

No. C100274

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

CRIMINAL JUSTICE LEGAL FOUNDATION, SAMANTHA
CARTER, RIZPA BELLARD, and MINA MOYNEHAN
Respondents and Cross-Appellants,

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND
REHABILITATION, JEFFREY MACOMBER, and CALIFORNIA
BOARD OF PAROLE HEARINGS,
Appellants and Cross-Respondents.

Sacramento County Superior Court
No. 34-2022-80003807-CU-WM-GDS (Hon. Jennifer K. Rockwell)

**APPLICATION FROM PRISON LAW OFFICE FOR
PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN
SUPPORT OF CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION, KATHLEEN
ALLISON, and BOARD OF PAROLE HEARINGS, Appellants
and Cross-respondents.**

AND

AMICUS CURIAE BRIEF OF PRISON LAW OFFICE

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APPLICATION TO FILE AMICUS CURIAE BRIEF¹

Prison Law Office applies, under the California Rules of Court, rule 8.520(f), for permission to file the accompanying amicus curiae brief in support of appellants/cross-respondents, California Department of Corrections and Rehabilitation (“CDCR”), et al. This application summarizes the nature of Prison Law Office and our interest in the issues presented in this case. It also demonstrates that our brief will assist the Court in its analysis and consideration of the issues.

A primary dispute in this case is whether CDCR’s credit regulations are consistent with Proposition 57’s plain language and the voters’ intent. Appellant CDCR challenges the lower court’s ruling that CDCR has exceeded its Proposition 57 authority by applying good conduct and programming credits to advance the minimum eligible parole dates of people serving indeterminate terms. (Appellants’ Opening Brief, filed Aug. 5, 2024.) Respondent/cross-appellant Criminal Legal Justice Foundation (“CJLF”) defends that ruling, and further contends that Proposition 57 either does not or cannot authorize CDCR to award *any* credits beyond those authorized by statutes, including awards of increased credits to people serving terms for violent

¹ As required by Rule 8.520(f)(4), the undersigned, Heather J. MacKay, on behalf of Prison Law Office, certifies to this court that no party involved in the litigation has authored any part of the attached amicus brief, tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of the amicus brief, and additionally certifies that no person or entity, other than amicus curiae has contributed any money, services, or other form of donation to assist in the production of the amicus brief.

felonies. (Respondents' Answer Brief and Cross-Appellants' Opening Brief, filed Sept. 6, 2024.) CDCR asserts that the lower court properly rejected these additional attacks on its Proposition 57 credit authority. (Appellants' Combined Reply Brief and Cross-Respondents' Brief, filed Dec. 9, 2024.)

Prison Law Office is a non-profit public interest law firm based in Berkeley, California that strives to reduce incarceration and demands fair and humane treatment of people who remain in prisons and jails and on parole. Prison Law Office has appeared as *amicus curiae* in federal court cases involving prison policies including *Witherow v. Skolnik* (9th Cir.) No. 18-17233, *Ashker v. Newsom* (9th Cir.) No. 21-15839, and *Ashker v. Newsom* (9th Cir.) Nos. 21-15839/22-15345. Moreover, Prison Law Office represents incarcerated people in the on-going federal class-action lawsuit that requires California officials to reduce prison crowding, *Coleman v. Newsom* (E.D. Cal.) No. 2:90-cv-00520-KJM-DB/*Plata v. Newsom* (N.D. Cal.) No. 4:01-cv-01351-JST (“*Coleman/Plata*”). Prison Law Office is interested in the current case because the issues raised affect the state’s ability to comply with the *Coleman/Plata* court orders and have profound impacts on the people we represent. Indeed, when then-Governor Brown developed Proposition 57, he assured the federal court that the measure would create a “durable remedy” to unconstitutional levels of prison crowding. (*Coleman/Plata, supra*, Def’s Oct. 2016 Status Report (Oct. 17, 2016), Exh. B, p. 4.) He also told the public that Proposition 57 would keep the prison population within the court-ordered cap “in a rational way.” (A.P. News, *Prop. 57 Would Change Governor’s Legacy, Simplify Sentences*,

Los Angeles Daily News (Oct. 17, 2016);² see also Lagos, *Jerry Brown Pushes Earlier Release of Felons Under Proposition 57*, KQED (Oct. 7, 2016).³ The federal court continues to maintain oversight over California’s prison population levels, and Prison Law Office continues to monitor the state’s compliance and to advocate on behalf of incarcerated class members.

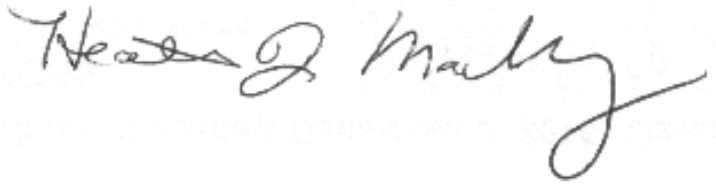
Prison Law Office’s amicus brief provides a perspective that has not been presented to this Court by the parties. The brief does not duplicate arguments already made. It provides additional information about how CDCR’s credit regulations further Proposition 57’s purposes and how those purposes would be thwarted if this Court were to prohibit CDCR from applying those regulations to reduce minimum eligible parole dates for people serving indeterminate terms or to award increased credits for people committed for violent offenses.

Based upon this application and the accompanying brief, Prison Law Office applies for an order granting permission to file an amicus curiae brief in support of Appellants/Cross-respondents. This application is timely filed pursuant to rule 8.200(c)(1).

² Available at <https://www.dailynews.com/2016/10/17/prop-57-would-change-governors-legacy-simplify-sentences/> (last checked 1/29/2025).

³ Available at <https://www.kqed.org/news/11114572/jerry-brown-pushes-earlier-release-of-felons-under-proposition-57> (last checked 1/29/2025).

