In the Supreme Court of the State of California

In re

MOHAMMAD MOHAMMAD,

On Habeas Corpus.

Case No. S259999

Second Appellate District, Division Five, Case No. B295152
Los Angeles County Superior Court, Case No. BH011959
The Honorable William C. Ryan, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

Proposition 57 amended the California Constitution to provide for early parole consideration for persons convicted of nonviolent felonies. Does the text of Proposition 57 both preclude consideration of the ballot materials to discern the voters' intent and prohibit the Department of Corrections and Rehabilitation from enacting implementing regulations that exclude inmates who stand convicted of both nonviolent and violent felonies from early parole consideration?

INTRODUCTION

When the Governor introduced Proposition 57 to the voters, he assured them that "[v]iolent criminals as defined in Penal Code 667.5(c) are excluded" from the proposed parole program. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) rebuttal to argument against Prop. 57, p. 59.) Proposition 57 passed, and the Department of Corrections and Rehabilitation issued regulations implementing that promise. The regulations thus exclude inmates currently serving a term of incarceration for a violent felony listed in Penal Code section 667.5 from nonviolent parole, even when the inmate has also been convicted of a felony not listed in that section. (Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).)

Mohammad is such a mixed-offense inmate. He is currently serving a sentence for robbery, and is therefore a "violent criminal[] as defined in Penal Code 667.5(c)." (Voter Information Guide, *supra*, rebuttal to argument against Prop. 57, at p. 59.) Because Mohammad was also sentenced at the same time for an

offense not listed in Penal Code section 667.5, however, he contends that he should eligible for the nonviolent parole program under the terms of Proposition 57 because he is a "person convicted of a nonviolent felony offense." (Cal. Const., art. I, § 32.)

Proposition 57 flatly precludes that result, and the Department therefore was required to exclude inmates like Mohammad who are currently serving a sentence for a violent felony listed in Penal Code section 667.5. Applying traditional rules of construction, the text of Proposition 57 (Cal. Const., art. 1, § 32) by itself is ambiguous because it does not speak to the eligibility of mixed-offense inmates. The text must therefore be read together with the ballot materials to discern voter intent. In the ballot materials, the voters were assured that inmates convicted of the violent felonies listed in section 667.5 would not be included in the nonviolent parole program. Further, including mixed-offense inmates like Mohammad would extend program eligibility to most of the State's prison population, well beyond the numbers estimated in the ballot materials. And including mixed-offense offenders would have the perverse effect of benefitting inmates who have been convicted of *more* crimes: An inmate who committed only a violent felony would not be eligible, but an inmate who committed a violent felony *plus* any nonviolent offense would be. The Department's mixed-offense exclusion, as applied to inmates like Mohammad, prevents those arbitrary results and is necessary to conform to voters' intent.

Even assuming the Department had discretion to promulgate some different mixed-offense inmate regulation, the Department did not clearly overstep its authority in excluding mixed-offense inmates like Mohammad. The voters were repeatedly assured that the program would be limited to nonviolent offenders and would keep "dangerous criminals behind bars." The regulations reasonably accomplish that pledge, excluding a class of inmates serving sentences for convictions on "extraordinary crimes of violence against a person" identified in Penal Code section 667.5. (Penal Code, § 667.5, subd. (c).)

The Court should reverse the judgment below and hold that Mohammad is ineligible for Proposition 57's nonviolent parole program.

