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22 SUPERIOR COURT OF THE STATE OF CALIFORNIA
23 COUNTY OF SACRAMENTO

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26 (District Attorney of Solano County); JASON
27 ANDERSON (District Attorney of San
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DAN DOW (District Attorney of San Luis
Obispo County); JOYCE DUDLEY (District
Attorney of Santa Barbara County); KEITH
FAGUNDES (District Attorney of Kings

Case No. 34-2021-00301253

**FIRST AMENDED
VERIFIED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

(Gov. Code, §11350; Code Civ.
Proc., § 1060.)

County); BIRGIT FLADAGER (District Attorney of Stanislaus County); MAGGIE FLEMING (District Attorney of Humboldt County); LORI FRUGOLI (District Attorney of Marin County); MORGAN GIRE (District Attorney of Placer County); SANDRA GROVEN (District Attorney of Sierra County); ALLISON HALEY (District Attorney of Napa County); MICHAEL HESTRIN (District Attorney of Riverside County); DAVID HOLLISTER (District Attorney of Plumas County); CANDICE HOOPER (District Attorney of San Benito County); AMANDA HOPPER (District Attorney of Sutter County); CASSANDRA JANECKE (District Attorney of Tuolumne County); TIM KENDALL (District Attorney of Mono County); SUSAN KRONES (District Attorney of Lake County); KATHERINE MICKS (District Attorney of Del Norte County); SALLY MORENO (District Attorney of Madera County); ERIK NASARENKO (District Attorney of Ventura County); CLIFF NEWELL (District Attorney of Nevada County); GILBERT G. OTERO (District Attorney of Imperial County); JEANNINE PACIONI (District Attorney of Monterey County); VERN PIERSON (District Attorney of El Dorado County); MIKE RAMSEY (District Attorney of Butte County); JEFF REISIG (District Attorney of Yolo County); TODD RIEBE (District Attorney of Amador County); MELYSSAH RIOS (District Attorney of Lassen County); MATT ROGERS (District Attorney of Tehama County); LISA SMITTCAMP (District Attorney of Fresno County); TODD SPITZER (District Attorney of Orange County); SUMMER STEPHAN (District Attorney of San Diego County); DWAYNE STEWART (District Attorney of Glenn County); WALTER WALL (District Attorney of Mariposa County); TIM WARD (District Attorney of Tulare County); BARBARA YOOK (District Attorney of Calaveras County); and CYNTHIA ZIMMER (District Attorney of Kern County) ON BEHALF OF THE PEOPLE OF

1 **THE STATE OF CALIFORNIA;**

2 **CRIME VICTIMS UNITED, a California**
3 **Nonprofit Corporation; CITIZENS AGAINST**
4 **HOMICIDE, a California Nonprofit**
5 **Corporation**

6 **Plaintiffs,**

7 **v.**

8 **STATE OF CALIFORNIA, DEPARTMENT OF**
9 **CORRECTIONS AND REHABILITATION;**
10 **and KATHLEEN ALLISON, in her official**
11 **capacity as Secretary of the California**
12 **Department of Corrections and Rehabilitation;**
13 **DOES 1-10, inclusive,**

14 **Defendants.**

15 **INTRODUCTION**

16 1. Plaintiffs seek a judicial declaration invalidating the regulations promulgated in
17 OAL File No. 2021-0408-04EON¹ (“the Regulations”) due to a substantial failure to comply
18 with the Administrative Procedure Act (“APA”) (Gov. Code, §11350, subd. (a)) and conflict
19 with statutes. (Pen. Code part 3, tit. 1, ch. 7, art. 2.5.)

20 2. In 2016, Proposition 57 was approved by California voters and amended the
21 California Constitution authorizing the California Department of Corrections and Rehabilitation
22 (“CDCR”) to award credits earned for good behavior and approved rehabilitative or educational
23 achievements. (Cal. Const., art. I, § 32.) It did not repeal existing statutes limiting credits.

