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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

CRIMINAL JUSTICE LEGAL FOUNDATION et al.,

Petitioners and Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION et al.,

Respondents and Defendants.

Case No. 34-2022-80003807-CU-WM-GDS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION FOR WRIT OF MANDATE

Hearing Date: February 3, 2023
Time: 2:00 p.m.
Dept: 27
Judge: Hon. Steven Gevercer
Action Filed: January 26, 2022

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MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF FACTS

This case is a facial challenge to the validity of regulations on inmate credit earning adopted by Respondent California Department of Corrections and Rehabilitation (CDCR). The material facts are the regulations themselves, the records of their adoption, and the contrary provisions of numerous statutes, none of which is subject to dispute. The regulations were adopted and readopted as emergency regulations three times: effective May 1, 2021, December 28, 2021, and March 29, 2022. (First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Pet."), May 3, 2022, ¶ 12; Petitioner's Request for Judicial Notice in Support of Petition for Writ of Mandate ("RJN"), May 3, 2022, Exs. D, E, G.) After the Amended Petition, they were adopted as permanent regulations, approved by the Office of Administrative Law (OAL) on August 8, 2022. See *infra* at 13.

The regulations purport to apply "notwithstanding any other authority to award or limit credit" in multiple places. (Pet. ¶¶ 15, 32.) The "other authority" limiting credits or their effect include numerous statutes, including sections 190, 667, 1170.12, 2933.05, 2933.1, 2933.2, 2933.5, and 3046 of the Penal Code. The regulations are in conflict with those limits, particularly with regard to shortening the sentences of perpetrators of violent crimes. (Pet. ¶¶ 13-16, 28.) The authority claimed for this action is section 32, of article I of the California Constitution, enacted in Proposition 57 of 2016. (RJN, Ex. D, Text of Proposed Regulations, p. 4, Note.)

OAL designated February 8, 2022, as the expiration date for the initial adoption (RJN, Ex. D, p. 1), four months longer than the statutory expiration date under section 5058.3 of the Penal Code, even though the executive order extending deadlines does not include that section among those extended. (RJN, Ex. A, ¶ 1, p. 2; Pet. ¶ 36.)

OAL approved the first readoption (RJN, Ex. E) despite the absence of any showing at all in the application of either progress toward adoption of permanent regulations or diligence in that effort. (RJN, Ex. F; Pet. ¶ 37; Gov. Code, § 11346.1, subd. (h).) The

application for the second readoption contains statements purporting to meet this requirement and to show the existence of an emergency (RJN, Ex. H, pp. 2, 5-6), but Petitioners submit that these statements fail to meet the statutory requirements. (Pet. ¶¶ 37-38.)

Petitioner Criminal Justice Legal Foundation is a nonprofit California corporation with a long record of advocating for the rights of victims of crime to the proper punishment of the perpetrators of crime. (Pet. ¶ 1, Declaration of Michael Rushford, attached to the Notice of Motion filed concurrently with this Memorandum.) Petitioners Samantha Carter and Rizpah Bellard are victims of violent crimes committed by perpetrators who may be released earlier than the pertinent statutes permit as a result of the challenged regulations. (Declaration of Samantha Carter, May 16, 2022, ROA 29; Declaration of Rizpah Bellard, May 24, 2022, ROA 29.)

SUMMARY OF ARGUMENT

An administrative action that is contrary to a statute is void. The regulations at issue in this case are contrary to statutes in many ways.

First, the regulations purport to give credits the effect of advancing the dates on which inmates with indeterminate sentences become eligible for parole. Section 3046 of the Penal Code, as long interpreted by the courts, requires that the inmate serve at least the minimum number of years in the sentencing statute, not reduced by credits, unless that statute provides otherwise. In addition, the sentencing statute for murder, section 190, expressly bars the use of credits to reduce the minimum. Nothing in Proposition 57 repeals these long-established laws expressly or by implication.

Second, the regulations give extra credit merely for being in minimum custody. No statute or constitutional provision authorizes credit on this basis.

Third, multiple statutes bar or limit credit for inmates convicted of particular crimes or recidivism in particular categories of crime. Among these limits are a complete bar on credits for those convicted of murder, a complete bar for repeaters of certain violent crimes, and a cap of 15% for those convicted of any of a long list of violent crimes.

As a constitutional amendment, section 32 of article I of the Constitution overrides any statutes inconsistent with the text of the section itself. However, the fact that the section authorizes CDCR to promulgate regulations does not vest that agency with the legislative power to effectively repeal statutes. Other constitutional provisions authorizing regulations have not been interpreted that way. Neither the text, the purpose, nor the ballot materials of Proposition 57 require such a drastic interpretation. Giving an executive agency supremacy over statutes would be a drastic change in the separation of powers. If the provision were interpreted that way, it would amount to a revision rather than an amendment of the Constitution, one that could not be validly adopted by initiative.

The initial adoption of the regulations expired October 8, 2021, under section 5058.3 of the Penal Code. The first readoption was void for failure to show diligence and progress in the permanent regulation process. The second readoption was void for that reason and for failure to demonstrate that an emergency existed as defined in the Administrative Procedure Act. There were no valid emergency regulations in effect after October 8, 2021, and any credits issued between that date and August 8, 2022, that would not have been authorized by the prior permanent regulations are void.

Petitioners have standing to bring this action. The individual victims have an interest in seeing the perpetrators of the crimes against them punished to the extent the law requires, an interest over and above the interest of the general public. The "beneficial interest" requirement for mandate is essentially the same. In addition, all parties have public interest standing. They have an interest as citizens in seeing the law enforced.

Mandate is an appropriate action to require executive officers to perform their duties under a proper interpretation of the law and not contrary to law. It is appropriate for settling the validity of a regulation claimed to be invalid on the ground that it conflicts with statutes. The availability of declaratory or injunctive relief does not preclude the use of mandate.

I. BACKGROUND.

A. Credit System.

California sentences are (1) determinate, expiring on a date fixed at sentencing, (2) indeterminate, up to life with release on parole determined by the parole authority (presently the Board of Parole Hearings), or (3) death or life without parole (LWOP), never eligible for release. (See *In re Monigold* (1983) 139 Cal.App.3d 485, 490.)

