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Case Number:
34-2017-80002581

9 **SUPERIOR COURT FOR THE STATE OF CALIFORNIA**
10 **COUNTY OF SACRAMENTO**

11 ALLIANCE FOR CONSTITUTIONAL
12 SEX OFFENSE LAWS, a California non-profit
13 corporation; and JOHN DOE, an individual,

14 Petitioners,

15 vs.

16 CALIFORNIA DEPARTMENT OF
17 CORRECTIONS AND REHABILITATION;
18 and, SCOTT KERNAN, in his official capacity
19 as Secretary of the California Department of
20 Corrections and Rehabilitation

21 Respondents.

Case No.:

**PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

22 **INTRODUCTION**

23 1. Respondent California Department of Corrections and Rehabilitation ("CDCR") has
24 disregarded the will of California voters and defied the California Constitution by issuing
25 emergency regulations that undermine a key provision of the recently enacted Public Safety and
26 Rehabilitation Act of 2016, a ballot initiative popularly known as "Proposition 57."

27 2. The objectives of Proposition 57 are to reduce the size of the prison population in this state,
28 as well as to increase the incentives and opportunity for inmates to rehabilitate themselves. In

1 CDCR's own words, "California voters overwhelmingly passed Proposition 57 (64% to 35%) to
2 enhance public safety, stop the revolving door of crime by emphasizing rehabilitation, and prevent
3 federal courts from indiscriminately releasing inmates."¹ To achieve these objectives, Proposition
4 57 amended the California Constitution "to make individuals who are convicted of '*nonviolent*
5 *felony*' offenses eligible for parole consideration after serving the full prison term for their primary
6 offense."² As amended by Proposition 57, the California Constitution now provides:

7 **Parole Consideration: Any person convicted of a nonviolent felony offense and**
8 **sentenced to state prison shall be eligible for parole consideration after**
9 **completing the full term for his or her primary offense.**

10 CAL. CONST. art. I, § 32(a)(1) (emphasis added).³ This "early parole consideration" provision is
11 mandatory and leaves no discretion for CDCR to pick and choose the nonviolent felony offenses to
12 which it applies.

13 3. Section 667.5(c) of the Penal Code already lists the 23 specific offenses that constitute
14 "violent felonies" under state law. State law treats all remaining offenses as non-violent.
15 Proposition 57 therefore renders all individuals eligible for early parole consideration if they are
16 incarcerated for offenses other than those listed in Section 667.5(c).

17 4. Proposition 57 directs CDCR to issue regulation consistent with its mandate. CAL. CONST.
18 art. I, § 32(b). However, on March 24, 2017, CDCR issued emergency regulations that significantly
19 undercut Proposition 57 by categorically denying early parole consideration to a significant portion
20 of the prison population: individuals incarcerated for offenses for which registration is required by
21 Section 290, *et seq.* of the Penal Code (hereinafter "Registrable Offenses"). Specifically, in
22 defining the term "nonviolent offender" for the purpose of early parole consideration under

23 ¹ PROPOSITION 57, THE PUBLIC SAFETY AND REHABILITATION ACT OF 2016,
24 <http://www.cdcr.ca.gov/proposition57/> (last visited April 24, 2017).

25 ² *Prop 57 Analysis, Official Voter Information Guide, California Secretary of State*, (emphasis
26 added), <http://voterguide.sos.ca.gov/en/propositions/57/analysis.htm> (last visited April 24, 2017)
(hereinafter "VOTER INFORMATION GUIDE").

27 ³ Although Article I, Section 32 of the California Constitution is now the governing law, for ease of
28 reference this Complaint will refer to both that constitutional provision and Proposition 57
interchangeably.

1 Proposition 57, CDCR's regulations exclude not only the "violent" offenses listed in Penal Code
2 section 667.5(c), but also *every* Registrable Offense, *even nonviolent offenses*. See CAL. CODE
3 REGS. tit.15, §§ 3490(a), 2449.1(a) (2017) (hereinafter, the "Regulations"). CDCR's Regulations
4 are attached hereto in relevant part as Exhibit A.⁴

5 5. As set forth below, most Registrable Offenses are nonviolent offenses. Because Proposition
6 57 mandates that all nonviolent offenses "shall" be eligible for early parole consideration,
7 individuals incarcerated for nonviolent Registrable Offenses must be included within CDCR's
8 regulatory definition of "nonviolent offender." By excluding such individuals, CDCR's Regulations
9 nullify the vote of the majority of Californians, who approved Proposition 57 with full knowledge
10 that its early parole consideration provision applies to *all* nonviolent offenses, including nonviolent
11 Registrable Offenses.