24 3. The APA was enacted to establish basic minimum procedural requirements for
25 the adoption, amendment, or repeal of administrative regulations promulgated by administrative
26 agencies. (*Morales v. California Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th

27 ¹ In OAL File No. 2021-0408-04EON, the Department of Corrections and Rehabilitation adopted California Code of
28 Regulations, title 15, section 3043.7 and amended sections 3043, 3043.2, 3043.3, 3043.4, 3043.5, 3043.6, 3044, 3045.1,
3043.7 [Renumbered to 3044.1], 3043.8 [Renumbered to 3044.2], 3047 [Renumbered to 3046.1].

1 729, 735-736 (*Morales*) citing Gov. Code, §11346; *Grier v. Kizer* (1990) 219 Cal.App.3d 422,
2 431, disapproved on other grounds in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14
3 Cal.4th 557, 577.)

4 4. Penal Code section 5058.3 was enacted to afford CDCR an exception to the APA
5 procedures in order to quickly adopt regulations as operational needs require. The CDCR
6 Secretary must, in writing, explain the “the operational need to use the emergency rulemaking
7 procedure.” (Pen. Code, §5058.3, subd. (a)(2).) The included statement of legislative intent of
8 the law was to “authorize the department to expedite the exercise of its power to implement
9 regulations as its unique operational circumstances require.” (Pen. Code, §5058.3, subd. (b).)

10 5. On April 8, 2021, the Office of Administrative Law (“OAL”) received CDCR’s
11 rulemaking file. (Exhibit A.) The proposed Regulations were filed only as an emergency by
12 operational necessity pursuant to Penal Code section 5058.3. (*Ibid.*) Executive Orders N-40-20
13 and N-71-20 extend the expiration date of emergency regulations issued under section 11346.1
14 of the Government Code, but there is no similar order for regulations under section 5058.3.
15 Section 5058.3 provides that regulations promulgated under it expire in 160 days.

16 6. On April 28, 2021, the OAL purported to approve the emergency regulatory
17 action pursuant to sections 11346.1 and 11349.6 of the Government Code as well as section
18 5058.3 of the Penal Code despite the lack of any demonstration of an emergency for the purpose
19 of section 11346.1. (Exhibit B.) The emergency regulatory action became effective on May 1,
20 2021. The OAL approval states that it will expire on February 8, 2022. (*Ibid.*)

21 7. The purpose of the emergency procedure outlined in Penal Code section 5058.3
22 is to immediately put into place operational regulations on an emergency basis. Operational is
23 commonly defined as “relating to the routine functioning and activities of a business or
24 organization.” (Oxford Dictionaries. Oxford University Press.
25 https://premium.oxforddictionaries.com/us/definition/american_english/operational (accessed
26 via Oxford Dictionaries Online on May 20, 2021).) In contrast to this intent, the Regulations are
27 credit earning provisions that have the effect of significantly shortening the length of sentences
28

1 for 76,000 offenders including violent and serious crimes: an expansive new public policy
2 rather than a regulation that goes to an operational need or circumstance of CDCR. This new
3 policy is contrary to statutes governing credits in several important respects, described below.

4 8. The APA codifies the proper procedures for such broad and far reaching changes
5 and those procedures should be respected. Regulations are subordinate to statutes in the
6 hierarchy of laws and may not contradict statutes.

7 9. This Court should, therefore, declare the Regulations approved in OAL File No.
8 2021-0408-04EON to be invalid and permanently enjoin the enforcement of these Regulations.
9 In any case, enforcement of the Regulations beyond their expiration date of October 7, 2021
10 under Penal Code section 5058.3 is illegal and should be enjoined.

11 **PARTIES**

12 10. District Attorney Plaintiffs Anne Marie Schubert (District Attorney of Sacramento
13 County); Krishna Abrams (District Attorney of Solano County); Jason Anderson (District Attorney
14 of San Bernardino County); Kirk Andrus (District Attorney of Siskiyou County); Michael Atwell
15 (District Attorney of Alpine County); Matt Beauchamp (District Attorney of Colusa County);
16 Stephanie Bridgett (District Attorney of Shasta County); Clint Curry (District Attorney of Yuba
17 County); Dan Dow (District Attorney of San Luis Obispo County); Joyce Dudley (District Attorney
18 of Santa Barbara County); Keith Fagundes (District Attorney of Kings County); Birgit Fladager
19 (District Attorney of Stanislaus County); Maggie Fleming (District Attorney of Humboldt County);
20 Lori Frugoli (District Attorney of Marin County); Morgan Gire (District Attorney of Placer
21 County); Sandra Groven (District Attorney of Sierra County); Allison Haley (District Attorney of
22 Napa County); Michael Hestrin (District Attorney of Riverside County); David Hollister (District
23 Attorney of Plumas County); Candice Hooper (District Attorney of San Benito County); Amanda
24 Hopper (District Attorney of Sutter County); Cassandra Janecke (District Attorney of Tuolumne
25 County); Tim Kendall (District Attorney of Mono County); Susan Krones (District Attorney of
26 Lake County); Katherine Micks (District Attorney of Del Norte county); Sally Moreno (District
27 Attorney of Madera County); Erik Nasarenko (District Attorney of Ventura County); Cliff Newell