DATED: January 31, 2025 Respectfully Submitted,

A handwritten signature in black ink that reads "Heather J. MacKay". The signature is written in a cursive style with a large, sweeping flourish at the end of the name.

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Document received by the CA 3rd District Court of Appeal.

AMICUS CURIAE BRIEF OF PRISON LAW OFFICE

PROCEDURAL AND FACTUAL HISTORY

Amicus curiae hereby adopts the Statement of the Case set forth in Appellants' Opening Brief. (AOB 13-20.)

ARGUMENT

I. **APPLYING CDCR'S CREDIT REGULATIONS TO REDUCE MINIMUM ELIGIBLE PAROLE DATES EFFECTUATES PROPOSITION 57'S PURPOSES, AND BARRING CDCR FROM AWARDING ANY ADDITIONAL CREDITS WOULD THWART PROPOSITION 57'S PURPOSES.**

Proposition 57 has four goals: enhancing public safety, improving rehabilitation, reducing wasteful prison spending, and preventing federal courts from issuing release orders. (Cal. Const, art. I, § 32, subd. (a); Voter Information Guide, Gen. Elec. (Nov. 8, 2016), text of Prop. 57, § 2, p. 141.) The voters sought to accomplish these purposes in part by granting CDCR “authority to award credits for good behavior and approved rehabilitative or educational achievements,” directing CDCR to adopt regulations in furtherance of that provision, and requiring the Secretary of the Department of Corrections and Rehabilitation to certify that those regulations “protect and enhance public safety.” (Cal. Const, art. I, § 32, subd. (a)(2), (b).) Appellants' briefing explains how Proposition 57's plain language and ballot materials show that the voters gave CDCR broad authority over credits, including authority to apply credits to advance the minimum

eligible parole dates (“MEPDs”)⁴ for people serving indeterminate terms. This *amicus curiae* brief supports appellants’ position by explaining how CDCR’s regulations are serving Proposition 57’s goals and how those goals would be impeded by forbidding CDCR from fully utilizing its regulations.

A. This Court should interpret Proposition 57 consistent with the state’s promise to create a durable remedy to unconstitutional and wasteful prison crowding.

Proposition 57 cannot fully be understood without considering the historical context in which the measure was developed and presented to the voters. This context shows that Proposition 57 was intended to create a durable solution to California’s long-term prison overcrowding and overspending, largely by implementing the federal court’s recommendation that the state could safely reduce its prison population by increasing credits for good conduct and rehabilitative programming.

Prior to criminal justice reforms like Proposition 57, the state’s policies had resulted in an extreme prison overcrowding and overspending crisis. Between 1980 and August 2006,

⁴ As described in appellant’s opening brief, Statement of the Case, Section I, pp. 15-16 advancing an MEPD allows a person to be considered for discretionary parole at an earlier date. However, no person with an indeterminate term is actually released from prison unless and until the Board of Parole Hearings (BPH) finds that they are suitable for parole. (Pen. Code § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2280, § 2281, subd. (a), § 2401, subd. (a).) If the person is convicted of murder, the Governor may review and reverse a BPH parole grant. (Cal. Const., Art. V, § 8, subd. (b).)

California's prison population soared from just under 28,000 people in 12 prisons to over 170,000 people in 33 prisons. (Little Hoover Commission Report, *Solving California Corrections Crisis: Time is Running Out* (Jan. 2007), p. 18.)⁵ This 607% increase far out-paced the state's 52% population growth during this period. (USA Facts Website, *Our Changing Population, California, time period 1980-2022*.)⁶ By October 2006, conditions due to overcrowding were so bad that the Governor declared a state of emergency and ordered prison officials to start transferring people involuntarily to out-of-state contract facilities. (Gov. Schwarzenegger, *Prison Overcrowding State of Emergency Proclamation*, Oct. 4, 2006.)⁷ In January 2007, an independent oversight agency found that California was spending more on corrections than most countries in the world but " 'reap[ing] fewer public safety benefits.' " (Little Hoover Commission Report (Jan. 2007), *supra*, p. 14.)

Actions that shrunk CDCR's ability to grant credits to people serving indeterminate terms and/or committed for violent offenses contributed to this crisis. From January 1983 to March

⁵ Available at <https://lhc.ca.gov/report/solving-californias-corrections-crisis-time-running-out/> (last checked 1/29/2025).

⁶ Available at <https://usafacts.org/data/topics/people-society/population-and-demographics/our-changing-population/> (last checked 1/29/2025).

⁷ Available at https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.library.ca.gov/wp-content/uploads/GovernmentPublications/executive-order-proclamation/38-Proc-2006_93.pdf&ved=2ahUKEwijuL3EutyIAxXkyOYEHdftJZwQFnoECBQQAQ&usg=AOvVaw3CO77XTsq2PFyG7Y4vwb5C (last checked 1/29/2025).

1987, CDCR granted up to 50% “worktime” credits to all incarcerated people, including applying those credits to advance MEPDs. (Pen. Code § 2933, as added by Stats. 1982, c. 1234, § 4; Office of the Attorney General, Opinion 86-1102 (Mar. 24, 1987) 70 Ops.Cal.Atty.Gen. 49; *In re Monigold* (1988) 205 Cal.App.3d 1224, 1226-1227.) In March 1987, the Attorney General’s (AG’s) office declared that CDCR had been misinterpreting the law, ruling that although the statutes authorized CDCR to award 50% credits to some people with indeterminate terms, “[t]he minimum terms of life sentences for murder are reduced not more than one-third by good behavior and participation credits” and that every person serving a life sentence must serve at least seven calendar years in prison before being paroled. (70 Ops.Cal.Atty.Gen. 49, *supra*, at *1; see also *id.* at *4-*6.) A court of appeal agreed with the AG, though it held that equitable estoppel principles barred CDCR from taking away half-time credits a person had already earned in reliance on CDCR’s erroneous policy. (*In re Monigold, supra*, 205 Cal.App.3d at pp. 1228-1233.) Later, in the 1990’s and 2000’s, the legislature and voters repeatedly chipped away CDCR’s ability to manage its prison population and incentivize rehabilitation, eventually barring prison credits for many people serving indeterminate terms, and limiting prison credits to 20% for anyone serving a second strike-sentence for a non-violent crime and 15% for anyone convicted of a violent felony.⁸