BACKGROUND

A. Prison Overcrowding and Proposition 57

Beginning in the 1980s and over the course of several decades, California saw its prison population "explode[] by 500%." (Voter Information Guide, *supra,* argument in favor of Prop. 57, p. 58.)[1] Prisons were operating at double their design capacity, "imperiling the safety of both correctional employees and inmates." (*Brown v. Plata* (2011) 563 U.S. 493, 502.) State

[1] The Department filed excerpts from the Official Voter Information Guide pertaining to Proposition 57 as Exhibit 2 to the return to the order to show cause filed in the Court of Appeal. An archived version of the Voter Guide is also available at <https://tinyurl.com/v7k2kgu> [as of April 29, 2020].

prisoners began to file federal lawsuits challenging conditions as early as 1990, alleging that overcrowding hindered the State's ability to provide adequate care to the mentally ill and to treat inmates with serious medical conditions. (*Plata*, *supra*, 563 U.S. at pp. 506-509.) In two companion cases, a three-judge court ordered the State to reduce its prison population by tens of thousands by 2013 or risk court-ordered release of state inmates. (*Id.* at p. 510.)

To avoid this result, the State took various measures to reduce its prison population. The Legislature passed Assembly Bill 109, which shifted "responsibility for criminals who commit 'non-serious, non-violent, and non-registerable sex crimes' from the state prison system to county jails." (*Coleman v. Brown* (E.D. Cal. 2013) 952 F.Supp.2d 901, 912.) The Legislature also enacted Senate Bill X3 18, which authorized a non-revocable parole program, ensuring that some inmates on parole would not be returned to prison for violating the conditions of release. (*Id.* at p. 912, fn. 7; Pen. Code, § 3000.03.) The State additionally implemented a court-ordered parole program, which offered "non-violent, non-sex registrant, second-strike offenders" the opportunity to seek parole once they served 50 percent of their sentence. (See *Coleman v. Brown* (E.D. Cal. Dec. 1, 2014, No. 90-CV-520) Dkt. 2826 (Def. Report on New Parole Process);[2] see generally *In re Ilasa* (2016) 3 Cal.App.5th 489, 501-503.) Through these efforts and others, California successfully reduced

[2] Available at <https://tinyurl.com/rxs64xt> [as of April 29, 2020].

its prison population by tens of thousands by 2016. (*Coleman*, *supra*, 952 F.Supp.2d at p. 912.)

Despite those achievements, without a "durable remedy," the risk of court-ordered release of inmates persisted. (*Coleman v. Brown* (E.D. Cal. 2013) 922 F.Supp.2d 1004, 1043.) Then-Governor Edmund G. Brown Jr. introduced Proposition 57, the Public Safety and Rehabilitation Act of 2016, to address prison overcrowding while keeping dangerous offenders in custody. The Governor proposed an amendment to the California Constitution to "significantly modify parole consideration" for state prisoners. (*Brown v. Superior Court* (2016) 63 Cal.4th 335, 341.) The initiative proposed to amend the California Constitution to add Article I, section 32 to the Constitution, to read (in full):

> (a) The following provisions are hereby enacted to enhance public safety, improve rehabilitation, and avoid the release of prisoners by federal court order, notwithstanding anything in this article or any other provision of law:
>
> (1) Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense.
>
> (A) For purposes of this section only, the full term for the primary offense means the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence.
>
> (2) Credit Earning: The Department of Corrections and Rehabilitation shall have authority to award

> credits earned for good behavior and approved rehabilitative or educational achievements.
>
> (b) The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety.

(Voter Information Guide, *supra*, text of Prop. 57, § 2, p. 141.) The preamble to the amendment asserted that the measure would "[p]rotect and enhance public safety"; "[s]ave money by reducing wasteful spending on prisons"; "[p]revent federal courts from indiscriminately releasing prisoners"; "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles"; and "[r]equire a judge not a prosecutor, to decide whether juveniles should be tried in adult court." (*Ibid.*)

In the ballot materials, the Governor advised voters that Proposition 57 offered a "common sense, long-term solution" to prison overcrowding by allowing "parole consideration for people with non-violent convictions who complete the full prison term for their primary offense." (Voter Information Guide, *supra*, argument in favor of Prop. 57, p. 58.) According to the Governor, the measure would serve its inmate-reduction purpose but still "keep[] dangerous criminals behind bars," "keep[] the most dangerous offenders locked up," and apply "only to prisoners convicted of non-violent felonies." (*Ibid.*)

Opponents contended that Proposition 57 was "poorly drafted" (Voter Information Guide, *supra*, argument against

Proposition 57, at p. 59), and that its non-violent parole program would "APPL[Y] TO VIOLENT CRIMINALS," just "because [Proposition 57's] authors call [the inmate] non-violent." (*Id.* at p. 58.) They urged voters to reject the proposition, warning, "Don't allow more violent and dangerous criminals to be released early." (*Id.* at p. 59.)