Since 1982, the two primary sources of statutorily authorized credits have been sections 2933 and 2933.05 of the Penal Code. Section 2933 was originally captioned "worktime," but it has been amended to make the credits automatic but subject to denial or forfeiture for misbehavior. This is effectively good behavior credit with good behavior rebuttably presumed. Section 2933.05, provides credits for participating in programs. In addition, section 2933.3 provides up to two-thirds credits for inmates working in conservation camps and inmate firefighters.

The credit statutes on their face apply only to determinate sentences, not indeterminate sentences unless the particular sentencing statute so provides. This limitation comes from both the statutes on credits and the statute on eligibility for parole, section 3046 of the Penal Code, as explained in Part II-A, below.

The statutory scheme further limits credits by specific prohibitions and caps on certain violent and recidivist felons. These limits are discussed further in Part II-C, below.

In summary, the statutes in effect before *Brown v. Plata* (2011) 563 U.S. 493 and Proposition 57, and still "on the books" today, sharply limited the use of credits to advance the minimum eligible parole date of indeterminate term inmates and limited credits for determinate term inmates sentenced for most violent crimes.

B. The *Plata* Case.

In 2010, a federal court ordered a reduction in prison population and the Supreme Court affirmed. (See *Brown v. Plata*, *supra*, 563 U.S. at pp. 509-510, 545.) When Realignment failed to reach the target fast enough, the plaintiffs demanded additional measures, including an increase in credits for violent felons from 15% to 34%.

Dr. Jeffrey Beard was then Secretary of CDCR and a defendant in the action. He submitted a declaration explaining why increasing the credits was dangerous. He explained that the best candidates for reduced sentences had already been removed from the state prison population through other measures. The plaintiffs' credit-earning proposals "would result in the immediate release of inmates convicted of serious, violent, or sex offenses.... [T]hese measures pose an undue risk to public safety and do not reflect sound correctional practice." (RJN, Ex. C, ¶ 15.) The federal court ultimately ordered adoption of some of these proposals, but its final order did not include the expanded credits for violent felons. *Plata v. Brown*, N.D. Cal. No., C01-1351TEH, Order Granting in Part and Denying in Part Defendants' Request for Extension of December 31, 2013 Deadline (Feb. 10, 2014) ¶ 4, https://www.cand.uscourts.gov/filelibrary/1345/2014-02-10 order extending time.pdf.

C. Proposition 57 and the Regulations.

Proposition 57 of 2015 included a constitutional amendment which states that CDCR "shall have authority to award credits earned for good behavior and approved rehabilitative or educational achievements" (Cal. Const., art. I, § 32, subd. (a)(2)) and directs it to adopt regulations to implement the section. (*Id.*, subd. (b).) In 2017, CDCR adopted regulations making a number of changes, including increasing good behavior credits for violent felons from the statutory 15% to 20% (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(2) (2017)) and stating that credits would advance initial parole hearing dates for inmates with indeterminate terms. (§ 3043.2, subd. (b).) The regulations also extended various kinds of program credits to all inmates eligible for good behavior credits (§§ 3043.3, subd. (c), 3043.4, subd. (b), 3043.5, subd. (b)), notwithstanding the statutory bar on such credits for violent felony inmates, among others.

CDCR sent a substantial "emergency" amendment of the credit regulations to the OAL on April 7, 2021, with an effective date of May 1, 2021. (RJN, Ex. D.) Among other changes, the amendment to section 3042.2, subdivision (b)(2) further increased credits for felons whose present offense is on the Penal Code section 667.5, subdivision (c) "violent" list to 33.3%, more than double the statutory limit of 15%. This "emergency" regulation, its

two dubious readoptions, and the subsequent permanent regulations are the subject of this suit. CDCR submitted a certificate of compliance to OAL to make the regulations permanent on June 24, 2022, which OAL approved on August 8, 2022. (See Cal. Reg. Notice Register 2022, vol. 33-Z, p. 961 (Aug. 19, 2022).) Petitioners' substantive objections to the emergency regulations, i.e., that they conflict with statutes, carry over to the subsequently adopted permanent regulations. (See *Californians for Political Reform Foundation v. Fair Political Practices Commission* (1998) 61 Cal.App.4th 472, 480.)

D. Impact of the Regulations.

The dry and technical nature of these regulations should not obscure the real, human impact of excessive leniency to violent criminals. Section 2936 of the Penal Code requires a report to the Legislature on the impact of changes to the credit regulations. In the report for the May 2021 regulations, CDCR estimated that the changes would reduce prison population by 9,983 inmates by Fiscal Year (FY) 2023-24. (See Declaration of Michael Rushford, Oct. 6, 2022, Ex. A, p. 9.) That necessarily means approximately that many more felons on the streets of California, once again able to victimize people on the outside.

The most recent CDCR recidivism statistics are for those inmates released in FY 2015-16. (California Department of Corrections and Rehabilitation, Recidivism Report for Offenders Released from the CDCR in Fiscal Year 2015-16 (2021), <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2021/09/Recidivism-Report-for-Offenders-Released-in-Fiscal-Year-2015-16.pdf>.) Within three years, of the 33,756 inmates released in that fiscal year, 15,059 were convicted of new crimes. (*Id*. table 1, p. 4.) Of these, 7,471 were convicted of new felonies, and 2,368 of those were felonies against persons. (*Id*. table 3, p. 11.) Applying the same ratio to the estimated additional releases, we can estimate 2,209 will be convicted of new felonies and 700 will be convicted of new violent felonies. The actual number of additional crimes that will be *committed* is unknown but much larger, given that many crimes go unsolved, even solved crimes do not always result in convictions, and those convicted have often committed more than one crime.

By any reasonable estimate, these regulations will result in thousands of additional violent felonies perpetrated against the people of California.

II. THE REGULATIONS ARE INVALID BECAUSE THEY CONTRADICT STATUTES REGARDING SENTENCE CREDITS AND MINIMUM PAROLE ELIGIBILITY DATES.

"Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391.) The regulations described in Part I-C, above, violate existing statutes in several ways, none of which, Petitioners submit, are authorized by Proposition 57.

A. Minimum Eligible Parole Date.

First, the regulations violate controlling law without authorization from Proposition 57 through blanket application of credits to reduce the minimum eligible parole dates of indeterminately sentenced felons. (See Cal. Code Regs., tit. 15, §§ 3043, subd. (a), 3043.2, subd. (b), 3043.3, subds. (b) & (c), 3043.4, subd. (b), 3043.5, subd. (b), 3043.6, subd. (b).) Not a word in Proposition 57 is inconsistent with the longstanding interpretation of section 3046 of the Penal Code that the minimum eligible parole date is determined by that section and the sentencing provisions of the statutes imposing indeterminate sentences, unaffected by credits unless those sentencing provisions make credits relevant. (See *In re Monigold* (1983) 139 Cal.App.3d 485, 491; *People v. Sampsell* (1950) 34 Cal.2d 757, 764.)