12 6. CDCR's categorical exclusion of all Registrable Offenses from the Regulations
13 implementing Proposition 57 impermissibly restricts and impairs the scope of Proposition 57, in
14 violation of the California Administrative Procedure Act (CAL. GOV'T CODE § 11340, *et seq.*), as
15 well as Article I, Section 32 of the California Constitution. Petitioners therefore respectfully seek a
16 writ of mandate directing CDCR to treat as void and to repeal the Regulations. Petitioners also seek
17 a judgment declaring that CDCR lacks the authority to exclude nonviolent Registrable Offenses
18 from its definition of "nonviolent offender" in the Regulations. Petitioners also seek a judgment
19 declaring that CDCR's definition of "nonviolent offender" in the Regulations is unconstitutional,
20 void, and otherwise invalid to the extent it excludes Registrable Offenses that are not listed in Penal
21 Code section 667.5(c). Plaintiffs also seek an injunction directing CDCR to implement Proposition
22 57 as written, and as enacted by California voters.

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26 _____
27 ⁴ The Regulations, OAL File No. 2017-0328-01EON, have not yet been added to the official
28 reporters, but can also be found here: <https://oal.blogs.ca.gov/files/2017/04/2017-0328-01EON-Approved.pdf> (last visited April 24, 2017).

1 14. Respondent Scott Kernan (“Kernan”) is and at all material times was the Secretary of
2 CDCR. Petitioners are informed and believe and thereon allege that Secretary Kernan is responsible
3 for drafting, issuing, and enforcing the Regulations that are the subject of this action, with ultimate
4 responsibility for ensuring CDCR’s compliance with its legal duties. Secretary Kernan is sued in
5 his official capacity.

6 15. Respondents CDCR and Kernan shall be referred to herein collectively as “Respondents.”

7 **FACTUAL ALLEGATIONS**

8 16. Petitioners reallege and incorporate herein, as though fully set forth, each and every, all and
9 inclusively, paragraphs 1 through 15.

10 **Proposition 57 and the California Constitution Mandate that All Convictions Are Eligible for**
11 **Early Parole Consideration, Unless they are Designated “Violent Felonies” by State Law**

12 17. On November 8, 2018, California voters approved Proposition 57 by a margin of 64.5% to
13 35.5%.⁵ Proposition 57 was supported by numerous civic leaders, including Governor Jerry Brown.
14 According to the California Secretary of State, Proposition 57 seeks to reduce the state’s prison
15 population by increasing the opportunities for release for all but the state’s “most dangerous
16 criminals.”⁶ To that end, Proposition 57 amended the California Constitution to “to make
17 individuals who are convicted of ‘nonviolent felony’ offenses eligible for parole consideration after
18

19 _____
20 ⁵ *California Proposition 57, Parole for Non-Violent Criminals and Juvenile Court Trial*
21 *Requirements (2016)*, BALLOTEDIA, [https://ballotpedia.org/California_Proposition_57,_Parole_for](https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_(2016))
22 [_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_\(2016\)](https://ballotpedia.org/California_Proposition_57,_Parole_for_Non-Violent_Criminals_and_Juvenile_Court_Trial_Requirements_(2016)) (last visited April 24,
23 2017).

24 ⁶ VOTER INFORMATION GUIDE, *supra* note 2. The additional reforms enacted by Proposition 57,
25 which are not at issue in this action, “require judges, rather than prosecutors, to determine whether
26 juveniles charged with certain crimes should be tried in juvenile or adult court,” and “give[] inmates
27 the opportunity to earn additional credits for good behavior and participation in rehabilitative,
28 educational, and career training programs so they are better prepared to succeed and less likely to
commit new crimes when they re-enter our communities.” CDCR, *Proposition 57: The Public
Safety and Rehabilitation Act of 2016 – Frequently Asked Questions*, at 1 (March 2017),
<http://www.cdcr.ca.gov/proposition57/docs/faq-prop-57.pdf>. The full text of Proposition 57 as
maintained by the California Secretary of State can be found here:
[https://www.gov.ca.gov/docs/The_Public_Safety_and_Rehabilitation_Act_of_2016_](https://www.gov.ca.gov/docs/The_Public_Safety_and_Rehabilitation_Act_of_2016_(00266261xAEB03).pdf)
[_\(00266261xAEB03\).pdf](https://www.gov.ca.gov/docs/The_Public_Safety_and_Rehabilitation_Act_of_2016_(00266261xAEB03).pdf).