The Governor in rebuttal assured voters that Proposition 57 "does NOT authorize parole for violent offenders," and specifically stated that "[v]iolent criminals as defined in Penal Code 667.5 are excluded from parole." (Voter Information Guide, *supra*, rebuttal to argument against Proposition 57, at p. 59.) The Governor also explained that Proposition 57 would be "implemented" "through Department of Corrections and Rehabilitation regulations developed" only after "public and victim input and certified as protecting public safety." (*Ibid.*)

As relevant here, the Legislative Analyst observed that the text of Proposition 57 did not "specify which felony crimes are defined as nonviolent." (Voter Information Guide, *supra*, analysis by Legislative Analyst, at p. 56.) To disclose practical effects, however, the Legislative Analyst assumed that a "nonviolent felony offense would include any felony offense that is not specifically defined" as a "violent felony" in Penal Code section 667.5. (*Ibid.*)[3] Based on this assumption, the Legislative

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[3] There is no general definition of "nonviolent felony" in the California Penal Code. The Penal Code defines "violent felony" in section 667.5, subdivision (c), for the purpose of imposing sentencing enhancements. It includes crimes like murder, robbery, arson and certain rapes. (Pen. Code, § 667.5, subd. (c).)

Analyst estimated that of the State's 128,000 inmates, approximately 30,000 (or less than a quarter of existing inmates)—and an additional 7,500 inmates a year—would become eligible for nonviolent parole consideration. (*Id.* at pp. 54, 56.)

On November 8, 2016, Proposition 57 passed with 64.5% of the vote. (Statement of Vote (Nov. 8, 2016) summary pages, p. 12;[4] see Cal. Const., art. I, § 32.)

B. Department of Corrections and Rehabilitation's Implementing Regulations

The Department initiated a rulemaking process to adopt implementing regulations.[5] Among other things, "[t]he department propose[d] to clarify the definitions for the terms 'nonviolent,' 'full term,' and 'primary offense'" for purposes of the nonviolent parole program. (Cal. Reg. Notice Register 2017, No. 28-Z, pp. 1037, 1039 (July 14, 2017).)[6] As relevant here, the proposed regulations defined a "nonviolent offender" as any

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[4] Available at <https://elections.cdn.sos.ca.gov/sov/2016-general/sov/2016-complete-sov.pdf> [as of April 29, 2020].

[5] The Secretary of the Department exercises plenary authority over "the supervision, management and control of the state prisons" as well as "the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein." (Pen. Code, § 5054.) To these ends, the Legislature vests the Secretary with broad power to "prescribe and amend rules and regulations for the administration of the prisons and for the administration of the parole of persons[.]" (*Id.*, § 5058, subd. (a).)

[6] Available at <https://oal.ca.gov/wp-content/uploads/sites/166/2017/07/28z-2017.pdf> [as of April 29, 2020.].

inmate who had not been sentenced to life in prison, was not "[s]erving a term of incarceration for a 'violent felony,'" and was not convicted of a registrable sex offense. (2017 Cal. Reg. Text 462644, § 3490, subd. (a) (July 14, 2017).) The Department proposed to define "violent felony" to mean a "crime or enhancement" set out in Penal Code section 667.5, subdivision (c). (*Id.*, § 3490, subd. (c).)