(District Attorney of Nevada County); Gilbert G. Otero (District Attorney of Imperial County); Jeannine Pacioni (District Attorney of Monterey County); Vern Pierson (District Attorney of El Dorado County); Mike Ramsey (District Attorney of Butte County); Jeff Reisig (District Attorney of Yolo County); Todd Riebe (District Attorney of Amador County); Melyssah Rios (District Attorney of Lassen County); Matt Rogers (District Attorney of Tehama County); Lisa Smittcamp (District Attorney of Fresno County); Todd Spitzer (District Attorney of Orange County); Summer Stephan (District Attorney of San Diego County); Dwayne Stewart (District Attorney of Glenn County); Walter Wall (District Attorney of Mariposa County); Tim Ward (District Attorney of Tulare County); Barbara Yook (District Attorney of Calaveras County); and Cynthia Zimmer (District Attorney of Kern County) on behalf of the People of the State of California.

11. Victims' Rights Organization Plaintiffs are Citizens Against Homicide and Crime Victims United, both of which are California nonprofit corporations.

12. Defendants are CDCR and Kathleen Allison, in her official capacity as Secretary of CDCR. Secretary Allison is and at all material times was the Secretary of CDCR. Plaintiffs are informed and believe and thereon allege that Secretary Allison was responsible for drafting, issuing, and enforcing the Regulations that are the subject of this action.

13. Plaintiffs are currently unaware of the true names or capacities of the persons or entities herein named as DOES 1 through 10, inclusive, and therefore sue these parties by their fictitious names. Plaintiffs will amend this Complaint to set forth the real names and capacities of the DOE defendants, along with any additional allegations, when such information is ascertained.

JURISDICTION AND VENUE

14. This Court has jurisdiction over the matters alleged in this Complaint pursuant to Government Code section 11350, subdivision (a) and Code of Civil Procedure section 1060.

15. Venue for this action properly lies in the Superior Court of the State of California, County of Sacramento, pursuant to Code of Civil Procedure sections 393 and 401.

STANDING

16. Pursuant to Government Code section 11350, subdivision (a) "any interested person

1 may obtain a judicial declaration as to the validity of any regulation or order of repeal by bringing
2 an action for declaratory relief in the superior court in accordance with the Code of Civil
3 Procedure....” District Attorney Plaintiffs, on behalf of the People of the State of California, are
4 interested in this matter because this Complaint seeks to invalidate the Regulations that were
5 approved without an opportunity for the public, including victims and their families, to be heard.
6 The District Attorney is empowered to prosecute criminal offenses on behalf of the People,
7 including victims and their families. Because the Regulations have the effect of reducing sentences
8 for 76,000 persons including for violent and serious offenses, the public, including the victims and
9 their families, have a direct and beneficial interest in ensuring that CDCR validly promulgates such
10 regulations under the APA. The plaintiffs identified in paragraph 10 represent over 20 million
11 Californians who have been impacted by these so-called emergency Regulations. The District
12 Attorney plaintiffs also represent victims and their next of kin including victims from adjudicated
13 cases, pending cases, and future cases.