1 serving the full prison term for their primary offense.”⁷ As amended and added by Proposition 57,
2 Article I, Section 32 of the California Constitution now provides:

3 **Parole Consideration: Any person convicted of a *nonviolent felony offense* and**
4 **sentenced to state prison *shall be eligible for parole consideration after***
5 **completing the full term for his or her primary offense.**

6 CAL. CONST. art. I, § 32(a)(1) (emphasis added). This provision is mandatory and makes no
7 distinction among the various types of offenses that qualify as “nonviolent.”

8 18. Neither Proposition 57 nor any other provision of state law exhaustively lists all “nonviolent
9 felonies.” This is because state law defines “violent felonies” by statute and thereby designates the
10 remaining universe of offenses as “nonviolent.” To qualify as “violent,” an offense must normally
11 be “committed by force, violence, duress, menace, fear of immediate and unlawful bodily injury on
12 the victim or another person.” E.g., CAL. WELF. & INST. CODE § 6600(b) (Deering 2017) (defining
13 “sexually violent offenses”). Penal Code section 667.5(c) lists the 23 offenses that are deemed by
14 state law to be “violent felonies,” of which the following are Registrable Offenses:

15 (c) For the purpose of this section, “violent felony” shall mean any of the following:

16

17 (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or
18 paragraph (1) or (4) of subdivision (a) of Section 262 [of the California Penal
19 Code].

20 (4) Sodomy as defined in subdivision (c) or (d) of Section 286.

21 (5) Oral copulation as defined in subdivision (c) or (d) of Section 288a.

22 (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.

23 (7) Any felony punishable by death or imprisonment in the state prison for life.

24

25 (11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.

26

27 (15) Assault with the intent to commit a specified felony, in violation of Section
28 220.

(16) Continuous sexual abuse of a child, in violation of Section 288.5.

. . . .

(18) Rape, spousal rape, or sexual penetration, in concert, in violation of Section
264.1.⁸

29 ⁷ VOTER INFORMATION GUIDE, *supra* note 2.

30 ⁸ The remaining offenses listed in Section 667.5(c) are: “(1) Murder or voluntary manslaughter.
31 (2) Mayhem. . . (8) Any felony in which the defendant inflicts great bodily injury on any person
32 other than an accomplice which has been charged and proved as provided for in Section 12022.7,
12022.8, or 12022.9 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213,

1 The Section 667.5(c) list above is routinely cited by courts as the definitive list of “violent felonies”
2 under state law. Notably, state law also defines a broader list of “serious felonies,” of which the
3 Section 667.5(c) “violent felonies” are a subset. See CAL. PENAL CODE § 1192.7(c). Offenses that
4 are not listed in either Section 667.5(c) or Section 1192.7(c) are consistently deemed “nonviolent”
5 and/or “non-serious” under state law.

6 19. Consistent with Section 667.5(c), a separate statute (Section 6600(b) of the Welfare and
7 Institutions Code) reiterates the subset of Registrable Offenses that qualify as “violent sex crimes,”
8 as follows:

9 “Sexually violent offense” means the following acts when committed by force,
10 violence, duress, menace, fear of immediate and unlawful bodily injury on the victim
11 or another person, or threatening to retaliate in the future against the victim or any
12 other person, and that are committed on, before, or after the effective date of this
13 article and result in a conviction or a finding of not guilty by reason of insanity, as
14 defined in subdivision (a): a felony violation of Section 261, 262, 264.1, 269, 286,
288, 288a, 288.5, or 289 of the Penal Code, or any felony violation of Section 207,
209, or 220 of the Penal Code, committed with the intent to commit a violation of
Section 261, 262, 264.1, 286, 288, 288a, or 289 of the Penal Code.

