No. C100274

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CRIMINAL JUSTICE LEGAL FOUNDATION, SAMANTHA CARTER, RIZPAH BELLARD, AND MINA MOYNEHAN,

Plaintiffs, Respondents, and Cross-Appellants,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; JEFFREY MACOMBER, Secretary of CDCR; AND CALIFORNIA BOARD OF PAROLE HEARINGS,

Defendants, Appellants, and Cross-Respondents.

Appeal from the Sacramento County Superior Court,
Honorable Jennifer K. Rockwell
Case No. 34-2022-80003807-CU-WM-GDS

RESPONDENTS' ANSWER BRIEF AND CROSS-APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL THIRD **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: C100274
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 105178 NAME: KENT S. SCHEIDEGGER FIRM NAME: Criminal Justice Legal Foundation STREET ADDRESS: 2131 L Street CITY: Sacramento STATE: CA ZIP CODE: 95816 TELEPHONE NO.: (916) 446-0345 FAX NO.: (916) 446-1194 E-MAIL ADDRESS: Kent.Scheidegger@cjlf.org ATTORNEY FOR (*name*): Criminal Justice Legal Foundation et al.	SUPERIOR COURT CASE NUMBER: 34-2022-80003807-CU-WM-GDS
APPELLANT/ PETITIONER: Cal. Department of Corrections and Rehabilitation; Jeffrey Macomber, Secretary of CDCR; and Cal. Board of Parole Hearings RESPONDENT/ REAL PARTY IN INTEREST: Criminal Justice Legal Foundation, Samantha Carter, Rizpah Bellard, and Mina Moynehan	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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[ ] Continued on attachment 2.

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Date: September 4, 2024

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(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

Never in the history of California has any executive agency been granted plenary legislative power over an area of law that it administers, with the unchecked authority to substitute its own policies for those enacted by the Legislature or the people, free of *any* constraint by statutes. (See *infra* Part IV-A.) Yet that is exactly the authority that appellant California Department of Corrections and Rehabilitation (CDCR) claims in this case. (Appellants' Opening Brief 41, 46 (AOB).) This is the kind of aggregation of power that has long been regarded in America as "the very definition of tyranny" (see *infra* at p. 58) and which the separation of powers and system of checks and balances were designed to prevent.

Neither the text of Proposition 57 nor the ballot materials for it require an interpretation yielding such a drastic alteration of the constitutional structure. If the initiative really did work such a far-reaching change it would be a revision rather than an amendment of the Constitution, which cannot be done by initiative. (See *Legislature of the State of California v. Weber* (2024) 16 Cal.5th 237, 277.)

Statutes enacted by both the Legislature and the people directly have established clear policies that most violent felons be limited to 15 percent credits, that murderers and specified repeat violent offenders receive no credits at all, and that murderers serve the minimum sentence of their life term with no reduction via credits. (Pen. Code, §§ 2933.1, subd. (a), 2933.2, 2933.5, 190, subd. (e).) The statute on minimum eligible parole dates has been consistently interpreted by the Supreme Court and this court over the course of three-quarters of a century to require service of the minimum stated in that statute or the sentencing statute for the crime, whichever is greater, without reduction via credits except as allowed by the sentencing statute. (*People v. Sampsell*

(1950) 34 Cal.2d 757, 764; *In re Monigold* (1983) 139 Cal.App.3d 485, 490-491; *In re Cervera* (2001) 24 Cal.4th 1073, 1079.)

Appellants now claim the power to run roughshod over all these policy determinations and substitute their own policy choices. Their source for this unprecedented claim is two brief provisions in an initiative that grant CDCR the authority to issue credits and promulgate regulations, but which do not say that they are granting plenary legislative authority rather than ordinary quasi-legislative authority. Appellants have more than doubled the available credits for rapists, and they are releasing murderers in dramatically shorter times than the minimum that the people deemed adequate punishment for the worst of crimes. In doing so, they undercut one of the most important of legislative prerogatives—the power to determine the punishment for crimes. If their thesis is accepted, even the people themselves are stripped of the power to correct agency excesses by any means short of a constitutional amendment.

This case is a petition for writ of mandate brought by three victims of crime[1] and an organization dedicated to protecting the rights of victims of crime. The respondents ask only that the appellants be ordered to obey the law, as established in California statutes enacted by the people and the Legislature, regarding the award of credits to violent criminals, calculation of minimum eligible parole dates, and the consequent setting of parole hearing dates and release dates.

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1. The trial court petitioners include the mother of a child victim and the daughter of a murder victim (see 1 Appellants' Appendix 248, 253 (AA)), cases in which the direct victims cannot represent themselves. Family members are also crime victims. (Cal. Const., art. I, § 28, subd. (e).)

The trial court granted the writ in part and denied it in part. Both parties filed notices of appeal. Appellants filed their opening brief on August 5, 2024. This brief is the combined answer brief and cross-appeal opening brief.

JURISDICTION

For the reasons explained in Respondents' Motion to Dismiss Appeal (filed May 24, 2024), appellants purported to appeal from a nonappealable order and subsequently failed to appeal from the final judgment. Briefly, a ruling on the merits of a writ petition is final and appealable only if it fully disposes of the matter, which it does not if it directs preparation of a final judgment (*Davis v. Taliaferro* (1963) 218 Cal.App.2d 120, 122-123) or if it does not resolve all causes of action before the court. (*Griset v. Fair Political Practices Com*. (2001) 25 Cal.4th 688, 697.) The ruling in this case satisfied neither criterion. (See Reply to Opposition to Motion to Dismiss 4-6 (filed June 14, 2024).)[2]

This court denied the motion to dismiss without stating the reason on June 14, 2024. Three possible reasons are: (1) agreement with appellants that the ruling was appealable; (2) a decision that exercise of the court's discretion to save the defective appeal was appropriate (see Cal. Rules of Court, rule 8.104(d)(2)); or (3) a decision to defer the question until after the briefing, after clarification from *Meinhardt*, or both. To the extent the question is still open, respondents renew the objection to jurisdiction.

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2. *Laraway v. Pasadena Unified School Dist*. (2002) 98 Cal.App.4th 579, cited in respondents' motion and reply, was disapproved on other grounds in *Meinhardt v. City of Sunnyvale*, Cal. Sup. Ct. No. S274147, pp. 22-23, fn. 14 (July 29, 2024). It is still good law on the point it was cited for, above, as are *Davis* and *Griset*, *supra*, which together make the same points.

While the court has discretion to save the appeal under rule 8.104(d)(2), it has not done so yet, so as of this writing the court does not have jurisdiction of appellants' appeal.

There is no uncertainty as to jurisdiction on respondents' cross-appeal. Respondents' February 2, 2024 notice of appeal (Respondents' Appendix 9 (RA)), filed seven days after entry of the judgment (RA 3), is proper regardless of the status of the December 13, 2023 ruling. (*Meinhardt*, *supra*, at pp. 2-3.) Even if the earlier ruling were appealable and the pre-*Meinhardt* rule still applied, respondents' appeal was within 60 days of the ruling and incorporated that ruling in the notice of appeal. (RA 10.)

ISSUES PRESENTED

In the appeal of appellants CDCR et al.:

1. Do CDCR's regulations applying credits to advance minimum eligible parole dates (for crimes other than those where the sentencing statute authorizes such use) conflict with sections 190, 3041, and 3046 of the Penal Code?

2. If so, does article I, section 32 of the Constitution authorize CDCR to redefine minimum eligible parole date by regulation despite the conflicting statutes?

In the cross-appeal of respondents CJLF et al.:

3. Do CDCR regulations providing credits above the limits and contrary to the exclusions in article 2.5 of chapter 7 of title 1 of part 3 of the Penal Code conflict with those statutes?

Common to both appeals:

4. Does article I, section 32 of the Constitution authorize CDCR to effectively abrogate statutes by regulations? Specifically, does the phrase "notwithstanding anything in this article or

any other provision of law" in the purpose clause of article I, section 32, subdivision (a) of the Constitution indicate only that the provisions of that subdivision prevail over laws contrary to the provisions themselves, or does it go farther and provide that any and all laws and constitutional provisions yield to any regulations that CDCR may promulgate under subdivision (b)?

5. If so, does this provision's drastic alteration of the separation of powers constitute a constitutional revision rather than an amendment, and was it therefore not validly adopted by initiative?

California Rules of Court, rule 8.216(b)(2) requires that points in the two appeals be addressed separately, which we do in Parts I through III, but the separation of powers and revision arguments are common to both appeals and are addressed as to both in Parts IV and V.

STANDARD OF REVIEW

The parties agree that the superior court's judgment is reviewed de novo. (AOB 13.) Review of the regulations for consistency with controlling law calls for independent judgment of the court. (See *infra* Part IV-B.)

STATEMENT OF FACTS AND CASE

This case was decided without an evidentiary hearing or findings of fact. However, the trial court petitioners (respondents/cross-appellants here) filed three requests for judicial notice. (See Appellants' Appendix, vol. 1, p. 82 (AA); 1 AA 194; 1 AA 313.) All were granted. (Ruling on Submitted Matter, 3 AA 740.)

Appellants describe the federal court litigation and the enactment of Proposition 57, including its stated purpose to "[p]revent federal courts from indiscriminately releasing prisoners." (AOB 13-14.) During the litigation, one of the measures that the CDCR fought against was a proposal to expand credit earning beyond the existing limits of California law for "inmates convicted of serious, violent, or sex offenses." (Declaration of Jeffrey Beard, 1 AA 110.) CDCR strongly opposed this proposal because "these measures pose an undue risk to public safety and do not reflect sound correctional practice." (*Ibid*.) This indiscriminate release measure threatened in federal court is largely what CDCR has since adopted itself, prompting the present litigation. (1 AA 272.) Proposition 57 was not actually necessary to prevent further federal release orders. CDCR was below the federal cap almost two years before the measure was enacted. (1 AA 197.)

Appellants deem it important that Proposition 57 requires the CDCR Secretary to certify that the regulations "protect and enhance public safety." (AOB 15.) In fact, this requirement is toothless. There is no check to prevent a knowingly false certification, as respondents believe the previous Secretary made in this matter.

Despite the initiative proponents' representation of Proposition 57 as being for nonviolent offenders and keeping the most dangerous criminals locked up, as further described in the body of the brief, CDCR promulgated regulations in 2017 and amended them in 2021 to expand credits and shorten time served primarily for the benefit of violent felons. For example, the regulations authorize good conduct credits at a rate of 33 percent for all violent felons (Cal. Code Regs., tit. 15, § 3043.2(b)(2)(B), 1 AA 121), more than double the statutory cap for most violent felons and contrary to the ban on credits for murderers and three-time

violent felons. The rate for most nonviolent felons remains at the statutory 50 percent. (*Id*., subd. (b)(4)(A).)

Victims of violent crime and their families are shocked and horrified to learn that the perpetrators of atrocities against them—who they believed were safely locked away for many more years—are scheduled for release or parole hearings far earlier than they were told at sentencing would be possible.