⁸ Zero credits for murder cases: Pen. Code §§ 190 and 2933.2, as amended and added by Stats. 1996, c. 598, §§ 1, 3 [S.B. 1231], amended by Stats.1997, c. 413 § 1 [A.B. 446] and made effective

The prison growth crisis resulting from these and other “tough-on-crime” policies came to a head in August 2009, when a three-judge federal court found that prison overcrowding – which was close to double the system’s design capacity – was the primary cause of unconstitutionally inadequate medical and mental health care. (*Coleman/Plata v. Schwarzenegger* (E.D. Cal and N.D. Cal. 2009) 922 F.Supp.2d 882, 889, 911-912, 950.) The court concluded that the deficiencies in medical and mental health care could not be remedied without a prisoner release order, and directed the state to reduce the overall crowding level to 137.5% of design capacity within two years. (*Id.* at pp. 889, 950-951, 1003.) The court determined that 137.5% was the maximum level of crowding that “might provide the relief from overcrowding necessary for the state to correct the constitutional violations,” not necessarily the optimal population level. (*Id.* at p. 962.) The U.S. Supreme Court subsequently upheld this extraordinary order. (*Brown v. Plata* (2011) 563 U.S. 493, 545.)

In its 2009 decision, the three-judge federal court expressly recommended that the state adopt a policy of early release

by Prop. 222, eff. June 3, 1998; § 2933.2, as added by Stats. 1996, c. 598, §3 [S.B. 1231]; *In re Maes* (2010) 185 Cal.App.4th 1094. 0% credits for three-strikes sentences/20% credits for two-strikes sentences: Pen. Code § 667, subds. (c)(5), (e)(2), as amended by Stats. 1994, c. 12, § 1 [A.B. 971]; Pen. Code §1170.12, subds. (a)(5) and (c)(2), as added by Prop. 184, § 1, approved Nov. 8, 1994; *In re Cervera* (2001) 24 Cal.4th 1073, 1076. 15% credits for violent felonies: Pen. Code § 2933.1, subd. (a), added by Stats. 1994, c. 713, § 1 [A.B. 2716]; 0% credits for one-strike sentences: Pen. Code § 667.61, as amended by Stats. 2006, c. 337, § 33 [S.B 1128]; *People v. Adams* (2018) 28 Cal.App.5th 170, 182-183.

through the expansion of good time credits. (*Coleman/Plata v. Schwarzenegger, supra*, 922 F.Supp.2d at pp. 974-976.) Based on recommendations made by experts on all sides of the litigation, the court opined that reducing the length of prison stays would not adversely affect recidivism rates, and that offering additional credits for rehabilitative programming would be expected to facilitate reintegration into society and reduce recidivism. (*Id.* at pp. 976-979.)

Four and a half years later, the state had neither significantly expanded prison credits nor complied with the federal court's population cap. (*Coleman /Plata, supra*, Opinion re: Order Granting in Part and Denying in Part Def's Request for Extension of Dec. 31, 2013 Deadline (Feb. 10, 2014), pp. 1-2.) The court found that state officials had "consistently refused to take measures to reduce the California prison population," except for redirecting some people with felony convictions to county jails rather than prisons. (*Id.* at p. 2.) The court granted the state a further extension to February 28, 2016 to meet the population cap, and set interim benchmarks. (*Ibid.*) The court also mandated that the state implement some measures designed to decrease crowding by prospectively increasing good conduct credits to 33.3% for people serving non-violent second-strike terms and to 66.6% ("2 for 1") for people in minimum custody. (*Id.* at pp. 2-3.) The court appointed a Compliance Officer to direct releases if the state failed to meet any of the benchmarks. (*Id.* at pp. 4-5.)

Through various measures, by fall 2016 the state had pared its prison population down to slightly under the court-ordered population cap. (See *Coleman/Plata, supra*, Def's Oct. 2016

Status Report, *supra*, Exh. B, p. 3.) However, the situation was fragile. The state still was operating 34 prisons plus housing 4,707 people in out-of-state contract facilities, 1,975 people at a California contract facility, and 1,584 people in “infill” beds crammed into an existing prison. (*Id.*, Exh. A, p. 2 and Exh. B, p. 3.) Also, since the federal court order did not cap populations at individual prisons, 14 prisons still were overcrowded in excess of 137.5% of design capacity. (*Id.*, Exh. A, p. 2.) The state addressed concerns about whether it could maintain compliance by assuring the federal court that Proposition 57, if passed by the voters, “will serve as a durable remedy.” (*Id.*, Exh. B, p. 4.) Thus, when Governor Brown presented Proposition 57’s credit provision to the voters in November 2016, the state purported to finally be taking one of the primary remedial actions recommended by the federal court seven years earlier.