15 CAL. WELF. & INST. CODE § 6600(b) (Deering 2017). This list is redundant of the Section 667.5(c)
16 list, which confirms that the nine Registrable Offenses listed in Section 667.5(c) are the only
17 offenses deemed “violent” for the purposes of state law.⁹

18 _____
19 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and
20 proved as provided in subdivision (a) of Section 12022.3, or Section 12022.5 or 12022.55. **(9)** Any
21 robbery. **(10)** Arson, in violation of subdivision (a) or (b) of Section 451. . . . **(12)** Attempted
22 murder. **(13)** A violation of Section 18745, 18750, or 18755. **(14)** Kidnapping. . . .
23 **(17)** Carjacking, as defined in subdivision (a) of Section 215. . . . **(19)** Extortion, as defined in
24 Section 518, which would constitute a felony violation of Section 186.22. **(20)** Threats to victims or
witnesses, as defined in Section 136.1, which would constitute a felony violation of Section 186.22.
(21) Any burglary of the first degree, as defined in subdivision (a) of Section 460, wherein it is
charged and proved that another person, other than an accomplice, was present in the residence
during the commission of the burglary. **(22)** Any violation of Section 12022.53. **(23)** A violation of
subdivision (b) or (c) of Section 11418.”

25 ⁹ Penal Code Section 667.6(e) also applies sentencing enhancements to convictions for each of the
26 of the violent Registrable Offenses listed in Section 667.5(c), as well as for the crime of rape
27 “[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any
28 controlled substance, and this condition was known, or reasonably should have been known by the
accused,” [Section 261(a)(3)], and for certain Registrable Offenses that are accomplished “by
threatening to use the authority of a public official [Sections 261(a)(7), 262(a)(5), 286(k), 288a(k),

1 **Most Registrable Offenses are Nonviolent and are Therefore Eligible for Early Parole**

2 **Consideration Under Proposition 57**

3 20. If an offense – including a Registrable Offense – is not classified as “violent” by Section
4 667.5(c), it is a nonviolent offense under California law. Because most Registrable Offenses do not
5 involve “force, violence, duress, menace, fear of immediate and unlawful bodily injury on the
6 victim or another person,” they are not classified by Section 667.5(c) as “violent,” and are therefore
7 nonviolent.

8 21. For example, a non-contact Registrable Offense is inherently nonviolent. Such offenses
9 include possession or control of child pornography (Sections 311.11(a) and 311.2), sending or
10 exhibiting harmful material to a minor (Section 288.2), contacting a minor with the intent to commit
11 a sex offense (Sections 288.3 and 288.4(a)), and inveigling or enticing a minor to have sexual
12 contact (Section 266). Additionally, certain contact offenses that do not involve “force, violence,
13 duress, menace, fear of immediate and unlawful bodily injury on the victim or another person” are
14 also deemed nonviolent, including sexual battery (Section 243.4(a), (d)), and lewd or lascivious acts
15 with a child aged 14 or 15 (Section 288(c)). Notably, these nonviolent contact offenses are also
16 excluded from the list of “serious felonies” in Section 1192.7(c), which underscores the fact that
17 they are not “violent” offenses for the purposes of state law.

18 **California Voters Understood that Proposition 57 Applies to All Felonies Not Already**

19 **Designated “Violent” by State Law**

20 22. Proposition 57’s inclusion of all offenses not already designated “violent” by state law was
21 intentional, well-publicized, and within the contemplation of those who voted for it. During the
22 2016 election season, the public debate surrounding Proposition 57 was vigorous, particularly the
23 provision granting early parole consideration for nonviolent felony convictions. Supporters and
24 opponents of the measure routinely listed and described the specific offenses that would be eligible
25 for early parole consideration if Proposition 57 became law, including the nonviolent Registrable
26 Offenses.

27 _____
28 and 289(g)].” However, Penal Code Section 667.6(e) does not designate these additional offenses
as “violent.”