> "Once the perpetrator was moved to CDCR within a couple weeks, we were horrified to learn that he was eligible for credits that could take seven or more years off his sentence. It was traumatizing all over again. How could a man that did this go from 22 years to 14 years? How is that justice for my daughter? She has to go through life with this on her shoulders and at such a young age." (Declaration of Samantha Carter, 1 AA 249.)

> "5. Tomasini was sentenced to 16-to-life on Aug 26, 2013. We were originally told a release would occur no earlier than 2028, but as early as February 2020 we received notices about his early parole eligibility hearings, indicating a possible release five years earlier. This immediately caused a re-awakening of the numerous emotional and medical issues our family experienced following the crime, associated with trauma. As a consequence of CDCR's actions, every member of the victim's family and close friends will have to experience up to 1,825 additional days in which we experience magnified re-traumatization and anxiety, knowing a monster is either about to be freed early or free.

> "6. The early hearing resulted in acute pain, suffering, and cost. On the day of the hearing, many of those attending to represent the victim had to take many days off of work. We had to emotionally re-live the heart-crushing tragedy we had endured just ten years prior, tearing open any protective scabs that allow us to function on a day to day basis. Following the hearing, several family members suffered stress that caused aggravation of medical condi-

> tions, and for which treatment had to be sought." (Declaration of Mina Moynehan, 1 AA 254.)

At no point in the adoption of these regulations has CDCR displayed any regard for the right of victims of crime to finality in their cases or protection against "the ongoing threat that the sentences of criminal wrongdoers will be reduced, prolong[ing] the suffering of crime victims for many years after the crimes themselves have been perpetrated." (Cal. Const., art. I, § 28, subd. (a)(6).) CDCR's statements on these regulations do not even mention victims. (1 AA 186-191.)

Despite its supposed expertise in the matter of credits and rehabilitation, CDCR disclaims any empirical basis to demonstrate that any of this will actually work to reduce recidivism. CDCR's statement of "Technical, Theoretical, or Empirical Studies, Reports, or Documents Relied Upon" reads, in its entirety, "Not applicable." (1 AA 190.)

The Criminal Justice Legal Foundation, an organization dedicated to the rights of victims of crime, along with individual victims, filed a petition for writ of mandate joined with a complaint for declaratory and injunctive relief. Two amended petitions were needed for procedural reasons not pertinent to this appeal,[3] and a third amended petition was directed by the court after it sustained a demurrer as to matters it deemed moot while overruling most of the claims in the demurrer. (2 AA 544-552.)

The final ruling of December 13, 2023, granted the writ petition in part and denied it in part. This ruling did not directly order the trial court respondents to do or refrain from doing

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3. There are some incorrect statements about the procedural history in some of the court orders in the record. They need not be detailed here, but a correction is available in a supplemental brief in the record. (3 AA 673-674.)

anything, but rather directed the petitioners to prepare an order, judgment, and writ for submission to opposing counsel and the court. (3 AA 753-754.) The parties then agreed that the complaint for declaratory and injunctive relief could be dismissed because that relief would be duplicative of the writ on the points where the petitioners prevailed. This process was completed on January 26, 2024 when the court entered the judgment and order. (RA 4, 11.) The clerk then issued the writ. (RA 20).

Appellants filed a notice of appeal purporting to appeal from the December 13 ruling on January 11, 2024. (3 AA 756.) Respondents filed a cross-appeal from the final judgment on February 2, 2024. (RA 9.)

SUMMARY OF ARGUMENT

The regulations at issue in CDCR's appeal conflict with both sections 3046 and 190 of the Penal Code. Section 3046 has a very long history of interpretation that the minimums it sets are not reduced by credits as a general rule, with exceptions only as made by the statutes setting the minimum terms for particular offenses. Section 190 unambiguously provides that a "person sentenced pursuant to this section [i.e., for murder] may not be released on parole prior to serving the minimum term of confinement prescribed by this section."

Section 32 of article I of the Constitution, as enacted in Proposition 57, does not vest CDCR with the power to change this definition. The superior court correctly held that "the authority to grant credits, in and of itself, is not sufficient to advance an inmate's MEPD." This is consistent with CDCR's position in *In re Canady* and with this court's holding in that case, where nonviolent felons were *awarded* credits but they did not *apply* to reduce the "full term." The ballot materials confirm this understanding.

The Legislative Analyst said nothing to support appellants' position, and the relevant opponents' claim was emphatically denied by the proponents. Appellants have barely mentioned the key holding of the superior court's decision, and it should be affirmed on this basis. If not, the arguments in Parts IV and V apply to both appeals.

Regarding the cross-appeal, the superior court correctly found that the regulations conflict with statutes that establish an exclusive system of credits and require service of the full sentence except as reduced by those credits. The regulations also conflict with subdivision (f)(5) of section 28 of article I of the Constitution, which requires full service of sentences except as reduced by statutorily authorized credits.

Section 32 does not authorize CDCR to override statutes via regulations and substitute its own view for the policies enacted into law by the Legislature and by the people directly. Vesting such a power in an executive agency would be a grant of plenary legislative power rather than the quasi-legislative power routinely vested in such agencies.

As the controversy in this case goes to CDCR's authority to issue the regulations in question, this court should use its independent judgment, or "respectful nondeference."

On its face, a provision that simply authorizes CDCR to award credits does not imply a grant of plenary legislative power rather than quasi-legislative power. Enactments are presumed not to overthrow long-established principles of law unless they expressly say so. It is a long-established principle that regulations are subordinate to statutes and yield when the two conflict. This remains true when regulatory authority is granted by the Constitution. Regulations have at times been authorized to make exceptions to statutes that are narrow in scope or time, but never

a wholesale displacement of the legislative will expressed in statutes.

The "notwithstanding" clause in the header of subdivision (a) only overrides statutes that conflict with the provisions of section 32(a) itself, not any and all regulations promulgated in the future. Further, subdivision (b), authorizing regulations, is outside the scope of the "notwithstanding" clause. There is no conflict between the statutes and the text of subdivision (a)(2). CDCR retains the authority to award credits consistently with the limits expressed in statutes. A constitutional provision that prevents rather than makes changes in the law is not superfluous. Many serve an anti-backsliding function, from the 1791 federal Bill of Rights to the recent section 1.1 of article I in California.

The ballot materials do not require a contrary interpretation. A general statement that fails to inform the voters of the magnitude of a change is not necessarily controlling, especially when it raises a substantial constitutional doubt. The Legislative Analyst's statement about credits did not inform the people that they would be stripping themselves and the Legislature of the ability to place *any* restraints via statute on CDCR's issuance of credits, effectively anointing the Secretary as an absolute monarch on this subject. Such a shift raises a grave question as to whether this provision was a validly enactment amendment or an unauthorized and invalid revision.

The resulting constitutional doubt is a powerful reason to prefer the interpretation that eliminates the doubt, so long as this can be done without violence to the language. The doubt-free interpretation is entirely consistent with the language, as described above. It promotes the initiative's purposes of public safety and preventing indiscriminate releases. It is not in conflict with the purposes of reducing *wasteful* spending on prisons (as

incapacitating violent criminals is not wasteful) and emphasizing rehabilitation (as incentives for rehabilitation remain).

A purported constitutional amendment is actually a revision, which cannot be made by initiative, if it alters the separation of powers in a way that changes the basic framework of California's government. Assigning full legislative authority to another branch is the paradigmatic example, and that is what CDCR's interpretation of this provision would do. It is a magnified mirror image of the provision in the Supreme Court's recent decision in *Legislature v. Weber*. That case involved a provision that would prevent the Legislature from delegating quasi-legislative authority; this one involves a total and irrevocable delegation of plenary legislative authority, depriving the Legislature and the people of any ability to pull back authority by statute.

If interpreted as CDCR claims, the pertinent parts of section 32 would be a revision. They should not be interpreted that way, but if they are they should be severed and declared void. The remainder of Proposition 57 is not at issue.

ARGUMENT

I. CDCR's regulations regarding minimum eligible parole date conflict with sections 3046 and 190 of the Penal Code.

A. Section 3046.

The easiest issues in this case are whether CDCR's regulations conflict with statutes, both as to determinate sentences and indeterminate sentences. The superior court had little difficulty concluding that they do as to both. (See Ruling on Submitted Matter, 3 AA 743,750-751 (Ruling).) We address the latter here and the former in part III, *infra*.

Section 3046, subdivision (a) of the Penal Code[4] defines the minimum eligible parole date (MEPD), although the section does not use that term. It says "shall not be paroled until ...," but this limit is referred to as the "minimum eligible parole date as set pursuant to Section 3046" in section 3041, subdivision (a)(4). The MEPD is the greater of seven years (§ 3046, subd. (a)(1)) or "a term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole." (§ 3046, subd. (a)(2).) Most indeterminate sentence crimes have minimums well above seven years. (See, e.g., § 190, subd. (a) [15 years for second-degree murder, 25 for first]; § 1170.12, subd. (c)(2)(A) [3d strike, 25+]; but see § 664, subd. (a) [attempted premeditated murder, life with no minimum stated, so seven years].)

Originally, the seven-year floor now found in subdivision (a)(1) was the only limit in the statute. The alternative limit now in subdivision (a)(2) was added in 1988, with the proviso that the higher of the two limits controlled. (Stats. 1988, ch. 214, § 1.) The subdivision designations were added in 2000. (Stats. 2000, ch. 312, § 3.)

Section 3046 has long been understood to set the MEPD without reduction via credits unless the specific sentencing statute permits such reduction. (*People v. Sampsell* (1950) 34 Cal.2d 757, 764; *In re Monigold* (1983) 139 Cal.App.3d 485, 491.) That is, if the statute setting the minimum allows the minimum to be reduced by credits, then it can be. Absent such a provision, "the general rule [is] that release on parole is barred until a specified minimum term has elapsed (§ 3046)," i.e., without reduction via credits. (*People v. Stofle* (1996) 45 Cal.App.4th 417,

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4. All further section references are to the Penal Code unless otherwise indicated.

421; *In re Cervera* (2001) 24 Cal.4th 1073, 1080 [agreeing with *Stofle*].) Credits were not thought to be needed for indeterminately sentenced prisoners, as they had sufficient incentive to behave well, participate in rehabilitation, and work in order to convince the parole authority to grant parole. (See *Monigold* at p. 491; *Cervera* at p. 1082.)

This understanding was so well established by 2006 that the Legislature relied on it to eliminate credits for indeterminate sentences under the "one strike" law merely by deleting the subdivision that previously authorized them, seeing no need to enact a prohibition. (*People v. Adams* (2018) 28 Cal.App.5th 170, 182 [summarizing legislative history].)[5] The Legislature also recognized this principle when it enacted the 15 percent limit on credits for violent felons, taking care to specify that it did not intend to alter the rule that credits are generally not usable at all to advance MEPDs. (§ 2933.1, subd. (b).)