Furthermore, Governor Brown’s public statements prior to the election were clear about the need for Proposition 57’s broad grant of authority to CDCR. A major wire service reported that “[t]he Democratic governor argues his initiative is needed to keep the inmate population below the cap set by federal judges. He also wants to fix what he sees as a festering problem as he enters the final two years of his record tenure.” (A.P. News, *Prop. 57 Would Change Governor’s Legacy, Simplify Sentences*, Los Angeles Daily News, *supra*.) That story stated that Proposition 57 “would give the Department of Corrections and Rehabilitation broad authority to give earlier release credits to inmates, including those convicted of violent crimes, who complete classes or treatment.” (*Ibid.*) In other press coverage, the Governor

stated, “First the Legislature goes hog wild – I’d say criminal legislation on steroids for 30 years. . . And then at the end of that the Supreme Court says prison conditions are terrible, it’s overcrowded, people are committing suicide, they have unconstitutional medical care, you’ve got to take out thousands and thousands of people from prison. . . We want to do that in a rational way, and that’s what Proposition 57 attempts to do.” (Lagos, *Jerry Brown Pushes Earlier Release of Felons Under Proposition 57, supra.*)

Describing the credits provision, the Governor said Proposition 57 would "cleanse the Augean stables" by allowing the Department of Corrections and Rehabilitation to develop a new credit system through a public regulatory process. (Lagos, *Jerry Brown Pushes Earlier Release of Felons Under Proposition 57, supra.*) Independent policy organizations likewise advised voters that Proposition 57 would give CDCR “new authority” to award credits “in addition to any authority granted to the CDCR through state law.” (Graves, Cal. Budget and Policy Center, *Issue Brief: Proposition 57: Should Voters Provide State Officials with New Flexibility to Reduce the Prison Population?*, (Oct. 2016), pp. 2, 4.)⁹ California voters were well apprised that “CDCR could award more credits than currently allowed and/or provide credits to prisoners who are otherwise prohibited from earning credits.” (*Ibid.*)

⁹ Available at <https://calbudgetcenter.org/resources/understanding-proposition-57/> (last checked 1/29/2025).

This historical context and public education information, in addition to the ballot materials discussed in appellants’ opening brief, Argument I-A-2, should resolve any uncertainties about whether Proposition 57 grants CDCR broad authority to award and apply credits. (See *O.G. v. Superior Court* (2021) 11 Cal.5th 82, 101-102 [relying on historical context of Prop. 57 juvenile transfer clause in examining validity of amendment to that clause]; *Independent Energy Producers Ass’n v. McPherson* (2006) 38 Cal.5th 1020, 1037-1043 [gleaning voters’ intent from historical context and Governor’s public statements]; *Howard Jarvis Taxpayers Assn. v. Newsom* (2019) 39 Cal.App.5th 158, 170 [finding evidence of proposition’s purpose can be drawn from sources including historical context].) Indeed, allowing CDCR to develop and implement sentence-reducing credits is consistent with the long-standing delegation to CDCR of the responsibility for “supervision, management and control of the state prisons,” including enacting credit policies. (Pen. Code § 5054; see, e.g., *In re Reina* (1985) 171 Cal.App.3d 638, 644 [upholding regulation providing work credits to people who had no access to work programs due to non-adverse transfers]; *In re Vargas* (1985) 172 Cal.App.3d 316, 320-321 [upholding policy of not granting work credit to people in reception centers, even when person had participated in voluntary work program].)

B. Of Proposition 57's three components, only CDCR's broad authority to award good conduct and programming credits has a substantial impact on reducing wasteful prison spending and avoiding federal court releases.

Proposition 57 has three separate components – limiting prosecution of juveniles in adult court, creating a non-violent offender early parole program, and authorizing CDCR to award credits for good conduct and for rehabilitative or educational achievements. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), *supra*, analysis by the Legislative Analyst, at p. 56.) However, the credits provision has by far the most significant and sustained impact on the state's ability to reduce wasteful prison spending and comply with the federal court's population cap. Thus, CDCR's exercise of broad authority to award increased credits is crucial to meeting Proposition 57's goals.

Proposition 57's requirement that a judge, not a prosecutor, decide whether a qualifying juvenile should be tried in adult court (Voter Information Guide, Gen. Elec. (Nov. 8, 2016), *supra*, at pp. 141-145) has a negligible impact on the prison population. It reduces new admissions by about 200 people a year. (Compare Cal. Dept. of Justice, *2015 Juvenile Justice in California*, p. 52 [in 2015, 218 juveniles were sentenced to CDCR] with Cal. Dept. of Justice, *2023 Juvenile Justice in California*, p. 50 [in 2023, 16 juveniles were sentenced to CDCR].)¹⁰ This is a tiny reduction

¹⁰ All DOJ Juvenile Justice reports available at <https://openjustice.doj.ca.gov/resources/publications> (last checked 1/28/2025).

compared to CDCR’s total admissions, which in the first half of 2024 averaged slightly over 2,000 people per *month*. (CDCR, Offender Data Points Dashboard [“CDCR Dashboard”], Admissions for Jan. 2024-July 2024.)¹¹

Another Proposition 57 mechanism, nonviolent offender parole, also has only a modest impact on the prison population. Any person convicted of only nonviolent felonies is eligible for parole consideration after completing the full term for their primary offense. (Voter Information Guide, *supra*, text of Prop. 57, § 3, p. 141.) The Board of Parole Hearings (“BPH”) has adopted procedures for determining whether and when such people can safely be released from prison. (Cal. Code of Regs., tit. 15, §§ 2449.4-2449.5, 2449.32.) Applying these regulations, fewer than 400 people were granted nonviolent offender parole in 2023. (BPH, *2023 Report of Significant Events* (Mar. 18, 2024), p. 13 [208 people with determinate terms and 180 people with indeterminate terms].)¹²

In comparison, CDCR’s Proposition 57 credit regulations have a great impact on reducing prison overcrowding and overspending. About 94% of the people currently incarcerated in state prisons are eligible to earn credits for good conduct and programming achievements, excepting only people serving life without parole and people serving capital sentences. (Cal. Code

¹¹ CDCR, Offender Data Points Dashboard available at <https://www.cdcr.ca.gov/research/offender-outcomes-characteristics/offender-data-points/> (last checked 1/28/2025).

¹² Available at <https://www.cdcr.ca.gov/bph/statistical-data/> (last checked 1/28/2025).