14 17. Victims’ Rights Organization Plaintiffs provide public policy advocacy for victims,
15 seek out justice for victims through advocacy, and engage in public education to better preserve
16 and promote public safety and victims’ rights. Under California law, victims of crimes are
17 guaranteed specific rights and protections. These rights give victims and their next of kin the ability
18 to be notified throughout the entire criminal process from bail to parole and even gives them the
19 right to be heard at many stages of the prosecutorial process. (Cal. Const., art I, § 28(b)(3)-(16).)
20 Victims are protected from defendants and those acting on their behalf (Cal. Const., art I, §
21 28(b)(2)), and are guaranteed that those “committing criminal acts are sufficiently punished in both
22 the manner and the length of sentences,” that these sentences will have a “punitive and deterrent
23 effect,” and that they “will not be undercut or diminished....” (Cal. Const., art I, § 28(a)(5).)
24 Victims are guaranteed the right of participation in the sentencing investigations and reports. (Cal.
25 Const., art I, § 28(b)(10)-(11).)

26 18. These provisions of Article 1, section 28 recognize that victims of crime have an
27 interest in the punishment of the perpetrators of crimes against them sufficient to make them
28

1 “interested persons” within the meaning of section 11350 of the Government Code. Plaintiffs are
2 informed and believe that members of the Victims’ Rights Organization Plaintiffs have been
3 victims of crimes committed by persons who may be released earlier under the Regulations than
4 the governing statutes allow. Further, the misuse of section 5058.3 to promulgate regulations that
5 effectuate sentencing policy rather than the operational needs of the Department have denied the
6 organizations and their members the opportunity to be heard before the Regulations took effect.

7 **EXHAUSTION OF ADMINISTRATIVE REMEDIES**

8 19. Plaintiffs have exhausted all administrative remedies to the extent required by the
9 law. Although not required under Government Code section 11350, subdivision (a), District
10 Attorney Plaintiffs sent a letter to Secretary Allison on May 17, 2021. (Exhibit C.) CDCR’s reply is
11 not necessary nor required by law in order to file this Complaint. (Gov. Code, § 11350, subd. (a).)
12 The relief sought in this Complaint is ripe and not moot because plaintiffs seek a judicial
13 declaration that the Regulations do not substantially comply with the provisions of the APA.
14 Specifically, plaintiffs are seeking a declaration that any regulation that has the effect of reducing
15 sentences is not within the scope of Penal Code section 5058.3. Any such regulation must be
16 adopted through the APA rulemaking process (Gov. Code, §11340 et seq.).

17 20. Counsel for the Victims’ Rights Organization Plaintiffs wrote to the Office of
18 Administrative Law on July 23, 2021 explaining that the expiration date on OAL’s approval of the
19 Regulations was incorrect and requesting correction. To date, counsel has not received a
20 substantive response.

21 **FACTUAL ALLEGATIONS**

22 **A. Proposition 57**

23 21. In 2016, a majority of California voters enacted Proposition 57 and added Article
24 I, section 32 to the California Constitution. The voter enacted amendment gave CDCR the
25 “authority to award credits earned for good behavior and approved rehabilitative or educational
26 achievements.”

27 22. Article I, section 32 further directed CDCR to “adopt regulations in furtherance
28

1 of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall
2 certify that these regulations protect and enhance public safety.”

3 23. Proposition 57 did not repeal existing statutes in the Penal Code that determine
4 the amount of credits earned for state inmates depending on the underlying crimes committed.
5 (See Pen. Code, §§ 2933(b), 2933.1, 667(c)(5), 1170.12(a)(5), 2933.2.) Nothing in the text of
6 the new constitutional section purports to invert the usual legal hierarchy of statutes over
7 regulations.

8 **B. Rulemaking Procedures**

9 24. Penal Code section 5058, subdivision (a) requires the CDCR Secretary to
10 promulgate rules and regulations for the administration of prisons pursuant to the APA, unless
11 enumerated exceptions apply. (*Morales, supra*, 168 Cal.App.4th at p. 735.)

12 25. Penal Code section 5058.3, subdivision (a)(2) states in relevant part:

13 Notwithstanding subdivision (b) of Section 11346.1 of the Government
14 Code, no showing of emergency is necessary in order to adopt, amend,
15 or repeal an emergency regulation if the director instead certifies, in a
16 written statement filed with the Office of Administrative Law, that
17 operational needs of the department require adoption, amendment, or
18 repeal of the regulation on an emergency basis. The written statement
19 shall include a description of the underlying facts and an explanation of
20 the operational need to use the emergency rulemaking procedure. This
21 paragraph provides an alternative to filing a statement of emergency
22 pursuant to subdivision (b) of Section 11346.1 of the Government Code.
23 It does not preclude filing a statement of emergency. This paragraph
24 only applies to the initial adoption and one readoption of an emergency
25 regulation.