Though they made no such argument in the superior court, on appeal respondents raise the creative argument that their regulations qualify as the "any other law" referred to section 3046, subdivision (a)(2). (AOB 43-44.) Reading that subdivision as a whole precludes such an interpretation. It reads, "A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole." This language obviously con-

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5. To the extent that appellants imply that the Legislature has consistently enacted a specific prohibition whenever it intends to preclude use of credits to advance MEPD (see AOB 44), they are mistaken.

   The issue in *Adams* was presentence credits, but the legislative history summarized there applies to postsentence credits as well.

templates a statute that sets a floor, not a regulation that tries to drill holes in floors set by other laws.

The regulation provisions in question do not even mention minimum terms, much less "establish" them. For example, California Code of Regulations, title 15, section 3043.2(a) says, "Good Conduct Credit shall ... advance an inmate's parole hearing date ... if sentenced to an indeterminate term." This purports to be a blanket rule applying to all indeterminate terms, with no mention of any minimum or any offense. This is not conceivably the kind of law that section 3046(a)(2) was meant to reference.

Respondents rely heavily on *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, but that case is readily distinguishable. That case involved two statutory requirements for the use of voting machines. Section 19201 of the Elections Code forbade use of any voting machine unless it had been approved by the Secretary of State. (*Bowen* at p. 509.) Section 15360 of the Elections Code required a manual tally in one percent of precincts in any election where any voting machine was used. (*Id*. at pp. 510-511.) After questions were raised about most of the voting machines then in use in California, the Secretary decertified these machines but mitigated the impact of this step by reapproving them on a number of conditions, one of which was an expanded manual tally requirement, considerably more burdensome than the general statutory requirement. (See *id.* at p. 506.)

The court held that there was no conflict because section 15360 did not impose a cap on tally requirements. Its purpose was to ensure the accuracy of the vote, and to that end it imposed a requirement on all elections by machine. (*Id*. at pp. 511-512.) It was not concerned "with limiting unnecessary vote tallying," and it did not say "*no more than* or *only* 1 percent of the precincts." (*Id*. at p. 512.)

The present case could not be more different. Section 3046 unequivocally places a floor on release dates. In contrast to the language that *Bowen* found absent from the statute, section 3046(a) *does* say "shall not be released until ...." In a typical second-degree murder case, for example, section 3046(a) forbids parole until the perpetrator has served the greater of (1) "seven calendar years" or (2) the term established by the law that sets the minimum term for this offense, i.e., section 190, subdivision (a), which is 15 years.

Appellants' objection that the statute does not explicitly forbid the use of credits to advance the MEPD does not wash. On its face, it says "not ... until" two alternative dates, neither of which mentions credits. Respondents do agree that *Bowen* is instructive. (See AOB 42.) It instructs the other way by providing a useful contrast. And while the statute on its face is clear enough, its long history of consistent interpretation, along with legislative reliance on and confirmation of that interpretation, described *supra*, leaves no doubt. The regulations violate section 3046 to the extent that they propose to advance MEPD for crimes where such advancement is not authorized by the statute setting the minimum term or in any case where the seven year limit is controlling.

B. Section 190.

In Proposition 222 of 1998, the people of California approved an amendment to section 190 of the Penal Code. Language authorizing credits for murder sentences was deleted, and subdivision (e) of the amended section reads as follows:

> "(e) Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 does not apply to reduce any minimum term of a sentence imposed pursuant to this section. A person sentenced pursuant to this section may not be released on

parole prior to serving the minimum term of confinement prescribed by this section." (Stats. 1998, p. A-260.)

The policy enacted by the people is crystal clear. Murderers do not get early parole. The minimums in section 190 are really minimums. Appellants now claim the authority to negate the people's unequivocal decision on this point of policy.

The first sentence of subdivision (e) refers to the credits article of the Penal Code, saying it does not apply to reduce the minimum term. Given that this article is, by its terms, exclusive (see *infra* at pp. 36-37), a prohibition on these credits advancing the MEPD is a prohibition on advancing them at all. In a supplemental brief in the superior court, appellants tried to evade this prohibition by saying that CDCR could set up a parallel system of credits so that the prohibition does not apply. (3 AA 617.) If administrative agencies could evade the requirements of statutes that easily, the principle that regulations must be consistent with statutes (see *infra* at p. 40-43) would be meaningless. In any event, that facile argument has no application to the second sentence.

The second sentence unequivocally forbids any shortening of the minimum term. Respondents so argued in the superior court (Petitioners' Supplemental Brief, 3 AA 683), and appellants had no answer. (Respondents' Reply to Petitioners' Supplemental Brief, 3 AA 707-727 [not discussing section 190].) Appellants evidently intend to address that issue for the first time in their reply brief on appeal. (See AOB 41, fn. 12; but see *In re Gadlin* (2020) 10 Cal.5th 915, 929.) Regardless of what they may say, a conflict is inescapable. Section 190(e), second sentence, says that murderers cannot be released before they complete the applicable minimum term from that section, and CDCR's regulations say they can.

This regulation cannot be valid unless this executive agency has the unprecedented power to effectively repeal a statute. The Superior Court correctly held it does not as to MEPD, as discussed in the next part.

II. Proposition 57 does not authorize CDCR to redefine MEPDs.

"Don't be misled by false attacks. Prop. 57: ... Does NOT authorize parole for violent offenders." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Proposition 57, p. 59.) So the proponents of Proposition 57, including then-Governor Brown, promised the people of California. Beyond genuine question, if appellants' interpretation is correct, then Proposition 57 authorizes parole for violent offenders earlier than they would otherwise be eligible, flatly contrary to the proponents' express promise.

A. The Text.

On its face, subdivision (a)(2) of section 32 of article I of the California Constitution simply says that CDCR "shall have authority to award credits earned for good behavior" etc. Putting aside for the moment the interpretive and constitutional questions of whether Proposition 57 did and could grant CDCR the super-legislative power to overrule the people and the Legislature, addressed in Parts IV and V, *infra*, the threshold question is whether these few words authorize CDCR to advance MEPDs at all. The superior court held that they do not.

The key holding in the superior court's decision is the observation that "the authority to grant credits, in and of itself, is not sufficient to advance an inmate's MEPD." (Ruling, 3 AA 752.) Appellants claim that all of the superior court's reasons for its

ruling are unavailing (AOB 32), but they do not even mention the key reason, much less refute it.

Long-established law did not permit the use of credits to advance MEPD as a general rule.[6] (*Id.* at pp. 750-751, quoting *People v. Carpenter* (1979) 99 Cal.App.3d 527, 535; see *supra* at p. 22.) *Carpenter* did not hold that the defendant could not be awarded credits because he had an indeterminate sentence, but only that he could not use them to advance his MEPD. On the contrary, under the law at the time he was able to accrue credits and use them for another purpose. (*Id.* at pp. 535-536.) The difference between the award of credits and the use of credits to advance MEPD can be seen in two different statutes regarding murder and murderers. Section 190, subdivision (e) says that credits shall not *apply* to reduce the minimum term, while section 2933.2, subdivision (a) makes murderers ineligible to *accrue* credits.

CDCR itself recognized the distinction between awarding credits and applying credits in the regulations upheld in *In re Canady* (2020) 57 Cal.App.5th 1022. Under those regulations, CDCR *awarded* credits for good behavior but did not *apply* them to reduce the "full term" for the nonviolent parole provision of Proposition 57. (See *id.* at pp. 1028, 1030.) The scheme of awarding credits has no bearing on the definition of "full term" for that type of parole (*id.* at p. 1034), and it has long been understood to

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6. While the legislative authorities could make exceptions permitting such use, they could also repeal them, as the people did in enacting section 190, subdivision (e) and repealing contrary language (see *supra* at p. 25) and as the Legislature did in repealing former subdivision (j) of section 667.61. (Sen. Com. on Public Safety, Analysis of Sen. Bill No. 1128 (2005–2006 Reg. Sess.) as amended Mar. 7, 2006, pp. N, W.; *People v. Adams*, 28 Cal.App.5th at p. 182.)

have no bearing on "minimum term" for section 3046, except where the legislative authority has chosen to make an exception.

Appellants are critical of the superior court's analogy to *Canady*'s decision of this "unrelated" issue. (AOB 19, 29-31.) First, it should be noted that this analogy merely bolsters a conclusion that already follows from the text (Ruling, 3 AA 752) and the long history of interpretation of section 3046. (*Id.* at pp. 750-751.) Second, it would be more than a little strange if the same initiative required a full term without reduction by credits for nonviolent inmates while freely granting such reduction for another group of inmates consisting largely of those who committed some of the most violent crimes known to our law. (See *infra* at 30; Ruling, 3 AA 752.)

The substantive provision of Proposition 57 at issue in this case simply provides, without elaboration, that CDCR "shall have authority to award credits earned for good behavior" etc. (Cal. Const., art. I, § 32, subd. (a)(2).) The superior court correctly held that "nothing in the text of Proposition 57 suggests that CDCR may allow credits to reduce the MEPD for indeterminately-sentenced inmates." (Ruling, 3 AA 751.)

Appellants claim that the superior court has injected language into the provision that is not there, discriminating between determinately sentenced and indeterminately sentenced persons. (AOB 25-26.) There is no such injection. As before Proposition 57, indeterminately sentenced persons can accrue credits, subject to any limits in the law, and use them to reduce determinate portions of their terms, such as enhancements or sentences for other crimes. (See *In re Cervera* (2001) 24 Cal.4th 1073, 1086 (conc. opn. of Werdegar, J.).)

Interpretation of statutory text must take into account the background of existing law, and this is true of initiatives as well as legislative statutes. (See *People v. Weidert* (1985) 39 Cal.3d 836, 844; *People v. Frahs* (2020) 9 Cal.5th 618, 634-635.) The authority to award credits, without elaboration, was granted over a background of law that credits generally do not have the effect of advancing MEPD.

By the time Proposition 57 was adopted, the exceptions that had allowed advancement of MEPD via credits had been repealed for the crimes accounting for the vast majority of life-with-parole sentences. An analysis of the "lifer" population (not including third-strikers) in 2010 found that 81 percent were in for murder (35% first, 36% second, 10% attempted), 6 percent were in for rape or other sex offenses, and 4 percent were in for kidnapping.[7] The people repealed the exception for murder in Proposition 222 of 1998. (See *supra* at p. 25.) The Legislature repealed the exception for "one strike" indeterminate-sentence sex offenses in 2006. (See supra at p. 23.) The minimum for attempted premeditated murder generally is the section 3046 seven-year minimum, which has never been reducible by credits. (See § 664, subd. (a); *People v. Sampsell*, 34 Cal.2d at p. 764.) The same is true for kidnapping for ransom or for robbery or sex crimes. (§ 209, subds. (a), (b).) Third-strikers also cannot use credits to advance their MEPD. (*In re Cervera*, 24 Cal.4th at pp. 1078-1080.)

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7. Weisberg, Mukamal, & Segall, Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California 15 (Sept. 2011) chart 8, p. 15 <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259833/doc/slspublic/SCJC%20Lifer%20Parole%20Release%20Sept%202011.pdf> (Weisberg Report).