Regs., tit 15, § 3043, subd. (b), § 3043.2, subd. (b)-(b)(1); §§ 3043.3-3043.6; CDCR Dashboard, *supra*, In-Custody, month-end July 2024 [prison population 92,251, with 5,100 people serving life without parole and 625 people serving capital sentences].) In the quarter from December 1, 2024 to February 29, 2024, the 4,229 people who were released from state prisons (not counting people released from fire camps) had earned an estimated average of 304.3 days of additional credits under CDCR's Proposition 57 regulations. (*Coleman/Plata, supra*, Defs' March 2024 Quarterly Update (March 15, 2024), Exh. B.) Similarly, from March 1, 2024 to May 31, 2024, 4,157 people who were released from state prisons had earned an estimated average of 280.1 days of additional credits. (*Coleman/Plata, supra*, Defs' June 2024 Quarterly Status Report (June 14, 2024), Exh. B.)¹³ Thus, the average reduction was approximately nine to 10 months per person.

By effectuating releases through the provision of good conduct credits, Proposition 57 has been effective at achieving its stated goals. Since adopting its Proposition 57 credit regulations, CDCR has ceased housing people out of state or at in-state contract facilities, has closed several prisons, and has deactivated individual housing units and facilities within many prisons. (*Coleman/Plata, supra*, Defs' June 2024 Quarterly Status Report, (June

¹³ This brief generally uses data ending in June or July 2024 to discuss the impact of CDCR's Proposition 57 credit regulations, as the lower court's order barring CDCR from applying Proposition 57 credits to indeterminate cases is affecting the data starting from approximately that time to the present.

15, 2025), *supra*, at p. 2 and Exh. A.) From 2019 to 2023, the CDCR's share of the state General Fund spending decreased from 8.6% to 6.5%, down from a 2008-2009 high of 10.7%; moreover, in 2024, CDCR faced its first budget decrease in 12 years. (Harris and Cremin, Public Policy Institute of California, *California's Prison Population* (Sept. 2024);¹⁴ Tafoya and Bohn, Public Policy Institute of California, *Spending on Corrections and Higher Education* (Aug. 4, 2016).)¹⁵ As of December 4, 2024, the total prison population was 91,719, at an overall level of 122.4% of design capacity. (*Coleman/Plata, supra*, Defs' Dec. 2024 Quarterly Status Report (Dec. 16, 2024), Exh. A.).

C. Denying CDCR its full authority to award credits would thwart the purposes of Prop 57.

CDCR cannot reasonably fulfill its obligations to reduce wasteful prison spending, avoid federal court releases, and promote rehabilitation without awarding increased good conduct and programming credits to people serving sentences for violent felonies and without applying credits to advance the MEPDs of people serving indeterminate terms. Indeed, these two groups comprise large percentages of the prison population, have longer sentences, and prior to Proposition 57 had limited or no eligibility to earn credits, burdening the state with the higher costs of an aging prison population. Conversely, limiting CDCR's authority

¹⁴ Available at <https://www.ppic.org/publication/californias-prison-population/> (last checked 1/28/2025).

¹⁵ Available <https://www.ppic.org/blog/spending-on-corrections-and-higher-education/> (last checked 1/28/2025).

so that CDCR could increase credits only for people with determinate terms for nonviolent offenses would hinder CDCR's ability to avoid wasteful prison spending and overcrowding while also protecting public safety.

CDCR's Proposition 57 regulations appropriately make only modest increases to credits for people serving determinate terms for non-violent offenses because this group comprises a small percentage of the prison population and had access to significant credit-earning opportunities prior to Proposition 57. Less than 25% of the people in state prison are serving terms for only non-violent offenses. (CDCR Dashboard, *supra*, In-Custody, month-end July 2024 [of total 92,251 people, 51,118 had a violent offense and 18,538 had both a serious and a violent offense; the remaining 22,595 had no violent offense].) Prior to Proposition 57, people with determinate terms for non-violent offenses were eligible for 50% good conduct credits, with increased credits of 66.6% for being a firefighter, assigned to a conservation camp or in minimum custody, except that people with two-strikes terms were limited to 33.3% credits. (Pen. Code § 2933, subds. (a)-(b); § 2933.3; § 667, subd. (c)(5); *Coleman/Plata*, Order (Feb. 10, 2014), *supra*, at p. 3.) In addition, many people in this group could earn up to six weeks of credit per year for completing programming milestones. (Pen. Code § 2933.05.) Thus, the only changes CDCR made were increasing good conduct credits for the lowest-risk nonviolent second-strikers, increasing milestone credits, and adding two additional types of programming credits. (Cal. Code Regs., tit. 15, § 3043.2, subds. (b)(3) and(b)(5) [50% or 66.6% credits for two-strikers in minimum custody or firefighters/ in fire

camp]; Cal. Code Regs., tit. 15, §§ 3043.3-3043.5 [authorizing annual milestone completion credit up to 12 weeks and rehabilitative achievement credit up to 40 days, and education merit credit of 90 or 180 days per degree].)

