's primary offense. (*Edwards*, at pp. 1187-1190.) The court rejected a literal interpretation of the Amendment—that an inmate can never "complete" an indeterminate term so as to become eligible—and concluded that an indeterminately sentenced inmate becomes eligible for nonviolent parole review after completing the statutory maximum for his or her primary offense. (*Id.* at p. 1192.)

Edwards was issued by the same court and is similar only in involving another challenge to the Department's regulations adopted under the Amendment. (See *Edwards*, *supra*, 26 Cal.App.5th at pp. 1187-1188.) The decision below cites *Edwards* when setting forth the Amendment's background and the governing standard of review. (Slip opn., at pp. 4, 6-7.) But *Edwards* was not followed as precedent for the Court of Appeal's ultimate conclusion. (See *id.* at pp. 7-8.) Justice Baker states as much in the concurring opinion, explaining that this case is distinguishable from *Edwards* given the absence of "a clear textual indication" barring the regulatory exclusion of at least some sex offenders. (Slip conc. opn., at p. 2.)

Indeed, unlike *Edwards*, there is a textual indication that the Department may exclude sex offenders for public safety reasons. (See *Gadlin*, *supra*, 31 Cal.App.5th at p. 796, conc. opn. of Baker, J. ["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."].) And to the extent that any ambiguity exists, a review of Proposition 57's official ballot pamphlet—which the court below did not do—would confirm that the voters understood that sex

offenders would be excluded. (See *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 431, 445.)

Even if *Edwards* was controlling precedent for the decision below, a split in the appellate courts is not a prerequisite for review. (See Cal. Rules of Court, rule, 8.500(b)(1).) That the Court of Appeal adopted an interpretation of the Amendment that fails to effectuate the voters' intent for enacting it and isolates one of its provisions out of context of the others sufficiently implicates important questions of constitutional construction that require the Court's guidance.

CONCLUSION

The Court should grant the petition for review.

Dated: April 19, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY TO ANSWER TO PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 1,873 words.

Dated: April 19, 2019

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DECLARATION OF ELECTRONIC SERVICE

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.

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REPLY TO ANSWER TO PETITION FOR REVIEW

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Michael Satris
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S. Figueroa
Declarant

Signature

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Supreme Court of California

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Lower Court Case Number: **B289852**

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