The only existing exceptions to the no-credits rule that appellants have been able to cite are "sections 191.5, subdivision (d) (gross vehicular manslaughter while intoxicated, repeat offender), 217.1, subdivision (b) (attempted murder of public official), 667.7, subdivision (a)(1) (people with specified priors),[8] and 667.75 (drug offenses involving minors, habitual offenders)." (AOB 43, footnoted added.) We do not know how many persons are in prison for these offenses, but they are not common enough to warrant mention in the Weisberg Report's tally.

The background law at the time of enactment of Proposition 57, therefore, is that credits did *not* have the effect of advancing MEPD in nearly all cases, with only a handful of exceptions. The Supreme Court has repeatedly noted that the enacting authority is presumed to be aware of existing law and must state the intention if it intends to vary from it. (See, e.g., *People v. Frahs*, 9 Cal.5th at pp. 634-635 and cases cited.) In 2016, credits for good behavior etc. generally meant credits to reduce determinate sentences but not to advance MEPD. If the drafters of Proposition 57 had intended something different, they could have simply said so. The text is silent, implying a lack of intent to deviate from the usual. Authority to "award credits" means authority to shorten determinate sentences, not to advance MEPD.

B. Ballot Materials.

If the text of an initiative measure does not resolve the question, a court may look to the ballot materials as the equivalent of legislative history. (See, e.g., *In re Lance W.* (1985) 37 Cal.3d 873, 887-888.) The ballot materials are discussed further

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8. More precisely, people who commit crimes causing great bodily injury with exactly two priors from a specified list. Having three or more such priors precludes parole altogether. (§ 667.7, subd. (a)(3).)

in Part IV-D, *infra*, for the cross-appeal, but for CDCR's and BPH's appeal regarding indeterminate sentences, the matter is straightforward. The superior court correctly found that the Legislative Analyst's discussion cited by the appellants "does not put a voter on notice that CDCR could then apply credits to reduce MEPDs." (Ruling, 3 AA 753.) Appellants' argument on appeal regarding this discussion (AOB 34-35) adds nothing of substance to that correctly rejected by the superior court.

In the background section, the analysis first described the difference between determinate and indeterminate sentencing. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) analysis by Legislative Analyst, p. 54 (Voter Guide).) This is followed by an explanation of parole consideration hearings, noting that the hearing is conducted after the minimum time has been served. "For example, BPH would conduct such a hearing for an individual sentenced to 25-years-to-life after the individual served 25 years in prison."[9] (*Ibid.*) The analysis notes that the federal *Plata* order permits some inmates to be considered earlier, but there is no mention of credits advancing the MEPD. Nothing in this discussion indicates that any ineligibility for credits is the reason for the general rule of completion of the minimum term. The next section notes that credits can reduce time that must be served, but this section is separate from the parole discussion and makes no mention of parole. (*Id.* at p. 55.)

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9. Actually, the initial *hearing* is conducted one year earlier, with the *release* following the MEPD (§ 3041, subds. (a)(2), (a)(4)), but this minor error by the Legislative Analyst is not material to the present discussion. The writ in this case orders BPH to conduct initial hearings one year prior to the section 3046 MEPD. (RA 21.)

In the discussion of the proposal, one section discusses the new parole for nonviolent offenders "after serving the full term for their primary offense," and a second section discusses credits with no mention of parole or indeterminate sentences. There is a general statement about awarding credits "to those currently ineligible" (*ibid.*), but nothing that ties this to the minimum time for eligibility under the existing parole law. Appellants' claim that the Legislative Analyst informed voters that credits would be used to advance MEPDs (AOB 35) was correctly rejected by the superior court as having no basis. (Ruling, 3 AA 753.)

Appellants try to make a case from the supposedly "multiple admonitions that the Proposition would result in regulatory credits that would shorten an indeterminate sentence for a person convicted of murder ...." (AOB 36.) Two of the three passages they cite refer to *prior* convictions of murder and rape. (See Voter Guide, argument against Prop. 57, item 5, p. 59; *id.*, rebuttal to argument in favor of Prop. 57, p. 58.) A *prior* conviction of murder does not mean that the inmate is *presently* under an indeterminate sentence. This is a quarrel with the definition of "nonviolent offender" for a subdivision not at issue in this case (see *In re Gadlin* (2020) 10 Cal.5th 915, 939-940), which was the main point of the opponents' arguments. (See *In re Mohammad* (2022) 12 Cal.5th 518, 539.)

The only point of the opponents' arguments that is relevant to this case is their statement that "57 authorizes state government bureaucrats to reduce many sentences for 'good behavior,' even for inmates convicted of murder, rape, child molestation and human trafficking." (Voter Guide, argument against Prop. 57, item 1, p. 59.) As appellants note, all murder sentences are either indeterminate or permit no possibility of release at all (AOB 36), and *if* that statement alone were determinative of the meaning of

the initiative, then it would support their interpretation. But it is not.

As noted *supra* at page 27, the proponents of Proposition 57 flatly rejected the opponents' claim. Appellants' claim that there is nothing to the contrary in the Voter Guide is nonsense. (See AOB 37.) "Opponents of Prop. 57 are wrong.... Don't be misled by false attacks. Prop. 57: ... Does NOT authorize parole for violent offenders." (Voter Guide, rebuttal to argument against Prop. 57, p. 59.) Murder is the ultimate violent offense. Appellants' regulations authorize BPH to grant parole to murderers who would not yet be eligible under prior law. If upheld, they would therefore authorize parole for violent offenders, squarely contrary to the proponents' arguments. (See *In re Mohammad*, 12 Cal.5th at pp. 537-538.)

Appellants try to evade the proponents' argument and the superior court's reliance on it by contorting the meaning of the word "authorize." (See AOB 38-39.) They claim their advancement of the MEPD does not "authorize" an early parole because it does not *grant* parole by its own force but only empowers BPH to grant it. This is an absurd argument. "Authorize" means "1. To give legal authority; to empower ... 2. To formally approve; to sanction." (Black's Law Dictionary (7th ed. 1999) p. 129, col. 1.) In the context of parole, "authorize" obviously has the first meaning, giving BPH the legal authority to grant parole. No one would think that Proposition 57 granted parole by its own force, and the proponents would not bother to refute a claim that no one made or would believe. Indeed, CDCR interpreted "authorize" in a way opposite to their present position in *Mohammad*, 12 Cal.5th at p. 536, and the court agreed. (*Id.* at p. 537.)

The California Supreme Court has sometimes considered opponents' arguments in interpreting initiatives, but it has also

recognized the limited probative value of such arguments. "We are mindful of the fact that ballot measure opponents frequently overstate the adverse effects of the challenged measure, and that their 'fears and doubts' are not highly authoritative in construing the measure." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 505, quoting *DeBartolo Corp. v. Fla. Gulf Trades Council* (1988) 485 U.S. 568, 585.) In the circumstances of that case, though, the court considered it significant that the proponents did not refute the argument in question, but rather their arguments were consistent with it. (See *ibid*.)

This case presents the opposite situation. The proponents *did* refute the argument. This is not limited to the broad statement that the opponents' arguments were "wrong" (cf. *In re Gadlin*, *supra*, 10 Cal.5th at p. 940), but included a specific and emphatic denial that Proposition 57 authorizes parole for violent felons. Taken as a whole, the ballot materials confirm what the text and the background of prior law already tell us: nothing in Proposition 57 was intended to change the law of minimum eligible parole dates under section 3046. The presumption against implied repeal and the doctrine of avoiding constitutional doubt add further support for this conclusion. (See Parts III-B and IV-E, *infra*.) That is sufficient to affirm the portion of the superior court judgment granting the writ.

III. CDCR's regulations for award of credits to violent offenders conflict with statutes limiting or barring such credits to particular categories of offenders.

A. Conflict.

Respondents' cross-appeal challenges the superior court's denial of the writ petition to the extent that it upheld CDCR's regulations awarding credits as opposed to applying them to

advance the MEPD. However, on the first point of the decision, the superior court was correct. The regulations do conflict with statutes, and appellants' argument to the contrary was without merit. (Ruling, 3 AA 743.)

When the Legislature or the people enacted laws to limit or prohibit otherwise available credits, they generally referred to credits under the credit article of the Penal Code or particular sections of it. Section 190, subdivision (e), first sentence, bars the application of "[a]rticle 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3" for reducing the MEPD for murder. Section 2933.2, subdivision (a) bars murder convicts from accruing credits under sections 2933 or 2933.05, which they otherwise could do to reduce the determinate portions of their sentences, such as enhancements or consecutively sentenced additional crimes. (See *In re Maes* (2010) 185 Cal.App.4th 1094, 1110.) Section 2933.1 limits violent felons to 15 percent credit under section 2933, designated "worktime" even though the work requirement has long since been removed, and section 2933.05, subdivision (e) bars them from program credits. Section 2933.5, subdivision (a)(1) makes inmates with three convictions of a list of violent offenses ineligible for any credits "pursuant to this article."

Appellants claimed that their regulations did not conflict with these statutes because they set up a parallel system of credits, neatly bypassing the numerous limits that the Legislature and the people had enacted. (Resp. Opp. to Pet. 18, 2 AA 432.) This argument failed because the legislative system of credits was established to be exclusive, and the Legislature said so in no uncertain terms. Section 2933, subdivision (a) provides:

> "It is the intent of the Legislature that persons convicted of a crime and sentenced to the state prison under Section 1170

> [i.e., determinate] serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Secretary of the Department of Corrections and Rehabilitation pursuant to this section and Section 2933.05."

This language disposes of the "no conflict" argument.

> "The plain language of this statute evidences a conflict between this statute and the Regulations. This is because it shows that the Legislature intends for persons convicted of an offense to serve their sentence, reduced only pursuant to this statute and Penal Code section 2933.05, and not any other credit scheme." (Ruling, 3 AA 743.)

In addition, there is a constitutional provision that prohibits a parallel nonstatutory system. Section 28, subdivision (f)(5) of article I of the California Constitution requires enforcement of sentences as imposed, including service of the full terms of sentences "except for statutorily authorized credits which reduce those sentences." The credits at issue in this case are not statutorily authorized. The superior court did not find it necessary to address this provision, possibly because the point was resolved by a statute without resort to the Constitution. (See *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230.)

Under either or both of these provisions, though, the regulations at issue conflict with statutes, the Constitution, or both. California Code of Regulations, title 15, section 3043.2, subdivision (b)(2)(B) authorizes 33 percent good conduct credit all for violent felons except those who can get even more under subdivision (b)(2)(C), i.e., firefighters. (See Ruling, 2 AA 578-579.) That is contrary to all the statutory limits and exclusions noted above. The subsequent sections make them eligible for a variety of additional program credits (see Cal. Code Regs., tit. 15, §§ 3043.3, subd. (c), 3043.4, subd. (b), 3043.5, subd. (b)), contrary to Penal

Code section 2933.05, subdivision (e). Clearly, as the superior court found, the regulations are in irreconcilable conflict with statutes.