26 Subdivision (b) provides that:

27 It is the intent of the Legislature, in authorizing the deviations in this
28 section from the requirements and procedures of Chapter 3.5
(commencing with Section 11340) of Part 1 of Division 3 of Title 2 of
the Government Code, to authorize the department to expedite the
exercise of its power to implement regulations as its unique operational
circumstances require.

1 26. The OAL website states that the APA

2 establishes rulemaking procedures and standards for state agencies in
3 California. The requirements set forth in the APA are designed to
4 provide the public with a meaningful opportunity to participate in the
5 adoption of state regulations and to ensure that regulations are clear,
6 necessary and legally valid. The APA is found in the California
7 Government Code, commencing with section 11340. State regulations
8 must also be adopted in compliance with regulations adopted by OAL
9 (Cal. Code Regs., tit. 1, §§ 1-120).

10 (<<https://oal.ca.gov/faq/>>)

11 27. Under the regular rulemaking process webpage of the OAL, it summarizes that:

12 The vast majority of regulations adopted pursuant to the APA are
13 submitted to OAL as “regular” rulemakings. Unless a proposed
14 rulemaking action is submitted to OAL as an “emergency”
15 rulemaking or is exempted from the APA, the regular rulemaking
16 process must be complied with when an agency undergoes a
17 rulemaking action. The regular rulemaking process includes
18 comprehensive public notice and comment requirements. It also
19 requires that documents and information on which the rulemaking
20 action is based are available for review and inspection. This
21 comprehensive process is intended to further the goal of public
22 participation in the rulemaking process and to create an adequate
23 rulemaking record for review by OAL and the courts.

24 (<https://oal.ca.gov/rulemaking_process/regular_rulemaking_process/>)

25 28. The OAL website informs the public that:

26 To initiate a formal rulemaking action, an agency publishes a notice of
27 proposed action in the California Regulatory Notice Register. The
28 agency must also mail the notice of proposed action to those persons
29 who have requested notice of regulatory actions, and post the notice of
30 proposed action, express terms, and initial statement of reasons on the
31 agency’s website. (Gov. Code, § 11346.5.) Once the notice of proposed
32 action is published in the California Regulatory Notice Register, the
33 APA rulemaking process is officially started and the agency has one
34 year within which to complete the rulemaking process and submit the
35 completed rulemaking file to OAL.

36 (<https://oal.ca.gov/rulemaking_participation/>)

1 29. The APA requires a minimum 45-day period for the public to comment to the
2 agency in writing on the proposed regulation. (*Ibid.*) The notice of proposed action specifies the
3 rulemaking agency name, contact person and address where the comments must be directed and the
4 date the written comment period closes. (*Ibid.*) Members of the public should not submit written
5 comments on regular rulemaking actions to OAL. (*Ibid.*)

6
7 30. The OAL website further provides that:

8 Under the APA, a rulemaking agency has the option whether to hold a
9 public hearing on a proposed rulemaking action. If an agency does not
10 schedule a public hearing, any interested person can submit a written
11 request for a hearing to be held. The written request for a hearing must
12 be submitted at least 15 days prior to the close of the written public
13 comment period. If timely requested, the agency must hold a public
14 hearing. (Gov. Code, § 11346.8.) If a public hearing is held, the hearing
15 must be scheduled for a date at least 45 days after the notice of proposed
16 action was published. At the public hearing, both written and oral
17 comments must be accepted.