At the time the proposed regulations were open to public comment, they specifically included in the definition of "nonviolent offender" a small class of inmates who had been convicted of both violent and nonviolent felonies. The proposed definition of a "nonviolent offender" included (1) "an inmate who has completed a determinate term of incarceration for a violent felony and is currently serving a concurrent term for a nonviolent felony offense" and (2) an "inmate who has completed a determinate or indeterminate term of incarceration and is currently serving a determinate term for a nonviolent in-prison offense." (*Id.*, § 3490, subds. (b)(1) and (b)(2).)[7] Thus, under the proposed regulations, an inmate convicted of both a violent felony offense and another offense who had completed his sentence for a violent felony—but was still serving the portion of a sentence attributable to a concurrent offense not listed in section 667.5—would be eligible for early parole consideration. But an inmate who had not completed the violent-felony portion of a concurrent

[7] Neither of these scenarios describes Mohammad's situation; he received nine *consecutive* sentences for his robbery conviction. Robbery is listed as a violent felony in Penal Code section 667.5.

sentence would be ineligible. Mixed-offense inmates who were sentenced to consecutive terms for a violent and nonviolent offense also were ineligible.

The Department received 41,000 comments from approximately 12,000 organizations and members of the public. (Dept. of Corrections and Rehabilitation, Final Statement of Reasons, Inmate Credit Earning and Parole Consideration (Apr. 30, 2018) at p. 1.)[8] Several comments addressed the eligibility of inmates convicted of both violent felony and other offenses. One commenter supported the proposed regulations, agreeing that inmates with "[m]ixed [s]entences should be eligible for parole consideration after completing their violent sentence time." (*Id.*, commenter S1665-S1670, cmt. 5 at p. 760; see also *id.*, commenter S1311.1 at p. 393.) Another thought the Department should expand eligibility further, so that "a person, who is serving a violent offense term with a nonviolent term, should be eligible for parole consideration," whether or not the inmate had finished the sentence for a concurrently sentenced violent felony offense. (*Id.* commenter A21.1 at p. 1381.)

Others disagreed with the Department's approach and believed that conviction of any violent felony offense should be disqualifying. One commenter, for example, stated that the proposed regulations would "betray[] the citizens of California

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[8] The Department has concurrently filed a Motion for Judicial Notice, attaching the Final Statement of Reasons (Ex. A), excerpts of the Department's Standard Responses (Ex. B), and excerpts of comments bearing on the nonviolent parole regulations (Ex. C).

because the citizens voted for a proposition that would not release violent offenders early" and argued that "if an inmate is convicted of both a violent and nonviolent offense, the inmate [should] be ineligible for early release." (*Id.*, commenter E1095.1 at p. 432.) Another disagreed "that a person who stands convicted of a violent crime [should] be considered a 'nonviolent offender,' because they are also convicted of a nonviolent offense." (*Id.*, commenter E572.4 at p. 440; see also *id.*, commenter S770.2 at p. 284; *id.*, commenter S203.1 at p. 992 ["[T]he proposed regulations impermissibly expand the definition of the term 'nonviolent offense' to include inmates who have completed a term for a violent offense and are now serving a determinate term for a nonviolent offense. This 'turns violent offenders into nonviolent' which circumvents the intent of Proposition 57"].)

In response, the Department revised its regulatory approach "to exclude inmates from the parole consideration process if they are concurrently sentenced to a violent felony and a nonviolent felony, regardless of which term may be completed first." (*Id.* at standard response #19, at p. 63.) "As a result, inmates who have completed a determinate term of incarceration for a violent felony and who are currently serving a concurrent term for a nonviolent felony will no longer be eligible for parole consideration under the proposed amendments." (*Ibid.*) The regulations continued to exclude mixed-offense inmates, like Mohammad, consecutively sentenced to a violent felony and a nonviolent felony from parole consideration. (*Id.* at p. 62.)