B. Presumption Against Implied Repeal.

The regulations would not be in conflict with the credit-limiting statutes or with section 28, subdivision (f)(5) of article I of the California Constitution if those provisions were impliedly repealed by Proposition 57. The presumption against such repeals was described by a unanimous Supreme Court in *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420, with italics added by the court:

> "The presumption against implied repeal is so strong that, 'To overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.' [Citation.] There must be '*no possibility* of concurrent operation.' [Citation.] Courts have also noted that implied repeal should not be found unless '. . . the later provision gives *undebatable* evidence of an intent to supersede the earlier. . . .' [Citation.]"

This principle has been reiterated in more recent decisions. (See, e.g., *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039, quoting *Western Oil*.)

Nor does the "notwithstanding" language change this principle. "Failing to designate what if any laws are superseded, such a clause has no greater force than a repeal by implication; it subordinates or repeals existing law only to the extent that the two laws are irreconcilable." (*Sacramento Newspaper Guild, etc. v. Sacramento County Board of Supervisors* (1968) 263 Cal.App.2d 41, 55.) This is consistent with the principle that a

"notwithstanding" clause indicates an intent to override earlier enactments only when they are contrary to the new enactment itself. (See *infra* at pp. 45-46.)

An implied repeal was found in *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, which provides an informative contrast to the present case. The central purpose of the initiative in that case was to remove restrictions on contracting out engineering services that had been found in article VII of the Constitution. (*Id*. at pp. 1024-1025.) The purpose and text of the initiative could not be reconciled with statutes that imposed restrictions derived from the now-overridden interpretation of article VII. (*Id*. at pp. 1039-1040.) In the present case, by contrast, CDCR still has the authority to award credits and can do so to promote rehabilitation consistently with the existing statutory limits. Some determinately sentenced inmates are limited in the credits they can earn, and most indeterminately sentenced inmates are limited to the incentive provided by improving their chances of being granted parole after reaching statutory eligibility, but the incentives are still there. (See *supra* at p. 23.) Concurrent operation is quite possible, and the presumption against implied repeal has not been rebutted.

IV. Properly interpreted, Proposition 57 does not authorize CDCR to effectively abrogate statutes via regulations, i.e., grant full legislative rather than quasi-legislative power.

A major theme of appellants' appeal in this court and their defense of the regulations in the superior court[10] is their

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10. Because this issue applies to both determinate and indeterminate sentences, this part and Part V, *infra*, apply to both the appeal and the cross-appeal. However, it would not be necessary to reach this issue on the appeal if the court

interpretation of the "notwithstanding" language of section 32 of article I of the California Constitution. They claim that it goes beyond trumping statutes that are contrary to the constitutional provision itself and also trumps any and all statutes that are contrary to any regulations that CDCR may promulgate on the subject of credits. (See AOB 26 ["unconstrained by any other statutory law"]; Resp. Reply Supp. Brief 11; 3 AA 717.) They are not merely claiming broad *quasi*-legislative authority of the type often delegated to executive agencies. They are claiming that section 32 vests their regulations with the same supremacy over statutes that the Constitution itself has. (AOB 46-48.) Although they attempt to limit the focus to current statutes (see AOB 26), their constitutional theory would necessarily apply to future statutes as well, meaning their power is not subject to any check by the Legislature or by initiative statute.

Such a drastic alteration of the separation of powers is not required by the text of the provision. (See *infra* Part IV-B.) Given the substantial constitutional doubt regarding whether such a change can be made by initiative, discussed in Parts IV-E and V, *infra*, such an interpretation should be avoided if possible.

A. The Normal Hierarchy–Constitution, Statutes, Regulations.

"Administrative regulations that violate acts of the Legislature are void and no protestations that they are merely an exercise of administrative discretion can sanctify them." (*Morris v. Williams* (1967) 67 Cal.2d 733, 737.) This rule is most often stated with reference to the statute granting the regulatory authority, as that is the most common question presented. (See, e.g., *In re Mohammad* (2022) 12 Cal.5th 518, 529, quoting *Mor-*

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affirms the superior court's interpretation of Proposition 57 as applied to MEPDs, as discussed in Part II, *supra*.

ris.) "But the principle is equally applicable when the regulation contravenes a provision of a different statute." (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420 (*ALRB*); see also Gov. Code, §§ 11342.1, 11349, subd. (d) [consistency with "other provisions of law" required for regulations].)

The subordination of regulations to statutes follows from the distinction between quasi-legislative power and true legislative power. (See *Morris*, *supra*, 67 Cal.2d at p. 748.) Some delegation of authority to fill in the details is a practical necessity given the complexity of modern government. (See *Legislature v. Weber* (2024) 16 Cal.5th 237, 268 [necessity]; *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 391 (*ACIC*) ["fill up the details"].) Delegation of unlimited authority, free of any constraints, is not. (See *Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, 1114.)

The absolute rule stated in *Morris* has been modified somewhat in later cases. In *ALRB*, 16 Cal.3d at p. 420, the Supreme Court reaffirmed this rule in general, though it noted a more nuanced situation when a general statute and a special statute are involved. The Legislature may make special-case exceptions to its own rules, and a special statute may authorize administratively created exceptions to general statutes. (*Ibid*.) Such power must be limited, and fundamental policy determinations must remain with the legislative authority. (See *Newsom v. Superior Court*, 63 Cal.App.5th at p. 1114.) In *ALRB*, an agency was established to deal with the specific issue of agricultural labor relations, which has unique problems. (16 Cal.3d at p. 417.) In these circumstances, the agency could make a rule granting organizers access to the fields of the employers, effectively making a very narrow and specific exception to the state's general criminal trespass statute. (*Id*. at p. 420.) In *Newsom*, the exceptions to

statutes were sharply limited in time to the duration of an emergency, with the Legislature retaining the power to declare the emergency terminated. (63 Cal.App.5th at p. 1118.)

In the present case, the conflict is not narrow in scope or in time. CDCR has completely supplanted the Legislature's and the people's judgment as to the proper limits on credits with its own, and the change is permanent. (See Parts I and III, *supra*.) If CDCR has this power, it is true legislative power, not quasi-legislative power.

As the present case involves an authority conferred in a constitutional amendment rather than a statute, the question arises whether that fact *alone* inverts the normal hierarchy of statutes over regulations. Appellants assert that it does, claiming "the regulations prevail [over a conflicting statute] *because* they are derived from the Constitution." (AOB 46, italics added.) The authority cited for this non sequitur is *Harris v. Alcoholic Beverage Control Appeals Bd*. (1964) 228 Cal.App.2d 1. That is a most curious citation, as that case says the exact opposite.

> "In the absence of valid statutory authority, an administrative agency may not, under the guise of a regulation, substitute its judgment for that of the Legislature. It may not exercise its sublegislative powers to modify, alter or enlarge the provisions of the legislative act which is being administered. Administrative regulations in conflict with the Constitution or statutes are generally declared to be null or void. [Citations.] *These principles apply even though its rule-making authority derives directly from the Constitution*. [Citation.]" (*Id*. at p. 6, italics added.)

While in *Harris* the constitutional provision did include a limitation on the power of the agency to make rules consistent with statutes, the court did not base its decision on that language. After quoting it (*ibid*.), the court never mentioned it again, and it

stated the rule quoted above as a general principle. The passage quoted above says "*an* administrative agency," not ABC in particular. It applies to agencies granted regulatory authority by the Constitution with or without the limiting language in the particular provision at issue.

BNSF Railway Co. v. Public Utilities Com. (2013) 218 Cal.App.4th 778, 785 applied the same principle to an agency whose constitutional regulatory provision lacked this language. The Public Utilities Commission is vested with the constitutional authority to regulate transportation by section 4 of article XII of the Constitution with no mention of statutes. Section 5 of that article empowers the Legislature to confer additional authority but says nothing about limiting the authority. Yet,"however broad the scope of the commission's authority over railroad crossings may be, the commission does not have the authority to contravene the expressed will of the Legislature in this area."

The vital distinction here is between quasi-legislative power and true legislative power. "The core functions of the legislative branch include passing laws, levying taxes, and making appropriations." (*Carmel Valley Fire Prot. Dist. v. California* (2001) 25 Cal.4th 287, 299.) Passing laws includes repealing laws. If an executive agency can effectively repeal a statute, it has been given true legislative authority and not quasi-legislative authority. Delegation of true legislative authority is unconstitutional if done by statute. (See *ibid*.) If the Constitution itself is changed to do so, it raises the question of whether the change is an amendment or a revision. (See *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1167 [noting issue with delegation to judiciary but not resolving it].) Courts should be extremely wary about interpreting an amendment to take such a momentous step.

B. The Text.

Section 32 of article I of the California Constitution provides in pertinent 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: [For nonviolent offenders, not pertinent to this case]
> >
> > "(2) Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements.
>
> "(b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety."

Subdivision (a)(2) is the pertinent substantive provision. On its face, it does no more than confer normal executive authority along the lines that CDCR already had by statute. Constitutional provisions are not superfluous merely because they make no immediate change in the law. The Bill of Rights was not introduced to create new rights, but rather to secure existing rights against future encroachment. (Remarks of Rep. Madison, 1 Annals Cong. 459 (1789).) The equal protection clause of the California Constitution was added even though it was substantially the same as the pre-existing protection of the Fourteenth Amendment. (*Reece v. Alcoholic Beverage Etc. Appeals Bd.* (1976) 64 Cal.App.3d 675, 679.) Most recently, section 1.1 was added to article I of the California Constitution to specifically protect reproductive rights that were already protected by statutes and

by judicial interpretation of a more general section. The purpose was to prevent future backsliding that might come from changed interpretation or a future legislature. (See Voter Information Guide, Gen. Elec. (Nov. 8, 2022), rebuttal to argument against Proposition 1, p. 15; see also *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 772-773 [rejecting surplusage argument on similar grounds].)

Authority to award credits, a normal executive function, does not mean unlimited, unchecked authority to award credits in violation of statutes. The Legislature can no longer abolish good behavior credits altogether, but the text of this provision does not require an interpretation that anoints the Secretary of Corrections and Rehabilitation as an absolute monarch on this subject, with both executive power and total legislative power "unconstrained by any other statutory law." (Cf. AOB 26.) Executive agencies normally exercise their authority within the limits set by statutes. That is, being constrained by statutory law is the norm, not the exception, for the executive. It is fully consistent with the normal allocation of executive and legislative powers for the legislative branch to set the boundaries for awards of credits and the executive to exercise discretion within those limits in actually awarding the credits. " '[T]he rulemaking authority of an agency is circumscribed by the substantive provisions of the law governing the agency.' " (*Carmel Valley Fire Prot. Dist. v. California*, 25 Cal.4th at p. 300, quoting *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982.)