For life sentences with the possibility of parole, subdivision (a) of section 3046 of the Penal Code establishes the minimum eligible parole date as the greater of (1) seven years or (2) the "minimum term" specified in the statute for the specific offense, generally with no allowance for reduction via good conduct or participation in prison. "A life sentence prisoner must serve a minimum calendar term before becoming eligible for parole. Conduct credits do not apply to that minimum term." (*Monigold*, *supra*, 139 Cal.App.3d at pp. 490-491; see Opinion of the Attorney General, 70 Cal. Ops. Atty. Gen. 49, 50 (1987).) Good conduct still counts, of course, in persuading the parole authority to actually grant parole once the minimum eligible parole date ("MEPD") has been reached.

(See *Monigold*, *supra*, at p. 491; *In re Cervera* (2001) 24 Cal.4th 1073, 1082, citing *Monigold*.)

This longstanding interpretation of section 3046 was subsequently recognized in statute. When the Legislature capped credits for violent felons at 15% in 2002, it took care to specify that the capping statute did not affect the *Sampsell/Monigold* rule. (See Pen. Code, § 2933.1, subd. (b).) Thus, even if a violent felon may *accrue* credits up to 15%, those credits do not have the *effect* of shortening the minimum eligible parole date for an indeterminate sentence unless the specific sentencing statute for the offense so provides.

Statutes setting a minimum indeterminate term have, at times, allowed credits to advance the MEPD. Section 190 of the Penal Code as amended by Proposition 7 of 1978 included a provision to allow good behavior credits under article 2.5, the credits article of the Penal Code, to reduce the minimum term. (See 70 Cal. Ops. Atty. Gen. 52, quoting section 190 as it then read.) This provision was removed and a contrary one enacted by Proposition 222 of 1998. (See Stats. 1998, pp. A-259–A-260.) Similarly, the "one-strike" law for aggravated sex crimes originally allowed both pre- and post-sentence credits, but the Legislature subsequently chose to eliminate both. (See *People v. Adams* (2018) 28 Cal.App.5th 170, 182.)

The decision to give credits the effect of reducing the MEPD, or not, was one that the legislative authorities of the state (the Legislature and the people) exercised on an offense-by-offense basis before Proposition 57. Those authorities sometimes reconsidered and revised their decisions.

This remains the law today, as nothing in Proposition 57 expressly or implicitly repeals it. Not only is there nothing in Proposition 57 contrary to the rule that "minimum term" in section 3046 is not generally reduced by credits, the proposition itself contains a very similar rule for its own new determinate-term parole procedure. Subdivisions (a)(1) and (a)(1)(A) of article I, section 32 of the California Constitution allow a determinately sentenced prisoner to be paroled after completion of the "full term" of the "primary offense." In *In re Canady* (2020) 57 Cal.App.5th 1022, 1031, the Court of Appeal

"conclude[d] the 'full term' was intended by the voters to refer to the sentence imposed by the court *without including conduct credits*." (Italics added.)

While *Canady* upholds a regulation denying credits the effect of reducing the "full term," the bulk of its discussion is straight interpretation of the constitutional provision rather than deference to CDCR's interpretation. (See *Canady*, *supra*, at pp. 1031-1034.) Near the end of that discussion *Canady* does refer to "broad authority" in CDCR (see *id*. at p. 1034), but "broad" is not unlimited. In the same paragraph the court concludes that "the plain language of article I, section 32, subdivisions (a)(1) and (a)(1)(A) *prohibits* the application of conduct credits to such calculations through its use of the description 'full term.' " (*Id*. at p. 1035, italics added.) It is unlikely that the *Canady* court would have deferred to a regulation requiring what it construed section 32 to prohibit.

If the "plain language" of section 32 *prohibits* the use of credits to reduce the "full term" of a determinately sentenced inmate, can it reasonably be construed to authorize the use of credits to reduce the "minimum term" for indeterminately sentenced inmates in contradiction of long-standing statutes as construed in long-standing case law? The illogic of such an interpretation further reinforces the presumption against implied repeal. (See *People v. Hazelton* (1996) 14 Cal.4th 101, 122.) It would require a strong indication in the text, and there is none. Proposition 57 contains only a bare authority to award credits, with no elaboration. (See Cal. Const., art. I, § 32, subd. (a)(2).) An authority to award credits, without more, does not imply an authority to give credits an effect that they did not have before.

To read Proposition 57's authority to award credits as implying an authority to override the legislative authority on substantive sentencing law would be a stretch, to put it mildly. One would have to believe that the people voting for Proposition 57 really intended to strip the Legislature *and themselves* of the power to enact statutes such as those providing that the minimum sentences for murder and the most horrible sex crimes are *really* minimums. (See Pen. Code, § 190, subd. (d); *People v. Adams*, *supra*, 28

Cal.App.5th at p. 182.) More than a bare authorization to issue credits is needed to justify such a sweeping change.

Interpreting subdivision (a)(2) of section 32 as allowing CDCR to reduce the MEPD of indeterminately sentenced felons would be contrary to one of the stated purposes of Proposition 57. The proponents repeatedly assured the voters that their purpose was to prevent, not cause, the release of dangerous criminals. (See Voter Information Guide, Gen. Elec. (Nov. 8, 2016) argument in favor of Prop. 57, p. 58 (cited below as "Voter Guide").) In rebuttal to the opponents' argument, they assured the voters, "Don't be misled by false attacks. Prop. 57 ... Does NOT authorize parole for violent offenders." Further, they said, "Prop. 57 ... WILL focus resources on keeping dangerous criminals behind bars." (*Id*., rebuttal to argument against Proposition 57, p. 59.)

Most indeterminately sentenced prisoners have been convicted of *very* violent crimes. A 2011 study found that 81% of lifers were in prison for murder or attempted murder, and another 10% were in for rape, other sex crimes, or kidnapping. (Weisberg, Mukamal, and 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 <https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259833/doc/slspublic/SCJC%20Lifer%20Parole%20Release%20Sept%202011.pdf>.) The kidnapping cases are not simple kidnapping but rather for the purpose of ransom, sex crimes, robbery, or carjacking, as those are the only types punishable by indeterminate sentences. (See Pen. Code, §§ 209, 209.5.)