18 (*Ibid.*)

19 31. A rulemaking agency must summarize and respond to timely comments that are
20 directed at the proposal or at the procedures followed by the agency during the rulemaking action.
21 (*Ibid.*) For each comment, the agency must include either an explanation of how the proposed
22 action has been changed to accommodate the comment or state the reasons for rejecting the
23 comment. (*Ibid.*) In summarizing and responding to public comments, the agency must
24 demonstrate that it understood and considered the comment. (*Ibid.*) The summary and response to
25 comments is included as part of the rulemaking file in a document called a Final Statement of
26 Reasons (Gov. Code, § 11346.9.). (*Ibid.*)

27 32. A rulemaking agency must transmit a rulemaking action to OAL for review within
28 one year from the date that the notice was published in the California Regulatory Notice Register.
(*Ibid.*) Once submitted, OAL has 30 working days to conduct a review of the rulemaking record to
ensure that the agency satisfied the requirements of the APA and OAL's regulations. (*Ibid.*) OAL

1 will then either approve the rulemaking action and file the proposed regulation with the Secretary
2 of State or disapprove the rulemaking action. (*Ibid.*)

3 C. Rulemaking History

4 33. On April 8, 2021, the OAL received CDCR's rulemaking file. (Exhibit A.) The
5 proposed Regulations were filed only as Operational Necessity pursuant to Penal Code section
6 5058.3. (*Ibid.*) On April 28, 2021, the OAL approved the emergency regulatory action pursuant to
7 sections 11346.1 and 11349.6 of the Government Code and section 5058.3 of the Penal Code.
8 (Exhibit B.) The emergency regulatory action became effective on May 1, 2021, and will expire
9 on February 8, 2022. (*Ibid.*)

10 FIRST CAUSE OF ACTION

11 (Invalid Regulatory Action Under Penal Code §5058.3)

12 34. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 33,
13 inclusive, of this Complaint as if fully set forth herein.

14 35. An actual controversy has arisen and now exists between Plaintiffs and Defendants.
15 Plaintiffs contend that the APA required Defendants to file the Regulations under the regular (Gov.
16 Code, §11346) or emergency (Gov. Code, §11346.1) rulemaking process contained in the APA
17 (Gov. Code, §11340 et seq.) because the operational needs of CDCR did not require adoption of
18 the Regulations on an emergency basis. Defendants specifically avoided the emergency rule
19 making process required under Government Code section 11346.1 because there is no actual
20 emergency, and they cannot meet those emergency requirements.

21 36. The purpose of the emergency procedure outlined in Penal Code section 5058.3 is
22 to immediately put into place regulations on an emergency basis. The Regulations, however, are
23 credit earning provisions that have the effect of shortening the length of a person's sentence rather
24 than a regulation that goes to an operational need or circumstance of the department. As such, the
25 operational needs or circumstances of the department did not require adoption of the proposed
26 Regulations on an emergency basis.

27 37. Further, there is no "description of the underlying facts and an explanation of the
28

1 operational need to use the emergency rulemaking procedure” in the proposed Regulations as
2 required by Penal Code section 5058.3, subdivision (a)(2). In the rulemaking file submitted to the
3 OAL, CDCR Secretary Allison cited the need to “Comply with the direction outlined in the
4 Governor’s Budget Summary, *May Revision 2020-2021*.”² (Exhibit A.) Nowhere in the supporting
5 documents is there an explanation of how *last year’s* budget has become an operational need for
6 adoption of the Regulations on an emergency basis.

7 38. Harm from the Regulations lies in the subversion of the democratic values the APA
8 was intended to serve. The notice, comment, and review procedures of the APA were enacted to
9 secure the public benefits of openness, accessibility, and accountability in the formulation of rules
10 that implement legislative enactments. Irreparable harm to these important public benefits occurs
11 whenever a state agency unlawfully adopts a regulation as CDCR has done here.

12 39. CDCR has denied crime victims and the public the right to participate in the
13 development of the Regulations and their enactment. It has denied victims’ rights organization
14 Plaintiffs the ability to challenge the validity of the Regulations before they were adopted and put
15 into effect.

16 40. The Regulations became effective on May 1, 2021, and purport to expire on
17 February 8, 2022. (Exhibit B.) Unless enjoined by order of this Court, Plaintiffs will continue to
18 suffer great and irreparable harm because the challenged Regulations violate the public’s ability to
19 comment about the proposed Regulations in violation of the APA for a period of no less than 10
20 months.