Nor does the provision that "[t]he following provisions are hereby enacted ... notwithstanding anything in this article or any other provision of law" require such a drastic alteration of the separation of powers. "The statutory phrase 'notwithstanding any

other provision of law' has been called a 'term of art' that declares the legislative intent to override all *contrary* law." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 983, citations and internal quotation marks omitted, italics added by *Arias*.) This override applies to "only those provisions of law that conflict with the act's provisions." (*Ibid*.)

Appellants quote the "notwithstanding" language coupled with a reference to or quote of subdivision (a)(2) of (b) out of order seven times in their brief. (See AOB 9, 11, 13, 18, 26, 46, 47.) In their correct order and context, quoted above, this language is consistent with an interpretation that CDCR is granted normal executive and quasi-legislative power notwithstanding any law that would deprive it of such authority. For example, 1982 legislation abolished good time credit for crimes committed after Jan.1, 1983, and allowed only work time credit until work time was effectively converted back to good time by a later amendment. (See Pen. Code, § 2931, subd. (d); former Pen. Code, § 2933, subd. (a) (1983)). The Legislature no longer has that option, but that does not mean that it has been stripped of the authority to put reasonable limits on credits in the interests of public safety and basic justice.

If subdivision (a)(2) said that CDCR "shall have *unlimited* authority to award credits," then the statutes that respondents seek to have enforced would be contrary to the provision itself and overridden. But it does not say that. Statutes that establish substantive law regarding credits do not conflict with a general executive authority to award credits. The statutes at issue do not conflict with section 32; they conflict with CDCR's regulations. The statutes therefore stand, and the regulations therefore fall.

Subdivision (b), which lies outside of the scope of the "notwithstanding" clause, simply directs the adoption of regulations

to implement subdivision (a) in unremarkable language fully consistent with the normal delegation of quasi-legislative authority rather than true legislative authority. If subdivision (a)(2) vests normal executive authority "circumscribed by the substantive provisions of the law," the addition of rulemaking authority adds nothing unusual. Rulemaking authority normally requires consistency with all statutes (see *supra* at p. 40) and nothing in subdivision (b) indicates that any greater power is conferred.

In short, the text of section 32 is fully consistent with an interpretation that CDCR is vested with normal executive and quasi-legislative power, both of which are bounded by statutes. "We do not presume that the Legislature intends, when it enacts a statute, to overthrow long-established principles of law unless such intention is clearly expressed or necessarily implied." (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 199.) The same principles apply to the interpretation of initiatives. (*People v. Jessup* (2020) 50 Cal.App.5th 83, 87-88.)

Regrettably, the superior court did not address any of these considerations in the interpretation portion of the opinion, even though they were thoroughly briefed. (See Pet. Mem. Merits, 1 AA 279-281; Pet. Reply Merits, 2 AA 491-494.) The superior court concluded that Proposition 57 vested CDCR with the power to abrogate statutes in a single short paragraph that merely quoted portions of the text that, as explained above and in the documents cited, do not require such a drastic interpretation. (Ruling, 3 AA 744.) There is nothing about separation of powers, the distinction between quasi-legislative and true legislative authority, or any justification for interpreting these provisions as conferring the latter.

C. Standard of Review.

In reviewing the validity of regulations, the degree of deference due to an administrative agency varies. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10; *ACIC*, *supra*, 2 Cal.5th at p. 390 ["depends on the context"] (*ACIC*).) This issue in this case lies at the bottom end of the range. "[E]ven quasi-legislative rules are reviewed independently for consistency with controlling law. A court does not, in other words, defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature." (*Yamaha*, *supra*, at p. 11, fn. 4 ["respectful nondeference"].) Or in this case, whether it lies within the scope of authority delegated by the voters.

CDCR claims that Proposition 57 delegates to it the power to steamroller the credit-limiting statutes enacted by the Legislature and the people. Respondents contend it does not. This is a scope-of-authority issue, not a question of what measures are needed to effectively implement a law. Matters within the technical expertise of an agency call for deference (see *ACIC*, 2 Cal.5th at p. 390), but this is not such an issue. Deference to an agency's opinion as to the scope of its own power is an exceptionally dangerous type of deference, given the tendency of governmental bodies to take expansive views of their "turf."

This case falls squarely within the terms of the *Yamaha* footnote. "[L]ack of statutory consistency would render deference inappropriate, even if quasi-legislative principles applied." (*State Farm General Ins. Co. v. Lara* (2021) 71 Cal.App.5th 148, 185, citing *Yamaha*, fn. 4.) The case is distinguishable on this ground from *In re Mohammad* (2022) 12 Cal.5th 518. That case involved the new kind of parole created by subdivision (a)(1) of section 32. There were no existing statutes governing this new procedure

and therefore no issue regarding regulations being inconsistent with statutes. Subdivision (a)(1) undeniably created the new procedure, and subdivision (b) vested authority to implement it in CDCR. As the matter was within the scope of the authority conferred, a deferential standard applied. (*Id*. at p. 541.) In the present case, the scope of authority is the whole dispute, and the basis of the dispute is consistency with controlling law. Independent review is in order.

Arguing for deferential rather than independent review, appellants cite the comment in *In re Canady*, 57 Cal.App.5th at page 1034, that CDCR can issue credits "as it sees fit." (AOB 28.) This is a textbook case of *obiter dictum*, and it is a prime illustration of ancient wisdom that *dicta* should be treated with caution. "The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (*Cohens v. Virginia* (1821) 19 U.S. 264, 399-400 (Marshall, C.J.)

In *Canady*, the court had just gone through an extended exercise of interpretation, using independent judgment, to find that CDCR's interpretation of the provision in question was correct. (*Canady*, 57 Cal.App.5th at pp. 1031-1034.) In the same paragraph where the "sees fit" language appears, the court concludes that the constitutional language *prohibits* a contrary rule. (*Id*. at p. 1035.) Taken literally, the "sees fit" *dictum* could be understood to say that CDCR could have decided the issue the other way, even though the rest of the opinion is contrary. It also is a poor fit to other language in the opinion acknowledging a distinction between the award of credits and their application for a particular purpose. (*Id*. at pp. 1028-1029.) The only authority

cited for the "sees fit" comment is a dissent. Given all this, it seems unlikely that this comment was fully thought through, particularly as applied to other situations. This *dictum* should not be regarding as controlling in the present case, and the court should exercise independent review as to whether Proposition 57 confers the authority CDCR claims.

D. Initiative Purpose and Ballot Materials.

The purpose of an initiative is a factor in its interpretation, but there are two limitations to keep in mind here. First, it is incorrect to assume that legislation " 'pursues its purposes at all costs.' " (*In re Friend* (2021) 11 Cal.5th 720, 740, quoting *Rodriguez v. United States* (1987) 480 U.S. 522, 525-526.) There is some point at which the impact on other competing values becomes excessive, and a simplistic assumption that an enactment is intended to be carried to an extreme to the sacrifice of those other values is likely incorrect. (See *ibid*.)

A second, related consideration, particularly important here, is that legislation may have more than one purpose, and even the legislation's own purposes may sometimes pull in different directions. Proposition 57, in its text, stated five purposes:

> "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.
>
> "5. Require a judge, not a prosecutor, to decide whether juveniles should be tried in adult court." (Voter Guide, text of Prop. 57, § 2, p. 141.)

The first purpose is public safety, and it is the one hammered home in the proponents' arguments as they promised to keep dangerous offenders locked up and focused on the distinction between violent and nonviolent felonies. (See *In re Mohammad*, 12 Cal.5th at pp. 537-538.) For indeterminate sentences, a grant of parole is no guarantee that the criminal is no longer dangerous. The parole law has a heavy tilt in favor of parole, requiring a grant unless the BPH makes an affirmative finding of dangerousness. (§ 3041, subd.(b)(1).) To the extent that appellants represent that parole requires an affirmative finding of nondangerousness, that is not the law. (Cf. AOB 16.)

For determinate sentences, participation in the rehabilitation activities that earn credits is no guarantee of anything. CDCR has a history of conducting large scale rehabilitation activities with no evidence they actually do any good. (See Cal. State Auditor, Transmittal Letter for Report 2018-113 (Jan. 31, 2019) <https://www.auditor.ca.gov/reports/2018-113/index.html> ["This report concludes that inmates who completed in-prison cognitive behavioral therapy (CBT) programs recidivated at about the same rate as inmates who did not complete the programs"].) Post Proposition-57 recidivism data show only a small difference between inmates who earned enhanced credits and those who did not, and even that difference cannot be attributed to actual effectiveness rather than selection bias. (See Berger, Recidivism trends in California: New CDCR report, Crime and Consequences Blog (Feb. 21, 2024), <https://www.crimeandconsequences.blog/?p=10055>.)

Whether enhanced credits for violent felons endanger public safety, as Secretary Beard told the federal court in *Plata* (1 AA 110), or promote it as appellants now claim remains very

much in dispute. Common sense tells us that CDCR had it right the first time.

Purpose three is unmistakably directed at the kinds of releases that CDCR so strongly opposed during the *Plata* litigation. Foremost among these were "credit earning measures ... [for] inmates convicted of serious, violent, or sex offenses." (Declaration of Beard ¶ 15, 1 AA 110.) CDCR's Secretary at the time understood that such credit schemes "pose an undue risk to public safety and do not reflect sound correctional practice." (*Ibid*.) The proponents' ballot argument warned the voters that "we will ... risk a court-ordered release of dangerous prisoners." (Voter Guide, argument in favor of Prop. 57, p. 58.) They promised that the measure would "focus resources on keeping dangerous criminals behind bars." (*Ibid*.) Yet the kind of scheme that Proposition 57 sought to avoid having imposed by federal courts is now being imposed by CDCR itself, claiming Proposition 57 as its authority. For the reasons stated by Secretary Beard, expanded credits for violent felons are also contrary to the first purpose of Proposition 57, public safety, and contrary to the proponents's representation that it would keep the most dangerous offenders "locked up."

Purpose two is to save money, but only by reducing *wasteful* spending on prisons. In their ballot arguments, the proponents unmistakably told the voters that the incarceration of violent felons was not their target, implying that such spending is not wasteful but necessary. They specifically said that Prop. 57 "• Saves taxpayer dollars by reducing wasteful spending on prisons. • Keeps the most dangerous offenders locked up." (Voter Guide, argument in favor of Proposition 57, p. 58.) Clearly, the "wasteful spending" that Proposition 57 was intended to reduce did not include the spending needed to keep violent felons in

prison. Saving money need not and should not be pursued to the maximum. (See *In re Canady*, 57 Cal.App.5th at p. 1036 [need not maximize monetary savings].)

Purpose four is related to the extent that expanded credits may encourage some prisoners to participate in programs who otherwise would not and to the extent (if any) that those programs actually have some rehabilitative effect. (But see Cal. State Auditor, Transmittal Letter for Report 2018-113 (Jan. 31, 2019) <https://www.auditor.ca.gov/reports/2018-113/index.html> ["This report concludes that inmates who completed in-prison cognitive behavioral therapy (CBT) programs recidivated at about the same rate as inmates who did not complete the programs"].) This purpose does pull weakly in the direction of favoring such credits even for violent felons, but the public safety and prevention of indiscriminate release purposes pull much stronger the other way, as noted by Secretary Beard, *supra*. Purpose five is unrelated. It refers to parts of the initiative not at issue here.