In contrast, people convicted of violent offenses and/or serving indeterminate terms comprise large portions of the prison population, generally are subject to longer sentences, and previously earned few or no good conduct or programming credits. Seventy-five percent of people in prison are serving terms for violent offenses. (CDCR Dashboard, *supra*, In-Custody, month-end July 2024 [of 92,251 total, 51,118 had a violent offense and 18,538 had both a serious and violent offense].) Before CDCR enacted its Proposition 57 regulations, this group was limited to no more than 15% good conduct credits. (Pen. Code § 2933.1.) Thirty-two percent of the people in prison have indeterminate terms. (CDCR Dashboard, *supra*, In-Custody, month-end July 2024 [of 92,251 people, 4,870 were serving Three Strikes terms and 24,938 were serving other indeterminate “lifer” terms].) Prior to Proposition 57, most of these people could not earn any good conduct credit toward their MEPDs, and people with murder convictions could not even earn credits on consecutive terms for other offenses. (See list of relevant statutes and cases in footnote 8, above.) Furthermore, milestone completion credits were not available to people serving Three Strikes sentences or terms for violent felonies, effectively excluding anyone serving an indeterminate sentence. (Pen. Code § 2933.05.) One effect of this lack of credit opportunities was that the percentage of the prison population age 55 or older increased from 3% in 1999 to 16% in

2019, an unwise policy given that older people have dramatically reduced recidivism and higher incarceration costs. (Widra, Prison Policy Initiative, *The Aging Prison Population: Causes, Costs, and Consequences* (Aug. 2, 2023), and appendix;¹⁶ see also Pew Research Center, *Aging Prison Populations Drive Up Costs* (Feb. 20, 2018).)¹⁷

CDCR has quite reasonably exercised its authority under Proposition 57 to reduce wasteful prison spending, avoid federal court ordered releases, and promote rehabilitation by increasing good conduct and programming credits to the groups that make up the majority of the prison population and are most in need of rehabilitation. Through its Proposition 57 regulations, CDCR has increased the base good conduct credit rate for people serving terms for violent felonies (regardless of whether the sentence is determinate or indeterminate) to 20% starting May 1, 2017 and then 33.3% starting May 1, 2021. (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(2)(A)-(B).) Increased credits of 50% are available to people with determinate terms who are firefighters or in fire camp. (Cal. Code Regs., tit. 15, 3043.2, subd. (b)(4)(B)-(C); see also Cal. Code Regs., tit. 15, § 3375.2, subd. (a)(8)-(11) [classification policies generally forbid placing people with indeterminate sentences in low security levels].) People serving indeterminate three-strikes terms for non-violent offenses started

¹⁶ Available at <https://www.prisonpolicy.org/blog/2023/08/02/aging/> (last checked 1/28/2025).

¹⁷ Available at <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/02/20/aging-prison-populations-drive-up-costs> (last checked 1/28/2025).

earning 33.3% as of May 1, 2017 and 50% as of May 1, 2021. (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(3)(A)-(B).) For programming achievements, all incarcerated people now can earn the same types and amounts of credits. (Cal. Code Regs., tit. 15, §§ 3043.3-3043.5.) CDCR's current regulations thus are in line with policies in effect in the mid-1980's, prior to the state's prison population explosion.

D. CDCR's regulations are serving well Proposition 57's purposes of reducing wasteful prison spending, promoting rehabilitation, and enhancing public safety.

This Court should reject respondents' claim that CDCR's good conduct and programming credit regulations are hindering rehabilitation, jeopardizing public safety, or reducing the prison population too much. The truth is quite the opposite, especially in regards to people serving indeterminate sentences.

Credit eligibility encourages incarcerated people to "conform to prison regulations, to refrain from criminal and assaultive conduct, and to participate in work and rehabilitative activities." (*People v. Brown* (2012) 54 Cal.4th 314, 317.) People with the most serious commitment offenses or criminal histories are precisely the people who can most benefit from incentives to follow rules and to participate in work, education, and rehabilitative programs. Moreover, under CDCR's regulations, the credits earned are proportional to the incarcerated person's ability and willingness to follow rules and engage in rehabilitation. Awards of programming credits require sustained

participation in an approved activity and completing specific goals. (Cal. Code Regs., tit. 15, §§ 3043.3-3043.5, and Milestone Completion Credit Schedule).¹⁸ A person who does not comply with prison rules or programming requirements will forfeit up to 360 days of their credits. (Cal. Code Regs., tit, 15, § 3323; see also Cal. Code Regs., tit, 15, §§ 3327-3329.5 [for more minor violations, credits sometimes can be restored for subsequent good behavior].) If a person commits a sufficiently serious rule violation and is sent to a restricted housing unit, they also will be barred from earning any good conduct credits for up to a year. (Cal. Code Regs., tit. 15, § 3044, subs. (b)(4), (b)(6).)

Furthermore, California’s current prison incarceration rate is not remarkably low, even though CDCR’s credit regulations and other criminal justice reforms have greatly reduced the prison population compared to the 2006 crisis point. As of June 2024, the prison population was 89,898. (*Coleman/Plata, supra*, Def’s June 2024 Quarterly Status Report, *supra*, p. 1 and Exh. A.) Compared to California’s 1980 prison population of just over 28,000, the current prison population of about 90,000 reflects a 320% increase, still much more than the state’s 64% population growth between 1980 and 2022. (Compare Little Hoover Commission Report, *supra*, p. 18; with USA Facts Website, Our Changing Population: California, *supra*.) California’s imprisonment rate is still higher than that of 16 other states.

¹⁸ The current CDCR Milestone Credit Completion Schedule is available at <https://www.cdcr.ca.gov/regulations/cdcr-regulations/new-rules-page/> (last checked 1/28/2025).

(The Sentencing Project, U.S. Criminal Justice Data.)¹⁹ Moreover, most people with indeterminate terms still are incarcerated for lengthy periods. As of July 2024, the average length of stay was 22.1 years for people serving Three Strikes terms and 26.2 years for people with other types of indeterminate terms. (CDCR Dashboard, *supra*, month-end July 2024, Releases.)

Most importantly, recidivism rates for people released from CDCR are now lower than in either the distant or near past. In the 1990s and 2000's, over 69% of people released were returned to either jail or prison within three years either for new criminal convictions (37%) or for parole violations (32%) that in 80% of cases were based on new criminal behavior, including homicide, robbery, rape, and sexual assault. (Petersilia, California Policy Research Center, *Understanding California Corrections* (May 2006), pp. 72-73.)²⁰ More recently, in the nine fiscal years prior to CDCR's Proposition 57 credit regulations, three-year recidivism rates ranged from 44.6 to 54.3 new crimes per 100 people. (CDCR Online Offender Recidivism Dashboard, Adult Recidivism, Recidivism Over Time and Place, Convictions.)²¹ Following

¹⁹ Available at <https://www.sentencingproject.org/research/us-criminal-justice-data/> (last checked 1/28/2025).