Advancing the minimum eligible parole date for indeterminately sentenced felons therefore means, largely, advancing the potential release of very violent criminals. How many voters could have discerned such a result from the simple authorization for CDCR to issue credits, in the face of the proponents' forceful argument that the initiative would do exactly the opposite? Few, if any. That authorization does not alter the *Monigold* rule.

Section 3046 of the Penal Code still governs this question and still requires the minimum term specified in the particular offense punishment statute or seven years,

whichever is greater, to be actually served before a life-sentenced inmate is eligible for parole. A contrary conclusion would require interpreting Proposition 57 to empower CDCR to go romping through the Penal Code repealing substantive statutes. Not only would this be improper interpretation, as explained above, but vesting such legislative authority in an administrative agency would render Proposition 57 an invalid revision rather than amendment, as explained in Part III below.

The provisions of the California Code of Regulations, title 15, §§ 3043, subdivision (a), 3043.2, subdivision (b), 3043.3, subdivisions (b) and (c), 3043.4, subdivision (b), 3043.5, subdivision (b), and 3043.6, subdivision (b), allowing the use of credits to advance minimum eligible parole dates, as applied to indeterminate-sentence offenses where the sentencing statute does not authorize such use, are contrary to law and invalid. Respondent Board of Parole Hearings has no authority to grant parole under these regulations on a date earlier than the minimum eligible parole date established by statutes.

B. Minimum Custody Credit.

A second way that the regulations are illegal is the authorization of additional credits or a higher rate of credits merely for being assigned to minimum custody. Penal Code, part 3, title 1, chapter 7, article 2.5 (§§ 2930-2936) authorizes credits for various reasons. Article I, section 32, subdivision (a)(2) of the Constitution authorizes CDCR to grant credits "*earned* for good behavior and approved rehabilitative or educational achievements." (Italics added.)

The May 2021 version of section 3043.7 of the California Code of Regulations, title 15, since repealed, authorized additional credit merely for being assigned to certain custody conditions. The December 2021, March 2022, and August 2022 versions roll the additional credit into good conduct credit as a higher rate. (See Cal. Code Regs., tit. 15, § 3043.2, subds. (b)(5)(A), (B).) Section 2933.3 of the Penal Code authorizes extra credit for some inmate firefighters and conservation camp workers, but otherwise these credits are authorized by neither statute nor the Constitution. Placement in minimum custody may be related to good behavior, but the constitutional authorization is limited to credits earned for

good behavior as such. These credits are not authorized by law, and CDCR has no authority to issue them or release inmates early based on them.

C. Violent Felon Caps.

1. The Constitution, Statutes, and Regulations.

Another important distinction renders invalid the regulation's effective repeal of the pre-existing statutory caps on credits for violent felons. That distinction concerns an authorization for a nonlegislative agency to make law in the absence of a statute versus an authorization for such an agency to make law in conflict with a statute. The former may be a "quasi-legislative" power, but the latter is an unqualified legislative power with no "quasi" about it. (See *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299 [discussing the distinction].)

The Legislature has made policy determinations that the subset of violent felons who have committed crimes on the list in section 667.5, subdivision (c) of the Penal Code should be limited to credits of 15%, ensuring that they serve 85% of their sentence. (See Pen. Code, § 2933.1, subd. (a).) It has further determined that murderers should not receive any credits at all against their murder sentence or other convictions and enhancements. (See Pen. Code, § 2933.2; *In re Maes* (2010) 185 Cal.App.4th 1094, 1103-1104.) It has further determined that certain repeat violent offenders "shall be ineligible to earn credit ...." (Pen. Code, § 2933.5, subd. (a)(1).) The people by initiative have decided that credits against determinate sentences under the three strikes law should be capped at 20%. (Pen. Code, § 1170.12, subd. (a)(5).)

All of these caps are violated by the regulations at issue in this case. Respondents claim that they are authorized to do so by subdivision (a)(2) of section 32 of article I of the California Constitution: "(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." This claim presents squarely the question of how drastically this subdivision altered the separation of powers.

At one extreme, the subdivision could be read to say that CDCR has the authority to award credits but only as authorized by statute, thus making no change to the law. At the other extreme, subdivision (a)(2) of section 32 could be read to anoint the Secretary of CDCR as an absolute monarch on the subject of credits, with the unreviewable power to issue any and all credits, regardless of any statutes to the contrary. In this interpretation, the subdivision strips both the Legislature and the people themselves of any authority to impose any restraints by statute. It would require a constitutional amendment to overrule a mere regulation. By giving the "notwithstanding" language of subdivision (a) its broadest interpretation, CDCR's regulatory authority would even allow it to trump other provisions of the Constitution. The "notwithstanding" clause of section 32 specifically calls out article I, the Declaration of Rights, which includes the state free exercise, equal protection, and due process protections among others. (See Cal. Const., art. I, §§ 4, 7.) This is, in essence, CDCR's interpretation.

Between these extremes lies a third interpretation, more compatible with the usual structure of governmental powers. The subdivision can be read to say that CDCR has the authority to issue the specified types of credits without an express statutory authorization yet subject to statutory restraints. In this interpretation, this executive agency would be vested with quasi-legislative power, a familiar concept in administrative law, not actual legislative power, a delegation unknown to both the California and United States Constitutions and contrary to our most fundamental principles.

2. Other Constitutionally Authorized Regulations.

Other constitutional provisions which directly authorize administrative regulations have been understood to confer quasi-legislative power, subject to limitation by statute, and not truly legislative power, with a power to nullify statutes. One of the clearest statements of the principle is given in *Harris* v. *Alcoholic Beverage Control Board* (1964) 228 Cal.App.2d 1, 6 (italics added):

> "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.]"

In *Harris* the constitutional provision in question did expressly limit the regulatory authority to regulations consistent with statutes, and the court did note that. (*Ibid*.) But the subsequent discussion and the statement of the general principle quoted above do not depend on that clause, which is never mentioned again in the opinion. At the end of the opinion, *Harris* again makes a statement of general principle, not dependent on the language of the particular provision:

> "The order of priority with respect to jurisdiction, accordingly, is as follows: (1) The Constitution is the supreme expression; (2) to the extent that it does not conflict with the Constitution, the Legislature may act; (3) to the extent that it does not conflict with the Constitution, or with lawful acts of the Legislature, the department may act through its rules and regulations." (228 Cal.App.2d at p. 7.)