Thus both the stated purposes and the proponents' arguments point toward an interpretation that would not allow CDCR to blow off statutory caps on violent felon credits. In the Legislative Analyst's analysis, we see this statement: "The department could award increased credits to those currently eligible for them and credits to those currently ineligible." (Voter Guide, Legislative Analyst's analysis of Prop. 57, p. 56.) *In re Friend*, *supra*, is on point that this statement is not controlling. In that case, the Legislative Analyst wrote regarding the measure's provision on successive habeas corpus petitions, "the measure does not allow additional habeas corpus petitions to be filed after the first petition is filed, except in those cases where the court finds that the defendant is likely either innocent or not eligible for the death sentence." (*Friend*, *supra*, 11 Cal.5th at p. 741.) On its face, the

analysis unambiguously says that the limit on "successive" petitions in section 1509, subdivision (d) of the Penal Code applies to every petition that is not the first, with no exception for claims that could not reasonably have been brought in the first one. However, the Supreme Court held that because this statement did not address that specific issue it did not bring the problem to the voters' attention enough to outweigh the other considerations against that interpretation, particularly including constitutional doubt. (See *ibid*.) The same reasoning applies here.

The general statement about increasing credits is not enough to alert the voters that they might be authorizing expanded credits for violent felons, nor does it alert them that they would be granting CDCR unlimited power, free of any statutory restraint by the Legislature or by the people themselves. The earlier discussion of the preexisting law (see Voter Guide, Legislative Analyst's analysis of Prop. 57, p. 55) does not provide such a warning, either by itself or in conjunction with the later statement. A particularly careful reader with an intricate knowledge of the law might piece that together out of two widely separated statements in the analysis, but reliance on ballot materials requires a realistic view of what the voters will understand from them. (*Gadlin*, 10 Cal.5th at pp. 941-942.) In *Friend*, by contrast, a single statement of the Legislative Analyst plainly stated a rule consistent with the trial court's interpretation and contradicting the defendant's interpretation without any need to refer elsewhere, yet the Supreme Court considered that insufficient to overcome the perceived constitutional doubt. (*Friend*, *supra*, at p. 741.) The Legislative Analyst's analysis in this case is weaker support for the constitutionally doubtful interpretation than it was in *Friend*, particularly given the proponents' repeated emphasis in their arguments on keeping the violent criminals "locked up."

With the proponents' arguments against them and the Legislative Analyst's analysis inconclusive, appellants turn to the opponents' arguments in the appeal (AOB 36), and we expect they will in the cross-appeal as well. Both the California and United States Supreme Courts have sounded notes of caution in relying on opponents' arguments. (See *supra* at 35.) The opponents warned that "57 authorizes state government bureaucrats to reduce many sentences for 'good behavior,' even for inmates convicted of murder, rape, child molestation and human trafficking." (Voter Guide, argument against Prop. 57, p. 59) As appellants correctly note, the inclusion of murder would necessarily include advancing minimum eligible parole dates. (AOB 36.) As previously explained, however, *supra* at p. 34, the proponents emphatically rejected that claim. That leaves the question of whether the absence of a separate denial specifically addressing determinate sentences supports an inference that the opponents' statement was understood by the voters to be correct to that extent, yet they approved the initiative anyway.

In *Legislature v. Eu* (1991) 54 Cal.3d 492, 505, the Supreme Court did find such an absence significant, but that inference was specific to the argument in question, not a blanket rule. In that case, the opponents' claim that term limits were a lifetime ban was consistent with the overall theme of the proponents' argument. In addition, the claim was a major theme of the argument, repeated in various forms "*11 times*." (*Ibid*., italics in original.)

The present case is entirely different. The claim was made once in an argument whose primary theme related to a different section of the initiative. (See *In re Mohammad*, 12 Cal.5th at p. 538.) The claim was made in a single statement which was expressly denied by the proponents as to one aspect, along with the general statement that the opponents were wrong. (See *supra* at

p. 34.) The claim was not consistent with the overall theme of the proponents' argument but quite the contrary. The proponents repeatedly stated their intent to "keep[] dangerous criminals behind bars" (Voter Guide at pp. 58-59), equating dangerous with violent. (See *Mohammad* at pp. 537-538.)

Further, an alternate explanation for the absence of a pinpoint refutation on determinate sentences is obvious. A ballot argument rebuttal is not an appellate brief. Its authors get only 250 words, not 14,000. (Compare Elec. Code, § 9069 with Cal. Rules of Court, rule 8.204(c)(1).) A detailed refutation of every nuance of the opponents' argument is not possible. Proposition 57 was a complex initiative with multiple facets, with the others receiving more attention. The proponents made their point that the opponents' solo statement about credits was wrong, but they could not be expected to go into detail, and no inference is warranted from the fact that they did not. The idea that the people accepted the opponents' argument as true but approved the initiative anyway is not supportable in this case.

Taken as a whole, the purpose statement in the initiative and the ballot materials weigh in favor of an interpretation that leaves the statutory limits on credits for violent felons intact. To avoid constitutional doubt, that interpretation should be adopted.

E. Constitutional Doubt.

The "usual rule" of interpretation is that "a statute will be interpreted to avoid serious constitutional questions if such an interpretation is fairly possible." (*People v. Buza* (2018) 4 Cal.5th 658, 682.) Although this rule "will not be pressed to the point of disingenuous evasion" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, quoting *Rust v. Sullivan* (1991) 500 U.S. 173, 191), it does apply when there are "two or more reasonable interpretations." (*Id*. at p. 1374; *Newsom v. Superior Court*, 63 Cal.App.5th at p.

1112.) The doubt-eliminating interpretation need only be "reasonably possible" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509), not necessarily the best without this consideration.

In this case, the constitutional doubt is not whether a statute violates the Constitution but whether a new constitutional provision was within the people's power to adopt by initiative, as further explained in Part V, *infra*. Even so, the principle is the same. The presumption favors the interpretation that makes it clearly valid. The court "need not definitively resolve the constitutional debate here. For present purposes it is enough to observe that the constitutional question[] ... raise[d] [is] both novel and serious." (*Friend*, *supra*, 11 Cal.5th at p. 736.) Section 32 should be interpreted to vest CDCR with normal executive and quasi-legislative power to administer the law within the boundaries set by statutes. That is enough to resolve this case.

V. If Proposition 57 is interpreted to vest plenary legislative authority in an executive agency, it is a revision not properly adopted by initiative.

If this court interprets Proposition 57 to authorize CDCR to substitute its own policies for those enacted into law by the people and the Legislature, "unconstrained by any other statutory law" (AOB 26), then it must confront the question of whether the vesting of unchecked legislative authority in an executive agency is a revision, as opposed to an amendment, of the Constitution, not validly enacted by initiative. If so, the portion which is a revision must be severed and declared invalid. (See *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 341 (*Raven*).)[11]

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11. The juvenile justice reforms and the parole for nonviolent offenders are not at issue in this case. The superior court's

The separation of powers has long been regarded as among the most important elements of American constitutions, both state and federal. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." (Madison, Federalist No. 47 (1788).) As we will show below, it has become the central focus of the distinction between revisions and amendments.

The history of the revision/amendment distinction was extensively reviewed in *Strauss v. Horton* (2009) 46 Cal.4th 364, 414-440 (*Strauss*). *Strauss* itself added a chapter to that history, as did the recent decision in *Legislature v. Weber* (2024) 16 Cal.5th 237 (*Weber*), decided after the superior court's decision in the present case. From this series of cases a clear pattern emerges. Qualitative revision challenges are assessed on whether they "alter the basic governmental framework" (*Brosnahan v. Brown* (1982) 32 Cal.3d 236, 261), and "framework" involves separation of powers concerns. Amendments can work major changes in government as a practical matter and not be revisions. They can roll back the Supreme Court's interpretations of fundamental rights in the Declaration of Rights and not be revisions. When they remove basic powers from one branch of government and assign them to another branch or level, though, they have either been found to be revisions or a substantial revision issue was presented but not decided because the case was resolved on other grounds. No changes of this type have been found not to be revisions.

The distinction between amendments and revisions has been in the California Constitution from the beginning, imported from the constitutions of other states which had begun making

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assumption that the revision argument challenges the entirety of Proposition 57 (Ruling, 3 AA 744), is not correct.

such distinctions in the 1830s. (*Strauss*, 46 Cal.4th at p. 415.) However, in the first century and a quarter of statehood, only two proposed amendments were challenged on this basis. A proposal to move the state capital to San Jose was obviously not a revision. (*Livermore v. Waite* (1894) 102 Cal. 113, 119-120.) The notorious "ham and eggs" initiative—21,000 words long and ranging from pensions to gambling to margarine to medical practice—obviously was. (*Strauss*, *supra*, at p. 422, discussing *McFadden v. Jordan* (1948) 32 Cal.2d 330.)

Revision challenges became more frequent beginning with the Proposition 13 tax revolt in 1978. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208 (*Amador*) established the structure for analyzing revision challenges which remains to this day. *Amador* held that a proposed change can be a revision based on either the quantity of its changes, exemplified by *McFadden*, or the quality of the change, making "far reaching changes in the nature of our governmental plan." (*Id*. at p. 223.) The quantitative branch of the analysis has been largely displaced by the adoption of the single-subject rule (see *Legislature v. Weber*, 16 Cal.5th at p. 259), and it is not at issue in this case. The remainder of this discussion will focus on the qualitative analysis.

Amador's exemplar of a qualitative revision via a relatively simple provision was a hypothetical change in the separation of powers: "an enactment which purported to vest all judicial power in the Legislature." (*Amador*, 22 Cal.3d at p. 223.) The qualitative analysis of *Amador* focused on whether the new provision had the drastic effect on the allocation of government powers that the opponents claimed. The court rejected the claim that the initiative moved control of local government finance from the localities to the Legislature. Existing constitutional provisions on home

rule were not impaired. (*Id.* at p. 225.) Local governments could still imposed special taxes, albeit with voter approval. (*Id.* at p. 226.) The initiative did not empower the Legislature to control local budgetary decisions. (*Ibid.*) The popular vote requirement for new taxes was in line with long-standing requirements of popular vote in financial matters. (*Id.* at p. 228.)

Following *Amador*, revision challenges were rejected in a series of cases involving initiatives on criminal law. The common theme in these cases was that even though they made large and important changes, they did not contain substantial shifts in the separation of powers or assign one branch's power to another. *People v. Frierson* (1979) 25 Cal.3d 142 rejected a claim that the 1972 initiative that reinstated capital punishment after its judicial abolition was a revision. The initiative did not remove from the judicial branch the authority to review death sentences. (*Strauss*, 46 Cal.4th at p. 430.) Although *Frierson* was a plurality, it was effectively endorsed by a majority the following year, and the provision in question has not been questioned on this ground in the hundreds of capital cases decided by the Supreme Court since. (*Id.* at p. 430, fn. 21.)