²⁰ Available at https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.prisonpolicy.org/scans/carc/understand_ca_corrections.pdf&ved=2ahUKEwj4_fCHmdyIAxUPATQIHS-mGOwQFnoECBUQAQ&usg=AOvVaw2XXYFLidiHR9dN_v0bjTpc (last checked 1/28/2025).

²¹ Available at <https://www.cdcr.ca.gov/research/offender-outcomes-characteristics/offender-recidivism/> (last checked 1/28/2025).

CDCR's exercise of its Proposition 57 credit authority, recidivism rates are lower – 41.9% of people released in 2018-2019 committed a misdemeanor or felony offense in the following three years, with 20.9% of releasees committing a felony and only 6.8% of releasees committing a felony against a person. (*Ibid*; CDCR, *Recidivism Report for Individuals Released from CDCR in Fiscal Year 2018-2019*, pp. vi, 10.)²² People who earned enhanced credits under CDCR's Proposition 57 regulations had even lower recidivism rates – 39.2% for people released in fiscal year 2018-2019. (CDCR Online Offender Recidivism Dashboard, Adult Recidivism, Statewide Recidivism Data Tables, Convictions, filtered by enhanced credit earning.) People with rehabilitative programming achievements had particularly good outcomes, with overall recidivism rates over a three-year period of 31.5% for people with educational achievements, 28.2% for people with career technical achievements, and 35.5% for people with cognitive behavior program achievements. (*Id.*, filtered by Fiscal Year 2018-2019.) Preliminary data shows that recidivism rates are on track to drop further for people released in fiscal years 2019-2020 and 2020-2021. (*Id.*, Adult Recidivism, Preliminary Recidivism Rates, Convictions.)

Moreover, there is no evidence that applying good conduct and programming credits to advance the MEPDs of people with indeterminate sentences poses any risk to public safety. People who have reached their MEPD remain in prison unless and until

²² Available at <https://www.cdcr.ca.gov/research/offender-outcomes-characteristics/offender-recidivism/> (last checked 1/28/2025).

the BPH determines that their release would not pose an unreasonable risk to public safety. (Pen. Code § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2280, § 2281, subd. (a), § 2401, subd. (a).) BPH does not take its duty to protect public safety lightly. In 2024, BPH granted parole in only 14.4% of cases that were scheduled for a hearing. (BPH, *Suitability Hearing Results Summary Jan. 1, 2024 to Dec. 31, 2024* [1,154 grants out of 8,001 scheduled cases].)²³ Most people who receive a parole grant have previously been denied parole at least once. (BPH, *2023 Report of Significant Events, supra*, p. 1.) In addition to BPH approval, the Governor can review the parole suitability of anyone convicted of murder, and has the power to reverse a parole grant. (Cal. Const., Art. V, § 8, subd. (b).) Courts must give great deference to the BPH's and Governor's decisions, and may overturn a parole denial or reversal only when there is not "some evidence" that the person is currently dangerous. (*In re Shaputis* (2011) 53 Cal.4th 192.)

With all of these safeguards, the recidivism rates for people paroled from indeterminate sentences have been and continue to be extremely low. Of the 5,248 people with indeterminate terms who were released between fiscal year 2011-2012 and fiscal year 2018-2019, only 2.8% committed any type of crime within three years of release. (BPH, *2023 Report of Significant Events, supra*, p. 10.) These rates have not risen in the wake of CDCR's implementation of its Proposition 57 credit regulations. Of the

²³ Available at <https://www.cdcr.ca.gov/bph/2024/02/21/calendar-year-2024-suitability-results/> (last checked 1/28/2025).

1,051 people released during fiscal year 2018-2019, the most recent period for which data is available, only 2.2% (23 people) were convicted of *any* type of crime (misdemeanor or felony) in the following three years. (*Ibid.*) Just two people – *0.2% of the people released from indeterminate sentences* – were convicted of a felony for a crime against a person within three years after release. (*Ibid.*) Indeed, the risk that a person released from an indeterminate term will commit a new crime against a person in a three-year period is lower than the likelihood that a random California resident will commit a violent crime in a one-year period. (Cal. Dept. of Justice, *2023 Crime in California*, p. 13 [2023 crime rate was 511 violent crimes [homicide, rape, robbery and aggravated assault] per 100,000 people].)²⁴

Interviews with indeterminately sentenced people illustrate how CDCR’s proposition 57 credit policies incentivize rehabilitation. Steve Berinti, a formerly incarcerated person, told a news reporter that “Prop. 57 decreased the violence and increased hope” inside the prisons. (Mihalovich, *They Earned Parole. A Court Order Keeps Them From Returning Home*, KQED (Aug. 25, 2024).)²⁵ Berinti, who was serving a term of 25 years to life, subsequently worked prison jobs and attended classes and self-help groups, which helped him find purpose and gain skills. (*Ibid.*) Through these activities, Berinti earned

²⁴ Available at <https://openjustice.doj.ca.gov/resources/publications> (last checked 1/28/2025).