This carefully phrased statement demonstrates that the constitutional provision at issue here, creating a quasi-legislative power, is not redundant with pre-existing law. The administrative power is limited by *lawful* acts of the Legislature. A statute that violated section 32 itself, as distinguished from regulations promulgated under it, would not be lawful. For example, the constitutional provision on its face provides for good-behavior credits. The Legislature abolished good-behavior credits for a time when it limited section 2931 to previously sentenced inmates and enacted section 2933, which originally required work as well as good behavior. (See Pen. Code, § 2933, as enacted by Stats. 1982, ch. 1234, § 4.) The Legislature could not do that again after Proposition 57. Such a statute would contradict section 32 on its face, would not be lawful, and would not effectively abolish CDCR's authority to issue such credits. But it does not follow that the legislative authorities, including the people by initiative, cannot set policies with regard to such credits, such as capping or prohibiting them for inmates convicted of violent felonies.

BNSF Railway Co. v. Public Utilities Com. (2013) 218 Cal.App.4th 778 illustrates that the same principle applies when the constitutional provision says nothing about the regulations being consistent with statutes. The Public Utilities Commission (PUC) 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." (BNSF, 218 Cal.App.4th at p. 785; see also *Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659, citing *Harris* in a PUC case.)

Without doubt, the Constitution *itself* is supreme over statutes, but a claim that regulations *authorized* by the Constitution are necessarily supreme over statutes is an entirely different matter. Other constitutional provisions authorizing regulations have not been read that way, whether the subordination of regulations to statutes is in the text or not. The "notwithstanding" clause of section 32 does not require the contrary, drastic interpretation. As nothing in the text requires departure from settled principles of the hierarchy of laws, the court could stop there. Even so, we will address other relevant principles of interpretation and extrinsic aids.

3. Constitutional Doubt.

"If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, *or raise serious and doubtful constitutional questions*, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*Miller v. Municipal Court of Los Angeles* (1943) 22 Cal.2d 818, 828, italics added.) This principle applies to the interpretation of initiatives as well as legislative statutes. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, quoting *Miller*, *supra*, at p. 828; *In re Friend* (2021) 11 Cal.5th 720, 734.)

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. 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.)

For the reasons explained in Part III, *infra*, the unprecedented step of giving an administrative agency the power to effectively repeal statutes is such a dramatic change in the constitutional separation of powers as to raise a "novel and serious" constitutional question of whether it is within the initiative power. That question can be avoided by simply interpreting the provision to grant quasi-legislative and not true legislative power, and it should be. " 'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' " (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230, quoting *Lyng v. Northwest Indian Cemetery Protective Assn*. (1988) 485 U.S. 439, 445.)

4. 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.' " (*Friend*, *supra*, 11 Cal.5th at p. 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.)

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." (Beard Decl., RJN, Ex. C, ¶ 15, p. 4.) 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 reason stated by Secretary Beard, expanded credits for violent felons are also contrary to the first purpose of Proposition 57, public safety.

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.

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. 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. 6.) *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, that 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. (See *ibid*.) The same reasoning applies here. The general statement is not enough to alert the voters that they might be authorizing expanded credits for violent felons. Indeed, that is even more true in this case than in *Friend*, given the proponents' repeated emphasis in their arguments on keeping the violent criminals "locked up."

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.

5. Article III, Section 3.5.

"When ... a duly enacted statute imposes a ministerial duty upon an executive official to follow the dictates of the statute in performing a mandated act, the official generally has no authority to disregard the statutory mandate based on the official's own determination that the statute is unconstitutional." (*Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068.) For state administrative agencies, this principle is expressly stated in section 3.5 of article III of the California Constitution. (See *id*. at p. 1085.) By declaring that section 32 authorizes it to override the statutes discussed above, Respondents are effectively declaring that those statutes are unenforceable and refusing to enforce them on the ground that they are unconstitutional, when no appellate court has yet so ruled. That is exactly what section 3.5 forbids in subdivision (a). Mandate is an appropriate remedy to correct a violation of this principle (see *id* at p. 1113), and the court need not resolve the underlying constitutional question to grant relief. (See *id*. at p. 1085.)

III. IF SECTION 32 VESTS CDCR WITH THE POWER TO EFFECTIVELY REPEAL STATUTES, IT WAS A CONSTITUTIONAL REVISION, NOT AMENDMENT, AND NOT VALIDLY ADOPTED BY INITIATIVE.

CDCR cites section 32 as its authority for regulations that award credits "[n]otwithstanding any other authority to award or limit credits" (Cal. Code Regs., tit. 15 § 3043.2, subd. (b) and Note) when those limits are in statutes. This is an assertion of true legislative power, not quasi-legislative power, purporting to effectively repeal statutes. This breathtaking revision of the constitutional separation of powers is said to follow from the fact that the authorization for CDCR to issue credits is located in the Constitution. In Part II, *supra*, we explain why that interpretation need not and should not be adopted. If it is adopted, though, then the question of whether such a drastic alteration of the separation powers may be validly adopted by initiative.

"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).) The drastic change in fundamental separation of powers principles that CDCR asserts should not be made lightly, and it should not be inferred from ambiguous

language. "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.)

The subject of prison credits is not just a minor niche in the law. Those credits can be used to undermine legislation and court judgments in the entire area of punishment of felonies, one of the most important powers of government. If CDCR can authorize different rates of credits to inmates sentenced under a particular law and disregard the caps in that law (see, e.g., Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(3) [Three Strikes]), then CDCR can effectively undermine the law merely because the current administration disagrees with it, even if that law was enacted by the people themselves. Excessively large credits can also undermine the judgments of courts, reducing a sentence to far less than the sentencing judge decided was appropriate for justice in the case.

Further, these decisions are not made by a disinterested agency considering all public interests equally but rather by one with a strong self-interest in lightening its own workload to fit its budget. In this case, the "operational necessity" cited for invoking the emergency regulation process was to comply with a provision in the Governor's Budget Summary. (See RJN, Ex. H, p. 2.)

Whether a purported amendment is actually a revision has both qualitative and quantitative aspects (see *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350), and the provision in question would not qualify as a revision on quantity. It would, however, qualify as a revision on quality if given CDCR's interpretation.