In *Brosnahan v. Brown* (1982) 32 Cal.3d 236, the Supreme Court rejected a revision challenge to a broad criminal justice reform measure, Proposition 8 of 1982. The court rejected the argument that the initiative authorized the Legislature to amend the constitution by amending statutes referred to in the constitutional amendments, noting contrary precedents. (*Id.* at p. 261.) The court also rejected arguments based on perceived practical effects rather than shifts in the separation of powers. (*Ibid.*) The focus on separation of powers issues continued with *In re Lance W.* (1985) 37 Cal.3d 873. That case rejected a revision challenge to the abolition of the state exclusionary rule, saying it was not "a

sweeping change either in the distribution of powers made in the organic document or in the powers which it vests in the judicial branch." (*Id*. at p. 892.)

In 1990, a second broad criminal justice reform initiative was approved by the people. This time, however, the drafters did run afoul of the revision barrier. It included a provision that a number of constitutional criminal procedure provisions had to be construed by the courts consistently with the parallel provisions of the Constitution of the United States. (*Raven*, 52 Cal.3d at p. 350.) Unlike the provisions previously upheld that had altered the provisions being interpreted by the courts, this one changed the power to interpret itself, effectively vesting the power to interpret the California Constitution in the United States Supreme Court. (*Id*. at p. 355.) By altering the federal-state separation of judicial powers, it was "a fundamental change in our preexisting governmental plan." (*Ibid*.)

The following year, the Supreme Court considered another initiative making major changes in government, imposing term limits on the Legislature, restricting retirement benefits, and limiting expenditures. The court once again rejected a revision challenge based on perceived practical effects of the changes. *Legislature v. Eu* (1991) 54 Cal.3d 492. The initiative was missing the key element found in *Raven* and presented in *Amador*'s hypothetical—an alteration in "the foundational powers of [the government's] branches." (*Id*. at p. 509.) Here lies a key distinction which the superior court in this case failed to grasp.

> "By contrast, Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or

> delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched." (*Ibid*.)

If Proposition 57 is interpreted as appellants do and as the superior court did as to all but MEPD, then it is the opposite of Proposition 140 in every sentence of this paragraph. The Legislature is *not* free to enact whatever laws it deems appropriate to restrict credits, as CDCR can issue them anyway unrestrained by statutory limits. (AOB 26.)[12] The measure alters the process by which credit limits are adopted by empowering CDCR to override statutory limits, reducing them to pointless statements rather than the binding law of the land. Legislative power to have the last word on this issue is removed from the Legislature and the people and delegated to an executive agency. The relationships between the legislative and executive branches is not merely "touched," it is inverted. An unelected agency official is boss; the people's elected representatives and even the people themselves (by initiative statute) are subordinate.

All of this was briefed to the superior court, yet the court found the present initiative more akin to *Eu* than *Raven*, and its explanation of why does not even mention the critical fact the CDCR claims the power to override statutory limits, effectively repealing statutes by regulation. (3 AA 746-747.) To say that this new *plenary* legislative power is not unlike CDCR's previously delegated *quasi*-legislative power (i.e., to fill in gaps within the constraints of statutes) (*id*. at p. 747) amounts to dodging the main question of this case.

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12. In the trial court, appellants failed to proffer any interpretation by which preexisting statutes could be overridden by CDCR but future statutes could not, and at one point they effectively conceded that the Legislature's authority is curtailed under their interpretation. (3 AA 700.)

Another case worth noting here raised a revision challenge, although it was not resolved as such. In *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, the Supreme Court considered an initiative which, among other changes, would have removed reapportionment from the Legislature and vested this legislative power in the Supreme Court. (*Id*. at pp. 1148-1149.) This raised a substantial revision question, and indeed the challengers made this their first point. (*Id*. at pp. 1150-1151.) The court decided the case on single-subject rather than revision (*id*. at pp. 1152-1153), but the court's decision on that point is revealing. The court characterized the transfer of legislative power on one precise issue, reapportionment, from the legislative to the judicial branch as "fundamental" and took care to state a second time that it was not deciding whether it was a revision. (*Id*. at pp. 1167-1168.) If the transfer of legislative power from one branch to another was exempt from the revision limitation merely because it was confined to a single subject, it would have been simple enough for the court to dismiss the revision argument out-of-hand.

Reappointment reformers got the message. To deal with the Legislature's conflict of interest on this unique issue, they later moved this piece of legislative authority to a single-purpose body with no executive or judicial functions. (See Cal. Const., art. XXI, § 2.) This avoids the concentration of legislative authority in the same hands with executive or judicial, and it avoids the problem Madison warned of, *supra* at p. 58. There do not appear to have been any revision challenges to this provision.

The separation-of-powers theme continued in *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016. That case involved a constitutional amendment that authorized agencies to contract out engineering services, thereby eliminating a restriction that the judiciary had read into the civil

service article. (*Id.* at p. 1025.) The civil service engineers claimed that the measure was an invalid revision because it removed the Legislature's power to regulate contracting out policies and vested it instead in executive agencies. That would likely have been a valid challenge if it had been a correct interpretation of the amendment, but it was not. The people exercised their own legislative authority to enact a constitutional amendment and implicitly repeal statutes. (*Id.* at p. 1047.) The Legislature had not been stripped of any legislative authority (*ibid.*), though it must, of course exercise it compatibly with substantive law in the Constitution. No legislative authority was vested in executive agencies.

Strauss itself was actually a straightforward case on the revision question. The length of the opinion is likely due to the extremely controversial nature of the provision in question, which is up for repeal on this year's general election ballot. (See Voter Information Guide, Gen. Elec. (Nov. 8, 2024), text of Proposition 3, p. 75.) Proposition 8 of 2008 was not a revision because it made no structural change to California's plan of government. (*Strauss*, 46 Cal.4th at p. 442.) In this way, it was like *Legislature v. Eu, supra,* and unlike *Raven, supra.* (*Id.* at pp. 443-444 & fn. 22.) The present case is the reverse.

This brings us, finally, to *Weber*, the last in this series of cases. Consistently with the theme described above, the focus was on whether the initiative (called the "TPA" by the court) was a substantial change in the constitutional framework of how powers are distributed. (*Weber*, 16 Cal.5th at p. 261.) Several points were considered, the most pertinent of which was how "the TPA shifts power between the executive branch and the legislative branch." (*Id.* at p. 266.) The ability of executive agencies to exercise quasi-legislative power to charge fees would be impacted in three ways,

most directly by a prohibition on imposing an "exempt charge" (i.e., a fee rather than a tax) by regulation rather than statute. (*Id*. at pp. 266-267.) The court noted the importance of the Legislature's ability to delegate " '*quasi*-legislative and *quasi*-judicial functions ... to departments, boards, commissions, and agents.' " (*Id*. at p. 268, quoting *Gaylord v. City of Pasadena* (1917) 175 Cal. 433, 436, italics in original.)

Under current law, the Legislature can and does choose between setting fees itself and delegating quasi-legislative authority to do so. That ability to choose is structurally important. "But the fact that the Legislature has chosen to set or limit certain fees does not answer Petitioners' central point that the Legislature today is authorized to decide whether to set certain fees itself or to delegate the task to various agencies. Under the TPA, the Legislature would be stripped of that authority and would instead be tasked with considering and voting on a multitude of fees currently set by agencies." (*Weber*, 16 Cal.5th at p. 270.)

The present case is a magnified mirror image, and *Weber* conclusively rejects a central claim made by appellants and accepted by the superior court. That is, that the complete transfer of legislative authority on this subject to the agency is no big deal because the Legislature has delegated some quasi-legislative authority before. (See Ruling, 3 AA 747.) It's a big deal. If the superior court's decision is affirmed as to both interpretation and validity, the Legislature and the people will have permanently lost the ability to decide how much authority over credits to delegate to CDCR, absent another constitutional amendment. Further than that, unlimited authority to grant credits undermines the legislative power to set minimum terms for particular offenses. If forcible rape of a child is punished by a minimum of

nine years (§ 264, subd. (c)(1)) and credits are capped at fifteen percent (§ 2933.1, subd. (a)), then the child victim can rest assured that the perpetrator will not be back for over seven and a half years. The Legislature provided that assurance for victims itself and chose not to delegate that decision to CDCR. Now CDCR has claimed the power to yank that assurance away and has exercised it.

Weber does not conclusively answer whether the TPA's shift in the legislative-executive balance amounts to a revision by itself. We now have the concept of the cumulative qualitative revision. (See *Weber*, 16 Cal.5th at p. 276.) But it does resolve that shifting that balance on a single area of law raises a substantial issue of a revision, as it implied in *Senate v. Jones, supra.* Further, the change here strikes deeper at the fundamental constitutional plan than the one in *Weber*. Transferring plenary legislative power to the executive is a more fundamental change than limiting the Legislature's ability to transfer a more limited quasi-legislative power.

The power that CDCR claims would be a revision if Proposition 57 really vested them with that power. The preferred course would be to interpret the initiative to delegate only normal quasi-legislative power to fill in the gaps while respecting statutory limits, as explained in part IV. If the court should chose not to go that route, however, then the provision making that transfer is an illegally adopted revision of the Constitution and is void.

CONCLUSION

The judgment of the superior court should be affirmed as to the portion granting the writ of mandate and reversed to the extent it denied the writ. The case should be remanded to the superior court to issue a writ granting the relief previously denied.

Date: September 4, 2024

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Respondents and Cross-Appellants
Criminal Justice Legal Fdn. et al.

CERTIFICATE OF COMPLIANCE

**Pursuant to California Rules of Court,
Rule 8.204, subd. (c)(1)**

I, Kent S. Scheidegger, hereby certify that the attached **RESPONDENTS' ANSWER BRIEF AND CROSS-APPELLANTS' OPENING BRIEF** uses a 13 point Century Schoolbook font and contains 16,672 words, as indicated by the computer program, WordPerfect, used to prepare the brief.

Date: September 6, 2024

Respectfully Submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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

The undersigned declares under penalty of perjury that the following is true and correct: I am over eighteen years of age, not a party to the within cause, and employed by the Criminal Justice Legal Foundation, with offices at 2131 L Street, Sacramento, California 95816.

On the date below, I electronically filed the attached document **RESPONDENTS' ANSWER BRIEF AND CROSS-APPELLANTS' OPENING BRIEF** by transmitting a true copy using the TrueFiling system. All participants in the case are registered TrueFiling users and will be served by the TrueFiling system.

In addition, I served on each person named below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail addressed as follows and by electronically emailing a digital copy to the email addresses indicated:

Sacramento County Superior Court
For: Honorable Jennifer K. Rockwell
Gordon D. Schaber Sacramento County Courthouse
Department 4, 2nd Floor
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Sacramento, CA 95814
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Executed on September 6, 2024, Sacramento, California.

KENT S. SCHEIDEGGER