²⁵ Available at <https://www.kqed.org/news/12001595/they-earned-parole-a-court-order-keeps-them-from-returning-home> (last checked 1/28/2025).

enough credits to advance his initial parole hearing by roughly four years. (*Ibid.*) He was granted parole at his first hearing and was lucky enough to be released about sixth months before the lower court's order in the current case took effect. (*Ibid.*) As of August 2024, Berinti had a job supporting other people returning from incarceration, an apartment, and was pursuing a degree at San Francisco State University. (*Ibid.*)

Another person, Lance Gonzales, who was sentenced to 21 years to life for a crime committed when he was age 22, described how the credit regulations motivated him to put hundreds of hours into self-help groups, including courses on victim impact and cognitive behavior. (Mihalovich, *They Earned Parole. A Court Order Keeps Them From Returning Home*, KQED, *supra.*) He led groups on coping mechanisms and overcoming adversity, earned several associate degrees, and worked as a peer literacy mentor and masonry technician. (*Ibid.*) These efforts advanced Gonzales' parole hearing date by nearly five and a half years, and – after being found suitable for parole by BPH – he was scheduled to be released on June 26, 2024. (*Ibid.*) Unfortunately, his release date was postponed and he remains in prison due to the lower court's order in the current case. (*Ibid.*)

CONCLUSION AND REQUEST FOR EXPEDITED DECISION

CDCR's Proposition 57 credit regulations are doing what the voters intended. The prison system is operating well within the 137.5% population cap, so that state prison and parole officials rather than federal judges are in charge of deciding who

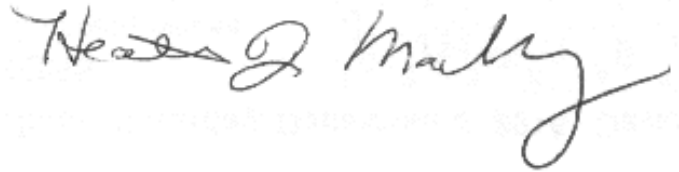
to release and when. Prisons are no longer bankrupting the state by grossly over-incarcerating people. There are now more incentives for people to follow prison rules and participate in rehabilitation programs. All of this has been accomplished while also decreasing the overall recidivism rate and maintaining an extremely low recidivism rate for people paroled from indeterminate sentences. This Court should interpret the law so that state prison officials can continue fulfilling their obligations to further the voters' goals.

In addition, *amicus curiae* asks this Court to expedite its decision because the lower court order is causing immense harm to people with indeterminate sentences who unexpectedly find themselves facing years more incarceration. (See Cal. Rules of Court, rule 8.240 [indicating court has authority to grant calendar preference].) CDCR promised these people earlier release if they behaved well, participated in programs, and demonstrated that their release would not endanger public safety. That promise is being broken. Approximately 87% of the people serving indeterminate sentences have had their MEPDs advanced by CDCR's Proposition 57 credit regulations. (Appellants' Request for Temporary Stay and Petition for Writ of Supersedeas (May 29, 2024), p. 24 and Exh. 9, p. 199.) As of May 2024, there already were about 102 people who had been found suitable for parole and were scheduled for release in following six months whose incarceration was to be extended by the lower court's order. (*Id.* at p. 23 and Exh. 18, p. 361.) Presumably, additional people are being affected every month that the lower court order remains in effect. For some people, the extensions

may be very long, such as the extra five-and-a-half years that Mr. Gonzalez is now required to serve. Of course, the most impact falls on the people most dedicated to rehabilitation. It is thus in the interests of justice for this Court to take swift action to resolve the issues presented in this case.

DATED: January 1, 2025

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Heather J. Mackay". The signature is written in a cursive style with a long, sweeping tail on the final letter.

Heather J. Mackay
Attorney for Amicus Curiae
Prison Law Office

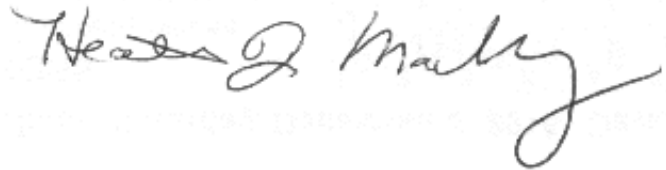
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CERTIFICATE OF COMPLIANCE

I, Heather J. MacKay, certify pursuant to the California Rules of Court, that the word count for this document is 5,855 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in Century13-point font and in Word 13, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Oakland, CA on January 31, 2025.



HEATHER J. MACKAY
Attorney for Amicus Curiae
Prison Law Office

Document received by the CA 3rd District Court of Appeal.

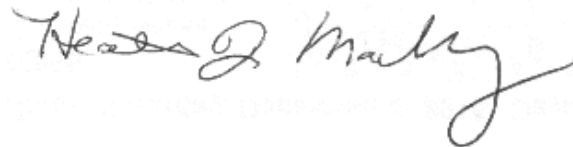
DECLARATION OF SERVICE

Criminal Justice Legal Foundation, et al, v CDCR, et al.
Court of Appeal No. C100274
Sacramento Superior Court No. 34-2022-80003807-CU-WM-GDS

I am employed in the County of Alameda, California. I am over the age of 18 years and not a party to the within entitled cause: my business address is 1917 5th St., Berkeley, CA 94710. On January 31, 2025, I served the attached APPLICATION FROM PRISON LAW OFFICE FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, JEFFREY MACOMBER, and CALIFORNIA BOARD OF PAROLE HEARINGS, Appellants and Cross-Respondents, AND AMICUS CURIAE BRIEF OF PRISON LAW OFFICE in said cause by serving an identical PDF copy of this document through this Court’s True-filing e-service system on:

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| <ul style="list-style-type: none"> • Office of the Attorney General, San Diego, CA: Gregory.Marcot@doj.ca.gov |
| <ul style="list-style-type: none"> • Criminal Justice Legal Foundation, Sacramento, CA: kent.scheidegger@cjlf.org |
| Honorable Jennifer K. Rockwell, Sacramento County Superior Court, Dept. 4, Sacramento, CA: dept4@saccourt.ca.gov |

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at Oakland, California on January 31, 2025.



/s/ Heather J. MacKay

Document received by the CA 3rd District Court of Appeal.