Raven v. Deukmejian (1990) 52 Cal.3d 336 (*Raven*) and *Legislature v. Eu* (1991) 54 Cal.3d 492 (*Eu*) are two of the leading cases on the revision argument and provide an informative contrast. In *Raven*, plaintiffs challenged one section of Proposition 115, which amended the state constitution to provide that certain enumerated criminal rights shall be construed consistently with the United States Constitution. (52 Cal.3d at pp. 342-343.) The

California Supreme Court found: "In essence and practical effect, [the amendment] would vest all judicial *interpretative* power, as to fundamental criminal defense rights, in the United States Supreme Court." (*Id*. at p. 352, original italics.) The Court observed that, under the amendment, California courts would no longer have authority to interpret the state Constitution in a manner more protective of defendants' rights than extended by the federal Constitution. (*Ibid*.) Noting that interpreting and applying the Constitution is "the very essence of judicial power," the court concluded that Proposition 115 "substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections" and that it "directly contradicts the well-established jurisprudential principle" that the judiciary possesses the " 'right to construe the Constitution in the last resort.' " (*Id*. at p. 354, quoting *Nogues v. Douglass* (1858) 7 Cal. 65, 69-70.)

In *Eu*, plaintiffs challenged Proposition 140, which amended the state Constitution by adding term, budget, and pension limitations on the Legislature. (*Eu*, *supra*, 54 Cal.3d at pp. 501-503.) As in *Raven*, plaintiffs argued that Proposition 140 constituted an impermissible revision, rather than an amendment, to the state Constitution. (*Id*. at p. 506.) Contrasting the case with *Raven*, the California Supreme Court found that "the basic and fundamental structure of the Legislature as a representative branch of government is left substantially unchanged by Proposition 140." (*Id*. at p. 508.) The Court explained that "By contrast [with *Raven*] 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." (*Id*. at p. 509.) Specifically, "*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*., italics added.)

These precedents support the conclusion that, if this Court finds that Proposition 57 granted CDCR the authority to nullify existing laws, Proposition 57 constitutes an impermissible revision of the state Constitution. Here, analogously to *Raven*, defendants' interpretation of Proposition 57 would vest all *legislative* power regarding custody credits

in CDCR, a power traditionally reserved to the legislative authority, not the executive. Under this interpretation, Proposition 57 "unduly restricts" legislative power, particularly where CDCR has unfettered discretion to nullify existing Penal Code provisions regarding credits. By granting CDCR such legislative power, defendants' interpretation of Proposition 57 contravenes the very essence of legislative power, substantially alters the preexisting constitutional scheme of legislating, and contradicts the well-established principle that the Legislature possesses the right to enact and repeal laws. (Cf. *Raven*, *supra*, 52 Cal.3d at pp. 352-354.) And, unlike Proposition 140 in *Eu*, defendants' interpretation of Proposition 57 here *does* substantially change the structure or foundational powers of the Legislature. Unlike in *Eu*, the legislative power here is diminished and in fact delegated to other persons or agencies (CDCR). The relationship between the governmental branches is affected, and the Legislature and the people do not remain free to enact whatever laws they deem appropriate in this important area. (Cf. *Eu*, *supra*, 54 Cal.3d at pp. 508-509.)

The power to determine sentences and the manner in which they may be reduced lies in the legislative authority in the last resort. (Cf. *Raven*, *supra*, 52 Cal.3d at p. 354.) Vesting that legislative authority in an executive agency in the last resort would be a revision of the Constitution.

IV. THE DECEMBER 2021 AND MARCH 2022 READOPTION ARE INVALID FOR VIOLATION OF THE APA, AND THE ORIGINAL MAY 2021 ADOPTION EXPIRED ON OCTOBER 8, 2021.

A. Invalid Readoptions.

While emergency adoption of regulations is sometimes needed, the procedure has high potential for abuse. (See Asimow & Cohen, Cal. Administrative Law 49 (2002).) Asimow and Cohen note an example in which a regulation was adopted and amended five times in twelve months, "always as an emergency." The Legislature has imposed restrictions to curb such abuse of the emergency procedure. One is a limit on the number of readoptions: twice for true emergencies (Gov. Code, § 11346.1, subd. (h)) and once for CDCR "operational needs" pseudo-emergencies. (Pen. Code, § 5058, subd. (a)(2).)

Another limitation, and the one applicable here, is that "[r]eadoption shall be permitted only if the agency has made *substantial progress* and *proceeded with diligence* to comply with subdivision (e)." (Gov. Code, § 11346.1, subd. (h).) The December 2021 rulemaking file is devoid of evidence of substantial progress or diligence.

The materials submitted by CDCR to Office of Administrative Law (OAL) for the December readoption made only this bare statement: "The Department has adhered to the process requirements of the Administrative Procedure Act and Penal Code 5058.3 for the permanent adoption of this emergency regulation. The Department expects to issue public notice regarding this rulemaking action in the near future." (RJN, Ex. F, p. 1.) This does not begin to comply with the statute's requirements.

CDCR sent the original regulations at issue to OAL on April 7, 2021. On November 29, 2021, almost *eight months* later, they still "expect[ed]" to issue a public notice "in the near future." This is not for some minor tweak to internal procedures that is far down the priority stack. This is for a major change to the punishment of crime in California, a change that is virtually certain to result in substantial numbers of robberies, rapes, and murders that could have been prevented. This is not proceeding with diligence by any stretch of the imagination. Certainly no diligence was shown.

The March 2022 readoption fares little better in this regard. RJN Exhibit H at pages 5-6 contains a thin attempt to meet the requirement. CDCR notes that on February 15, 2022, it submitted the notice for permanent regulations. That is nine and a half months after the initial submittal and too late to complete the process before the December 2021 readoption expired. Yet there is not a single *specific* fact to justify the lateness. There is a very broad, generic statement that COVID-19 affected CDCR generally, but nothing specific to the regulatory process at all, much less to this specific regulation.

The burden is on the agency to submit "specific facts demonstrating by substantial evidence that the agency has made substantial progress and proceeded with diligence to comply with" the permanent rulemaking process. (See Cal. Code Regs., tit. 1, § 52, subd. (b)(1).) CDCR has not even come close. The fact that OAL approved the emergency

regulations nonetheless carries no weight. (See Gov. Code, § 11350, subd. (c).) Both of these emergency readoptions are void.

CDCR's special "operational needs" exception for adopting emergency regulations without an emergency is only valid for the first adoption and one readoption. A second readoption requires a genuine emergency. (See Pen. Code, § 5058.3, subd. (a)(1).)