21 41. Because there is no operational need for the Regulations, Defendants must comply
22 with the regular (Gov. Code, §11346) or emergency (Gov. Code, §11346.1) rulemaking process
23

24
25 ² The Governor’s May 2020 Budget Summary was issued on *May 14, 2020*, wherein the Governor recommended
26 increased Good Conduct credits stating, “CDCR will pursue changes to good conduct credits that will be applied
27 prospectively. While the changes are still being developed, they will be informed by preliminary recidivism data
associated with existing good conduct credit.” (See <[http://www.ebudget.ca.gov/2020-](http://www.ebudget.ca.gov/2020-21/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf)
28 <[21/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf](http://www.ebudget.ca.gov/2020-21/pdf/Revised/BudgetSummary/FullBudgetSummary.pdf)>)

1 contained in the APA. (Gov. Code, §11340 et seq.)

2 42. Plaintiffs are therefore entitled to a judicial declaration pursuant to Government
3 Code section 11350 and Code of Civil Procedure section 1060 that the Regulations are invalid
4 because they were not properly adopted under Penal Code § 5058.3 and to a permanent injunction
5 against enforcement of such Regulations.

6 **SECOND CAUSE OF ACTION**

7 **(Invalid Duration)**

8 43. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 42,
9 inclusive, of this Complaint as if fully set forth herein.

10 44. Regulations promulgated under the “operational needs” exception are limited in
11 duration to 160 days. (Pen. Code § 5058.3, subd. (a)(1).) Under that provision, a regulation
12 effective May 1, 2021 would expire October 8, 2021. The OAL’s approval of the Regulations
13 designates an expiration date of February 8, 2022 (Exhibit B), a duration of 283 days.

14 45. Executive Order N-40-20, ¶ 1, provides for an extension of the expiration date
15 for emergency regulations promulgated under Government Code 11346.1. That order is further
16 extended by Executive Order N-71-20, ¶ 9. Neither the text of the Regulations nor the OAL
17 approval cites any authority for a similar extension of the deadline in section 5058.3(a)(1).
18 Plaintiffs are informed and believe there is no such authority.

19 46. Enforcement of the Regulations to grant credits after October 8, 2021 would
20 violate section 5058.3(a)(1) of the Penal Code and Article I, section 28(f)(5) of the California
21 Constitution. Plaintiffs are entitled to a judicial declaration that the Regulations are invalid to
22 the extent they purport to apply after that date and a permanent injunction against CDCR’s
23 application of them after that date.

24 **THIRD CAUSE OF ACTION**

25 **(Invalid Promulgation Under APA/Conflict With Statutes)**

26 47. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 46,
27 inclusive, of this Complaint as if fully set forth herein.

1 48. Plaintiffs contend that the APA required Defendants to file the Regulations
2 under the regular (Gov. Code, §11346) or emergency (Gov. Code, §11346.1) rulemaking
3 process contained in the APA (Gov. Code, §11340 et seq.) because the operational needs
4 of CDCR did not require adoption of the Regulations on an emergency basis.

5 49. The emergency rule making process under Government Code section 11346.1,
6 subdivision (b)(2) states in pertinent part:

7 A finding of emergency based only upon expediency, convenience, best
8 interest, general public need, or speculation, shall not be adequate to
9 demonstrate the existence of an emergency. If the situation identified in
10 the finding of emergency existed and was known by the agency
11 adopting the emergency regulation in sufficient time to have been
12 addressed through nonemergency regulations adopted in accordance
13 with the provisions of Article 5 (commencing with Section 11346), the
14 finding of emergency shall include facts explaining the failure to
15 address the situation through nonemergency regulations.

16 50. Plaintiffs are informed and believe that Defendants specifically avoided the
17 emergency rule making process required under Government Code section 11346.1 because
18 there is no actual emergency, and they cannot meet those emergency requirements.

19 51. The Regulations conflict with multiple sections of the Penal Code. Section
20 1170.12, subdivision (a)(5) caps credits for repeat serious or violent felons at one-fifth of
21 the total term. Section 3043.2(b) of the regulations previously conformed to this limit but
22 has been amended to flout it. Penal Code section 2933.2 forbids credits altogether for
23 prisoners convicted of murder of any degree with or without additional circumstances, but
24 section 3043.2(d)(1) of the Regulations limits that restriction to those sentenced to death or
25 life without parole. That is a subset of convicted murderers, primarily those convicted of
26 first-degree murder with special circumstances plus a few other special cases. (See Pen.
27 Code, §§ 190, 190.03, 190.05, 190.2.)