1 23. For example, in the Official Voter Information Guide for Proposition 57 published by the
2 California Secretary of State, proponents of the measure explained that only “[v]iolent criminals *as*
3 *defined in Penal Code 667.5(c)* are excluded from parole” under Proposition 57.¹⁰ In the same
4 Voter Information Guide, opponents of the measure likewise pointed to this fact as their *first*
5 “Argument Against Proposition 57,” and specifically listed some of the Registrable Offenses that
6 would become eligible for early parole consideration, as follows:

7 Proposition 57 will allow criminals convicted of RAPE, LEWD ACTS AGAINST A
8 CHILD, GANG GUN CRIMES and HUMAN TRAFFICKING to be released early
9 from prison.

10 . . .

11 Here are the facts:

12 The authors of Proposition 57 claim it only applies to "non-violent" crimes, but their
13 poorly drafted measure deems the following crimes "non-violent" and makes the
14 perpetrators eligible for EARLY PAROLE and RELEASE into local communities:

15 • Rape by intoxication • Rape of an unconscious person • Human Trafficking
16 involving sex act with minors • Drive-by shooting • Assault with a deadly weapon •
17 Hostage taking • Attempting to explode a bomb at a hospital or school • Domestic
18 violence involving trauma • Supplying a firearm to a gang member • Hate crime
19 causing physical injury • Failing to register as a sex offender • Arson • Discharging a
20 firearm on school grounds • Lewd acts against a child 14 or 15 • False imprisonment
21 of an elder through violence. *partial list.¹¹

22 24. Many law enforcement officials also explained to the public that Proposition 57’s use of the
23 phrase “nonviolent felonies” would render *all* convictions eligible for early parole consideration,
24 *unless* they were specifically designated “violent” felonies by Penal Code section 667.5(c). For
25 example, Ballotpedia.com, an authoritative website regarding California’s initiative and referendum
26 system, published an interview with Sacramento County District Attorney Anne Marie Schubert
27 who confirmed that:

28 the California penal code defines 23 crimes as “violent.” According to Schubert,
“Domestic violence, rape of an unconscious person, exploding a bomb with the
intention of hurting people . . . The public rightly believes those crimes are violent,
but under the penal code they are nonviolent.”

. . . .

Moreover, under California legal precedent, any offense that is not among the 23

¹⁰ VOTER INFORMATION GUIDE, *supra* note 2.

¹¹ VOTER INFORMATION GUIDE, *supra* note 2.

1 designated “violent” in Section 667.5(c) of the state penal code is regarded as
2 “nonviolent.”

3 Numerous other commentators and newspaper editorials throughout California echoed these
4 conclusions, and discussed their merits pro and con. Proposition 57 passed overwhelmingly, with
5 64.5% of the vote.

6 **CDCR Has Repeatedly Confirmed that Proposition 57 Encompasses All Felonies Not Already
7 Designated “Violent” Under State Law**

8 25. After Proposition 57 was enacted on November 8, 2016, CDCR issued several public
9 statements that explain its provisions, and now maintains a webpage dedicated to this topic. See
10 <http://www.cdcr.ca.gov/proposition57/>. In its public statements, CDCR has repeatedly confirmed
11 that *all* inmates are eligible for early parole consideration, *unless* their convictions are designated as
12 violent by Penal Code section 667.5(c). CDCR has also confirmed that, under Proposition 57, it has
13 no discretion to determine which offenses qualify for early parole consideration because the
14 universe of “nonviolent felony offenses” is already “defined by penal code.”

15 26. For example, in March 2017, CDCR published an answer to the “Frequently Asked
16 Question” “What will Proposition 57 do?” In that answer, CDCR explained that Proposition 57
17 “establishes a parole consideration process for non-violent offenders, *as defined by California Penal*
18 *Code*, who have served the full term for their primary criminal offense and who demonstrate that
19 they should no longer be considered a current threat to public safety.”¹² Additionally, CDCR stated
20 in its “Fact Sheet” dated March 24, 2017 that “Proposition 57 creates a process for non-violent
21 offenders, *as defined by California Penal Code*, who have served the full term for their primary
22 offense to be considered for parole by the Board of Parole Hearings (BPH).”¹³

23 27. Respondent Scott Kernan, Secretary of CDCR, also released a video to inmates in which he
24 explained that “*all inmates* currently serving convictions for a nonviolent offense, *as defined by*

25 ¹² CDCR, *Proposition 57: The Public Safety and Rehabilitation Act of 2016 – Frequently Asked*
26 *Questions*, at 2 (March 2017) (emphasis added), <http://www.cdcr.ca.gov/proposition57/docs/faq-prop-57.pdf>.