"Emergency" for the purpose of the rulemaking chapter of the Administrative Procedure Act "means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code, § 11342.545.) "A finding of emergency based only on expediency, convenience, best interest, general public need, or speculation shall not be adequate to demonstrate the existence of an emergency." (Gov. Code, § 11346.1, subd. (b)(2).) The present regulation is a perfect example of what the latter statute declares not to be an emergency.

The burden is on the agency to "provide specific facts demonstrating the existence of an emergency and the need for immediate action." (Gov. Code, § 11346.1, subd. (b)(2).) Inaction means only that the permanent, pre-May 2021 version of the credit regulations is restored. The facts submitted (see RJN, Ex. H, p. 2) do not establish that such a restoration would cause the "serious harm" that the definition of "emergency" requires.

The second paragraph discusses the confusing changes made in the May 2021 regulations regarding minimum security credit and the need to back them out. This is not a reason at all, much less an emergency. The changes made in May 2021 are repealed by the expiration of that regulation. (See Gov. Code, § 11346.1, subd. (f).) If the second readoption had not occurred, the only difference on this point would be that the permanent regulations would be reinstated rather than the mostly similar March 2022 regulations.

CDCR's notice further asserted these reasons why the situation at that time was an "emergency":

> "Allowing emergency authority for these regulations to expire would subject tens of thousands of inmates to abrupt, temporary changes in their credit earning rates. This would make it extremely difficult to project an inmate's release date, which may impact placement into rehabilitative and other programs. Inmates and their families would have difficulty planning for the inmate's release. Pre-release planning, such

> as finding housing, work, and social services, would be complicated without a reliable projection of the release date. Some inmates currently finishing their time to serve in a community correctional setting could be returned to a state prison."

The May 2021 emergency regulations made an abrupt change, and over ten months later CDCR cited avoiding the abrupt reversal of its own abrupt change as an "emergency." This is a situation of CDCR's own making, announcing major changes in penal policy on an "emergency" basis when there is no emergency, rather than going through the public comment process, "with public and victim input," that Proposition 57's proponents promised the people would be used. (See Voter Guide, rebuttal to argument against Prop. 57, p. 59.)

Finally, CDCR asserts a direction in the Governor's Budget Summary for Fiscal Year 2020-21 (i.e., a year already in the past) as an emergency. The Governor's budget is a proposal; the budget enacted by the Legislature is the law. (See Cal. Const., art. IV, § 12.) CDCR has been citing the budget summary since April 2021, but it has yet to cite any authority that this direction has the force of law, and Petitioners are aware of none.

Nowhere in the asserted facts is there any showing of "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare," the statutory definition of an emergency, *supra*. At best, the assertions describe "expediency, convenience, best interest, general public need, or speculation," the statutory examples of what is *not* an emergency, *supra*. The "facts recited in the finding of emergency" for the March 2022 regulations "do not constitute an emergency" for the purpose of the APA and therefore the regulations are invalid. (Gov. Code, § 11350, subd. (a).)

B. Expired Initial Adoption.

When an emergency regulation amending or repealing an existing regulation expires, the prior regulation is reinstated without further action. (Gov. Code, § 11346.1, subd. (f).) Because the readoptions were invalid, the authority to award expanded credits expired with the May 2021 regulations.

The OAL indicated in its approval of the original regulation that the expiration date was February 22, 2022. (See RJN, Ex. D, p. 1.) This was evidently based on the theory that Executive Orders N-40-20 and N-71-20 extended the duration of the regulation. That is not correct. Paragraph 1 of the former order (RJN, Ex. A) precisely listed by section number the deadlines it extended. The latter order, in paragraph 9, further extended paragraph 1 of the former by an additional 90 days. (RNJ, Ex. B.)

Conspicuously absent from both of these orders is any reference to the deadline in Penal Code section 5058.3, subdivision (a)(1). CDCR promulgated the regulations at issue under the Penal Code section not the general APA. Section 5058.3 does incorporate general APA requirements, but only those that are not contrary to the exceptions it specifies. (Pen. Code, § 5058.3, subd. (a).) "The deadline[] specified in Government Code section[] ... 11346.1(e) ...," which the executive orders extend by a total of 150 days (RJN, Ex. A, ¶ 1), does not apply. It is one of the APA provisions supplanted by section 5058.3, in subdivision (a)(1). The deadline that does apply is absent from an order that carefully specifies which deadlines it extends.

Given that the initial adoption expired and the readoptions are void, there was no authority for awarding credits in excess of the limits in effect prior to the initial adoption from October 8, 2022, to August 8, 2023. This lack of authority provides an independent basis for barring the use of credits awarded during that period for release and parole decisions.

V. PETITIONERS HAVE STANDING, AND THIS IS AN APPROPRIATE CASE FOR RELIEF VIA WRIT OF MANDATE.

A. Standing and Beneficial Interest.

Standing to sue generally and "beneficial interest" for seeking a writ of mandate are largely the same and equivalent to the "injury in fact" test in federal cases. (See *People for the Ethical Operation of Prosecutors v. Spitzer* (2020) 53 Cal.App.5th 391, 407-408.) Absent the public interest exception, discussed below, the petitioner must have "some special interest to be served or some particular right to be preserved or protected over and

above the interest held in common with the public at large." (*Carsten v. Psychology Examining Com*. (1980) 27 Cal.3d 793, 796.) The interest need not be a legal right that is not shared by the general public, however. In environmental cases, standing may be granted to persons who merely want to visit an area that is open to the public, such as national forests. "[R]ecreational or even the mere esthetic interests of the plaintiff ... will suffice." (*Summers v. Earth Island Institute* (2009) 555 U.S. 488, 494; see also *In re Big Thorne Project v. United States Forest Service* (9th Cir. 2017) 857 F.3d 968, 974 [" 'enjoy the solitude' available only in 'remote, undeveloped areas on the Tongass' "].)

In *Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist.* (2015) 235 Cal.App.4th 957, 962-963, recreational vehicle enthusiasts had standing and a beneficial interest to challenge a restriction on RV activity in a state park with no requirement to show that they had any more right to use the park than anyone else. The restriction affected them, and that was a sufficient interest.