28 52. Article I, section 32, as added to the California Constitution by Proposition
57, gave CDCR the power to “award credits” to inmates and to “adopt regulations in

1 furtherance of these provisions.” Proposition 57 did not expressly invert the established
2 rule that regulations are subordinate to statutes, even when the regulatory authority is
3 derived from the Constitution. (See *Harris v. Alcoholic Beverage Control Appeals Board*
4 (1964) 228 Cal.App.2d 1, 6.) CDCR is an executive branch agency and it possesses no
5 legislative power. California Constitution Article III, section 3 requires separation of
6 legislative power from executive power. CDCR’s authority to regulate must stay within
7 the confines of the Penal Code.

8 53. A judicial declaration invalidating the Regulations for failing to
9 substantially comply with the APA and for violating Article III, section 3 of the California
10 Constitution and a permanent injunction against enforcement of such Regulations are
11 necessary and appropriate at this time, as Defendants are currently enforcing such
12 Regulations.

13 **FOURTH CAUSE OF ACTION**

14 **(Invalid Revision)**

15 54. Plaintiffs reallege and incorporate by reference Paragraphs 1 through 33,
16 inclusive, of this Complaint as if fully set forth herein.

17 55. If Article I, section 32, subd. (a)(2) is construed to provide CDCR with the
18 unfettered authority to repeal existing statutory law, it would amount to “a fundamental
19 change in our preexisting governmental plan.” (*Raven v. Deukmejian* (1990) 52 Cal.3d
20 336, 355.) Such a construction would amount to a revision, rather than an amendment, of
21 the California Constitution rendering it invalid. (*Ibid.*) The California Constitution can
22 only be amended, not revised, by initiative. (Cal. Const., art. XVIII.) A revision requires
23 convening “a constitutional convention and obtaining popular ratification.” (*Raven, supra*,
24 52 Cal. 3d at p. 349.)

25 56. Plaintiffs are entitled to a judicial declaration that Article I, section 32 was not
26 validly adopted and that all Regulations promulgated under it are void and to a permanent
27

1 injunction against enforcement of such Regulations.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiffs pray for relief as follows:

4 1. For a declaration that CDCR's Regulations are invalid and unenforceable;

5 2. For a permanent injunction prohibiting Defendants from enforcing the
6 Regulations;

7 3. In the event that article I, section 32 of the Constitution is construed to authorize
8 regulations contrary to statutes, a declaration that this section was not validly adopted and is
9 void and a permanent injunction against enforcing any regulations promulgated under it;

10 4. For an award of costs and of attorneys' fees to the Victims' Rights Organization
11 Plaintiffs pursuant to section 1021.5 of the Code of Civil Procedure, and

12 5. For such other and further relief as this Court deems just and proper.

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16 ///

17 Dated: August 18, 2021

Respectfully Submitted,

18 ANNE MARIE SCHUBERT
19 District Attorney of Sacramento County
20 ROD NORGAARD
21 Chief Deputy

22 

23 ALISSA KUBOCHI
24 Deputy District Attorney
25 *Attorneys for District Attorney Plaintiffs*

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27 ///

KENT S. SCHEIDEGGER
THOMAS W. HILTACHK


KYMBERLEE C. STAPLETON

Attorneys for Victims' Rights Organization Plaintiffs

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

Are Mary Elvins

ANNE MARIE SCHUBERT
District Attorney
Sacramento County

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



ALISSA KUBOCHI

IN THE MATTER OF: Schubert, et al. v. CDCR
SUPERIOR COURT NO.: 34-2021-00301253
DEPT.: ROOM 102

PROOF OF SERVICE

I AM A CITIZEN OF THE United States and a resident of the State of California; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 901 G Street, Sacramento, California 95814.

On 8/18/2021, I served the enclosed:

**FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the District Attorney at 901 G Street, Sacramento, Ca 95814, as well as by email where indicated, addressed as follows:

Office of the State Attorney General
Michael J. Quinn
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Michael.Quinn@doj.ca.gov

Office of the State Attorney General
Anthony Tartaglio
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Anthony.Tartaglio@doj.ca.gov

And by hand delivering a true copy thereof to:

Superior Court of California
County of Sacramento
720 9th Street, Room 102
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

DATED: 8/18/2021

Megan Caster
Megan Caster