27 ¹³ CDCR, *Fact Sheet, Proposition 57 – The Public Safety and Rehabilitation Act of 2016*, at 1
28 (emphasis added) (March 24, 2017), <http://www.cdcr.ca.gov/proposition57/docs/prop-57-fact-sheet.pdf>.

1 *Penal Code*, will be able to participate in this parole process.”¹⁴ Finally, in his own written
2 commentary on Proposition 57, Secretary Kernan stated: “It is also important to stress that
3 ***Proposition 57 does not change the Penal Code in regards to what crimes are considered non-***
4 ***violent.***”¹⁵

5 **CDCR’s Regulations Implementing Proposition 57 Defy its Own Interpretation of that**
6 **Provision, Nullify Voters’ Intent, Contradict the California Constitution, and Violate the APA**

7 28. CDCR is the agency responsible for administering the state’s prisons and for issuing
8 regulations that govern parole consideration. Proposition 57 provides that CDCR “shall adopt
9 regulations in furtherance of these provisions,” including those that govern the eligibility of inmates
10 for early parole consideration. CAL. CONST. art. I, § 32(b).

11 29. On March 24, CDCR submitted its draft Regulations purporting to implement Proposition 57
12 to the Office of Administrative Law (“OAL”). CDCR petitioned OAL to exempt the Regulations
13 from public comment pursuant to the “emergency” provisions of Penal Code section 5058.3. OAL
14 complied and published the Regulations on April 18, 2017 without public comment.

15 30. In unveiling its Regulations, CDCR claimed that it “has worked with stakeholders and staff
16 to draft regulations to implement the will of the voters.”¹⁶ Yet, as explained below, CDCR’s
17 Regulations do not “implement the will of the voters” or comply with the plain text of Proposition
18 57. CDCR’s Regulations create several new provisions within Title 15 of the Code of Regulations.
19 The new provisions are entitled “Parole Consideration for Determinately-Sentenced Inmates,” and
20 define the nonviolent offenses eligible for early parole consideration pursuant Proposition 57 and
21 CDCR’s Regulations, as follows:

22 ///

23
24 ¹⁴ CDCR, *Kernan Prop 57* [video], timestamp 2:04-2:28 (March 29, 2017),
<https://www.youtube.com/watch?v=a-tPZ-5reyA&t>.

25 ¹⁵ *We Must Work Together Professionally to Implement Proposition 57*, INSIDE CDCR (CDCR,
26 Sacramento, CA), November 23, 2016, <http://www.insidecdcr.ca.gov/2016/11/we-must-work-together-professionally-to-implement-proposition-57/>.

27 ¹⁶ *CDCR Unveils Regulations for Proposition 57*, INSIDE CDCR (CDCR, Sacramento, CA), March
28 24, 2017, <http://www.insidecdcr.ca.gov/2017/03/cdcr-unveils-regulations-for-proposition-57/>.

Definitions.

For the purpose of this article, the following definitions shall apply:

(a) A **“Nonviolent Offender”** is an inmate who is **not** any of the following:

(1) Condemned, incarcerated for a term for life without the possibility of parole, or incarcerated for a term of life with the possibility of parole;

(2) Serving a term of incarceration for a “violent felony;” or

(3) **Convicted of a sexual offense that requires registration as a sex offender under Penal Code section 290.**

....

(c) “Violent Felony” is a crime or enhancement as defined in Penal Code section 667.5, subdivision (c).

CAL. CODE REGS. tit. 15, §§ 3490(a), 2449.1(a) (emphasis added). See also Exhibit A hereto.

31. Thus, despite CDCR’s repeated confirmations that “Proposition 57 does not change the Penal Code in regards to what crimes are considered non-violent” (see footnote 15, *supra*, and accompanying text), CDCR’s implementing Regulations do just that by excluding from early parole consideration *both* “violent felonies” as defined by state law *and* every Registrable Offense – including offenses that are unequivocally nonviolent.