If "mere esthetic interests" in public lands are sufficient, the interest of victims of crimes in sufficient punishment of those who have committed horrible crimes against them must be vastly more than sufficient. The interest in justice is shared with the general public, to be sure. (See Cal. Const., art. I, § 28, subds. (a)(4), (a)(5), (f)(5).) But the interests of victims, including the families of the direct victims (see *id*., subd. (e)), are far more intense and more personal. (See Declaration of Samantha Carter, May 16, 2022, attached to the Notice of Motion of May 26, 2022, ROA 29.) "Marsy's Law clearly demands a broad interpretation protective of victims' rights." (*Santos v. Brown* (2015) 238 Cal.App.4th 398, 418.) We should be long past the brutal notion that the victim of a crime has no interest in the outcome of the case or the enforcement of the judgment. The individual petitioners in this case have standing and a beneficial interest for writ of mandate.

Aside from the usual standing/beneficial interest requirements in cases involving only individual interests, California courts regularly grant "public interest standing" "where the question is one of public right and the object of the mandamus is to procure the

enforcement of a public duty ... since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166, internal quotation marks omitted.) Questions of the validity of important criminal legislation have regularly been reached on the merits by the Supreme Court in mandate cases brought by citizens with no more interest than any other citizen. (See, e.g., *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 240 [Prop. 8 of 1982, "taxpayers and voters"]; *Raven v. Deukmejian*, *supra*, 52 Cal.3d at p. 340 [Prop. 115 of 1990, "taxpayers and voters"].) Further, *someone* must have standing or else illegally lax regulations would be immune from judicial review. (See *Farm Sanctuary, Inc. v. Department of Food & Agriculture* (1998) 63 Cal.App.4th 495, 503.) If the present Petitioners do not, it is difficult to see anyone who does.

As far back as 1973, organizations with long-standing activity and interests in prison conditions were held to have public interest standing in a prison case. (*American Friends Service Committee v. Procunier* (1973) 33 Cal.App.3d 252, 255-256.) Petitioner Criminal Justice Legal Foundation has been advocating for the rights of victims and the public to sufficient punishment of the perpetrators of crime for 40 years. (See Declaration of Michael Rushford, Oct. 6, 2022, attached to the Notice of Motion.) All of the petitioners have an interest in seeing the laws limiting credits enforced, and all have public interest standing.

B. Appropriateness of Writ of Mandate.

The writ of mandate lies "to compel the performance of an act which the law specially enjoins ...." (Code Civ. Proc., § 1085, subd. (a).) This language has been interpreted to require that "the public official has a legal and usually ministerial duty to perform." (*Menefield v. Foreman* (2014) 231 Cal.App.4th 211, 216-217.) This case does involve a ministerial duty, but the qualifier "usually" is also significant, as discussed below.

"If the [criminal case] judgment is for imprisonment, ...the defendant must forthwith be committed to the custody of the proper officer and by him or her detained

until the judgment is complied with." (Pen. Code, § 1215; see also Pen. Code, §§ 1202a [Director of Corrections is the officer], § 5050 [now Secretary of CDCR].) Maintaining custody until release is authorized by law is a ministerial duty. Mandate is also proper to restrain unlawful exercise of a duty. This use of the writ is "known as 'prohibitory mandate.' " (*Planned Parenthood Affiliates v. Van De Kamp* (1986) 181 Cal.App.3d 245, 263.) Prohibitory mandate is appropriate in this case to restrain unlawfully early parole or other release. Also, executive officers have a constitutional duty to abide by statutes until they are judicially declared unconstitutional, and mandate is proper to enforce that duty. (See *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1068-1069, 1113.)

In *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442, the Supreme Court endorsed the use of mandate for settling the interpretation of laws. "Mandamus will lie to compel a public official to perform an official act required by law. (Code Civ. Proc., § 1085.) Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner. Mandamus may issue, however, to compel an official both to exercise his discretion (if he is required by law to do so) *and to exercise it under a proper interpretation of the applicable law*." (Italics added.)

Mandate is the proper action to challenge the validity of an enactment which is claimed to violate a higher level of law, such as a statute in violation of the Constitution (see *Patterson v. Padilla* (2019) 8 Cal.5th 220, 250) or a regulation in violation of the Constitution or statutes. (See *Friends of Oceano Dunes*, *supra*, 235 Cal.App.4th at p. 966; *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562.) In *Saleeby*, the writ of mandate required the agency to reformulate its rules to conform the legal requirements found by the court. (See 39 Cal.3d at p. 575.)

Section 1086 of the Code of Civil Procedure provides, "The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." While this statute is sometimes cited as forbidding issuance of the writ when *any* other adequate

remedy exists, it is not actually that broad. *Villery v. Department of Corrections & Rehabilitation* (2016) 246 Cal.App.4th 407 is one of the few cases to examine what "ordinary course of law" means. It includes appeal, when a writ is sought from an appellate court, and actions in law for damages, but beyond that its meaning is more obscure. (See *id*. at pp. 414-415.) It does not include habeas corpus. (*Id*. at p. 416.)

Most importantly for this case, the fact that declaratory and injunctive relief are or may be available does not prevent the use of mandate. (*Brock v. Superior Court* (1952) 109 Cal.App.2d 594, 603; see also *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 343, fn. 20, quoting *Brock*; *Timmons v. McMahon* (1991) 235 Cal.App.3d 512, 518.)

The merits of this case are properly presented as a petition for writ of mandate. Petitioners have also pleaded actions for declaratory and injunctive relief, as is common practice (see CEB, Cal. Civil Writ Practice (4th ed. 2008) § 5.119), but there is no legal impediment to proceeding to the merits on the writ petition.

These regulations are a clear and present danger to the lives and safety of law-abiding Californians. They were illegally adopted. They are contrary to law. They are not authorized by section 32 of article I of the California Constitution, properly construed, and if that provision is construed to authorize them then it was improperly adopted and void.

CONCLUSION

The writ of mandate should issue as requested in the petition.

Dated: October 7, 2022

Respectfully submitted,

By: _____
KENT SCHEIDEGGER
Attorney for Petitioners and Plaintiffs

PROOF OF SERVICE

1. I am over the age of 18 and not a party to this cause. I am employed in the county where the mailing occurred. The following facts are within my first-hand and personal knowledge and if called as a witness, I could and would testify thereto.

2. My business address is 2131 L Street, Sacramento, CA 95816.

On October 7, 2022, I served the foregoing document entitled:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE PETITION FOR WRIT OF MANDATE

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 electronically emailed a digital copy to the email addresses indicated:

3. Name and address of each person served:

Gregory J. Marcot
Deputy Attorney General
Office of the State Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
Gregory.Marcot@doj.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 7, 2022, at Sacramento, California.

IRMA H. ABELLA