The final regulations define a nonviolent offender eligible for the nonviolent parole program as an inmate who is not: (1) condemned to death; (2) incarcerated to a term of life without the possibility of parole; (3) serving a term of life with the possibility of parole; (4) serving a determinate term prior to beginning a term of life with the possibility of parole, or prior to beginning a term for an in-prison offense that is a "violent felony"; (5) currently serving a term of incarceration for a "violent felony"; or (6) currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent term for a "violent felony." (Cal. Code Regs., tit. 15, § 3490, subds. (a)(1)-(a)(6).)[9] A nonviolent offender includes an inmate who has "completed a determinate or indeterminate term of incarceration" for any offense, but "is currently serving a determinate term for an in-prison offense that is not a 'violent felony.'" (*Id.*, § 3490, subd. (b).) A "violent felony" is a "crime or enhancement as defined in subdivision (c) of Section 667.5 of the Penal Code." (*Id.*, § 3490, subd. (c).) Inmates who do not fall into one of the excluded categories are eligible for nonviolent parole

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[9] Similar definitions apply to inmates serving indeterminate sentences. (Cal. Code Regs., tit. 15, § 3495, subd. (a).) After the initial notice and comment periods, the regulations were amended for reasons that are not relevant here. (See *In re Edwards* (2018) 26 Cal.App.5th 1181; *In re McGhee* (2019) 34 Cal.App.5th 902.) This Court is also currently reviewing the exclusion of individuals required to register as sex offenders under Penal Code 290 from the nonviolent parole program. (*In re Gadlin* (2019) 31 Cal.App.5th 784, review granted May 15, 2019, S254599.)

consideration by the Board of Parole Hearings. (*Id.*, §§ 3490-3497.)

STATEMENT OF THE CASE

In January 2012, Mohammad was sentenced to an aggregate sentence of 29 years on 15 counts, consisting of six counts of receipt of stolen property (Penal Code, § 496, subd. (a)) and nine counts of robbery (Penal Code, § 211). (Ret. to Order to Show Cause, C.A. No. B295152, Exh. 1.) Robbery is listed as a violent felony in Penal Code section 667.5, subdivision (c), but receiving stolen property is not. (Penal Code, § 667.5, subd. (c).) The trial court imposed consecutive sentences on all counts. (Ret. to Order to Show Cause, C.A. No. B295152, Exh. 1.) The "full term" of Mohammad's "primary offense"—the longest term of imprisonment imposed by the court for any offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence (Cal. Const., art. I, § 32, subd. (a)(1)(A))—was three years on Count 11 for receiving stolen property. (Ret. to Order to Show Cause, C.A. No. B295152, Ex. 1.) Mohammad also received subordinate consecutive sentences of eight months on his five other counts of receiving stolen property, and consecutive one-year sentences on his nine counts of robbery. (*Ibid.*)[10]

Four years after Mohammad's sentencing, the voters passed Proposition 57, and Mohammad requested nonviolent parole

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[10] Mohammad also received gang sentencing enhancements on six counts. (Ret. to Order to Show Cause, C.A. No. B295152, Ex. 1.)

consideration. (Am. Petn. for Writ of Habeas Corpus, C.A. No. B295152, at pp. 9-11.) The Department denied Mohammad's request. Because Mohammad's aggregate sentence included consecutive sentences for violent felonies under section 667.5, Mohammad was ineligible under section 3490, subdivision (a)(5) of the regulations because he was "currently serving a term of incarceration for a 'violent felony.'" (Petn. for Writ of Habeas Corpus, C.A. No. B295152, Exh. B-1, at p. 30, citing Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).) Mohammad unsuccessfully pursued administrative appeals. (Am. Petn. for Writ of Habeas Corpus, C.A. No. B295152, at pp. 9-11.)