32. California voters enacted Proposition 57 with full knowledge that its reforms mandate early parole consideration for Registrable Offenses, provided they are not among the nine offenses also designated “violent felonies” by state law. There is no lawful basis in the text of Proposition 57, the California Constitution, the California Administrative Procedure Act (CAL. GOV’T CODE § 11340, *et seq.*), or elsewhere that permits CDCR to unilaterally reclassify nonviolent Registrable Offenses as “violent” and thereby nullify the decision of California voters in enacting Proposition 57. CDCR lacks the authority to draft Regulations that categorically exclude Registrable Offenses from the offenses eligible for early parole consideration under Proposition 57. In enacting the Regulations, CDCR has violated its ministerial duties under California law, and has otherwise failed to act as required by California law. CDCR’s Regulations also impermissibly conflict with, and impair and limit, the scope of Proposition 57 by categorically excluding all Registrable Offenses from its definition of “nonviolent offender.”

33. There are no plain, adequate, complete, speedy, or required alternative remedies available to redress the violations of law committed by Respondents in this action, nor are there any available, non-futile, or required administrative remedies available to redress the violations of law committed

1 by Respondents. Damages are not adequate to protect Petitioners from the continuing effects of
2 Respondents' violations of the law and from Respondents' failure to carry out their duties under the
3 law.

4 **FIRST CLAIM FOR RELIEF**

5 **(Mandamus – CAL. CIV. PROC. CODE § 1085)**

6 34. Petitioners reallege and incorporate herein, as though fully set forth, each and every, all and
7 inclusively, paragraphs 1 through 33.

8 35. Respondents, and each of them, along with their agents, officers, and employees, have failed
9 to comply, and are failing to comply, with their duties under the laws of the State of California,
10 including Article I, Section 32(a)(1) of the California Constitution, and the California
11 Administrative Procedure Act (CAL. GOV'T CODE § 11340, *et seq.*).

12 36. The injuries that Petitioners and the public are suffering as a result of the actions of
13 Respondents, and each of them, along with their agents, officers, and employees, are severe,
14 irreparable, and ongoing, and there is no plain, adequate, complete, speedy, or required alternative
15 remedies available to redress the violations of law committed by Respondents in this action, nor are
16 there any available, non-futile, or required administrative remedies available to redress the
17 violations of law committed by Respondents. Damages are not adequate to protect Petitioners from
18 the continuing effects of Respondents' violations of the law and from Respondents' failure to carry
19 out their duties under the law. Immediate mandamus relief is necessary to halt and prevent further
20 occurrence of these ongoing unlawful acts and the infliction of irreparable harm to Petitioners and
21 the public.

22 **SECOND CLAIM FOR RELIEF**

23 **(Declaratory Judgment – CAL. CIV. PROC. CODE § 1060; CAL. GOV'T CODE § 11350(a))**

24 37. Petitioners reallege and incorporate herein, as though fully set forth, each and every, all and
25 inclusively, paragraphs 1 through 36.

26 38. The California Administrative Procedure Act declares that, to be effective, regulations “shall
27 be within the scope of authority conferred and in accordance with standards prescribed by other
28 provisions of law,” and that “no regulation adopted is valid or effective unless consistent and not in

1 conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” CAL.
2 GOV'T CODE §§ 11342.1, 11342.2 (Deering 2017).

3 39. California Government Code section 11350(a) states: “Any interested person may obtain a
4 judicial declaration as to the validity of any regulation or order of repeal by bringing an action for
5 declaratory relief in the superior court in accordance with the Code of Civil Procedure. The right to
6 judicial determination shall not be affected by the failure either to petition or to seek reconsideration
7 of a petition filed pursuant to Section 11340.7 before the agency promulgating the regulation or
8 order of repeal. The regulation or order of repeal may be declared to be invalid for a substantial
9 failure to comply with this chapter, or, in the case of an emergency regulation or order of repeal,
10 upon the ground that the facts recited in the finding of emergency prepared pursuant to subdivision
11 (b) of Section 11346.1 do not constitute an emergency within the provisions of Section 11346.1.”

12 40. Petitioners are “interested persons” within the meaning of California Government Code
13 section 11350(a) and therefore have standing to bring this action for declaratory and injunctive
14 relief.

15 41. Petitioners seek a declaration that two provisions of the Regulations challenged in this
16 Complaint (*i.e.*, OAL File No. 2017-0328-01EON, approved and rendered effective on April 13,
17 2017) are void, invalid, and otherwise unlawful. Specifically, Petitioners seek a declaration that the
18 definition of “nonviolent offender” codified at CAL. CODE REGS. tit. 15, §§ 3490(a)(3) and
19 2449.1(a)(3), is void, invalid, and otherwise unlawful the grounds that Respondents lack the
20 authority to issue regulations that exclude individuals incarcerated for sex offenses from early
21 parole consideration pursuant to Article I, Section 32(a)(1) of the California Constitution, unless
22 those individuals are serving sentences exclusively for “violent felonies” as defined by state law.
23 Petitioners also seek a declaration that the definition of “nonviolent offender” codified at CAL. CODE
24 REGS. tit. 15, §§ 3490(a)(3) and 2449.1(a)(3), is void, invalid, and otherwise unlawful on the
25 grounds that the definition: (i) is inconsistent with and in conflict with Article I, Section 32(a)(1) of
26 the California Constitution; (ii) is inconsistent with and in conflict with state law, including but not
27 limited to California Penal Code section 667.5(c); (iii) exceeds the scope of authority granted to
28 Respondents in Article I, Section 32(a)(1) of the California Constitution; and (iv) impermissibly

1 impairs and restricts the scope of Article I, Section 32(a)(1) of the California Constitution.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Petitioners pray for judgment against Respondents California Department of
4 Corrections and Rehabilitation and Scott Kernan, as follows:

5 A. That the Court issue a peremptory writ of mandate directing Respondents to comply with
6 their duties under Article I, Section 32(a)(1) of the California Constitution, and the
7 California Administrative Procedure Act (CAL. GOV'T CODE § 11340, *et seq.*), by:

8 1. voiding and repealing the provision codified at CAL. CODE REGS. tit. 15, §§
9 3490(a)(3) and 2449.1(a)(3); and by

10 2. amending and revising its Regulations implementing Article I, Section 32(a)(1)
11 of the California Constitution to make eligible for early parole consideration all
12 individuals serving sentences for offenses for which registration is required by
13 California Penal Code section 290 *et seq.*, unless those individuals are serving
14 sentences exclusively for “violent felonies” as defined by Penal Code section
15 667.5(c);

16 B. For a judgment declaring that Respondents lack the authority to adopt the definition of
17 “nonviolent offender” codified at CAL. CODE REGS. tit. 15, §§ 3490(a)(3) and
18 2449.1(a)(3), on the grounds that the definition: (i) is inconsistent with and in conflict
19 with Article I, Section 32(a)(1) of the California Constitution; (ii) is inconsistent with
20 and in conflict with state law, including but not limited to California Penal Code section
21 667.5(c); (iii) exceeds the scope of authority granted to CDCR in Article I, Section
22 32(a)(1) of the California Constitution; and (iv) impermissibly impairs and restricts the
23 scope of Article I, Section 32(a)(1) of the California Constitution;

24 C. For a temporary restraining order, preliminary injunction, and permanent injunction,
25 directing Respondents to strike the provision codified at CAL. CODE REGS. tit. 15, §§
26 3490(a)(3) and 2449.1(a)(3);

27 D. For a temporary restraining order, preliminary injunction, and permanent injunction,
28 directing Respondents to amend and revise the Regulations implementing Article I,

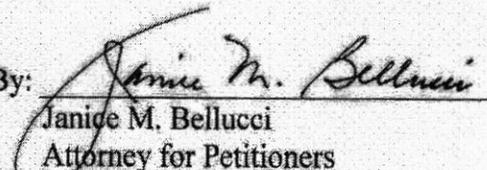
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Section 32(a)(1) of the California Constitution to make eligible for early parole consideration all individuals serving sentences for offenses for which registration is required by California Penal Code section 290 *et seq.*, unless those individuals are serving sentences exclusively for "violent felonies" as defined by Penal Code section 667.5(c);

- E. That Petitioners recover from Respondent all of Petitioners' reasonable attorneys' fees, costs, and expenses of this litigation pursuant to California Code of Civil Procedure section 1021.5 and other applicable law; and
- F. For such other and further relief as the Court deems just and proper.

Dated: April 27, 2017

LAW OFFICE OF JANICE M. BELLUCCI

By: 
Janice M. Bellucci
Attorney for Petitioners