Mohammad filed a petition for a writ of habeas corpus, which the trial court denied. (Am. Petn. for Writ of Habeas Corpus, C.A. No. B295152, at p. 10.) The court concluded that the regulations excluded Mohammad from nonviolent parole consideration. (Petn. for Writ of Habeas Corpus, C.A. No. B295152, at p. 7; citing Cal. Code Regs., tit. 15, § 3490, subds. (a)(5) & (a)(6).) Because Mohammad had been consecutively sentenced for robbery, the trial court deemed Mohammad to be currently serving a term of incarceration for a violent felony under Penal Code section 667.5 and ineligible for the nonviolent parole program. (*Id.* at p. 8.)[11]

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[11] The trial court also denied the petition under subdivision (a)(6) of section 3490. (Petn. for Writ of Habeas Corpus, C.A. No. B295152, at p. 8.) Mohammad inaccurately claimed he had completed his sentence on all nine robbery counts and was therefore eligible for nonviolent parole consideration. The trial court determined that this assertion was not correct and

Mohammad renewed his petition in the Court of Appeal. (*In re Mohammad* (2019) 42 Cal.App.5th 719, 724.) The court granted relief in a published opinion, directing the Department to provide Mohammad parole consideration. The court also ordered the Department to "treat as void and to repeal" subdivision (a)(5) of section 3490 of the regulations, to the extent the regulation barred inmates similarly situated to Mohammad from being considered for nonviolent parole. (*Id*. at p. 729.)

The Court of Appeal based its decision on the text of section 32, subdivision (a)(1) alone, which provides that "[a]ny person convicted of a nonviolent felony offense … shall be eligible for parole hearings after completing the full term of his or her primary offense." The Court of Appeal relied on the provision's use of the article "a" preceding "nonviolent felony offense." "Section 32(a) grants eligibility for early parole consideration to '[a]ny person convicted of a nonviolent felony offense ... after completing the full term of his or her primary offense,' and the use of the singular 'a' in a sentence that expressly contemplates criminals would be sent to prison for more than one offense means any nonviolent felony offense component of a sentence will suffice." (*In re Mohammad*, *supra*, 42 Cal.App.5th at p. 725; see

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concluded that Mohammad therefore remained ineligible. Even assuming the robbery sentences had been imposed concurrent to terms for his receipt of stolen property offenses, the trial court observed that Mohammad would still be ineligible for nonviolent parole because the "regulations also exclude inmates serving a term for a nonviolent offense after completing a concurrent determinate term for a violent felony." (*Ibid.*; citing Cal. Code Regs., tit. 15, § 3490, subd. (a)(6).)

also *id.* at p. 726 ["The phrase 'a nonviolent felony offense' takes the singular form, which indicates it applies to an inmate so long as he or she commits 'a' single nonviolent felony offense—even if that offense is not his or her only offense."].)

The court also reasoned that the term "primary offense" shows that the "provision assumes an inmate might be serving a sentence for more than one offense, i.e., a primary offense and other secondary offenses." (*In re Mohammad*, *supra*, 42 Cal.App.5th at p. 726.) It noted that nothing in the Constitution's text expressly excludes inmates with secondary violent offenses from the scope of the provision. (*Ibid.*) Moreover, the court observed that section 32, subdivision (a)(1)(A) defines "full term for the primary offense" to mean "the longest term of imprisonment imposed by the court for any offense, *excluding the imposition of an enhancement*, [a] *consecutive sentence*, or [an] alternative sentence." (*Ibid*, italics in original.) According to the court, "nothing in the Constitution's text suggests a 'consecutive sentence' is disqualifying if it is a consecutive term for a violent felony." (*Ibid.*) In the court's view, that silence meant that mixed-offense inmates are entitled to nonviolent parole consideration. (*Ibid.*)

According to the Court of Appeal, the text of section 32 was clear and unambiguous. "[U]nder sections 32(a)(1) and 32(a)(1)(A), an inmate who is serving an aggregate sentence for more than one conviction will be eligible for" early parole consideration "if one of those convictions was for 'a' nonviolent felony offense." (*In re Mohammad*, *supra*, 42 Cal.App.5th at p.

726.) "There is just no escaping the conclusion that the text … obviously contemplates inmates would be sent to prison for more than one criminal offense and would qualify for early parole consideration if one of those offenses was a nonviolent offense." (*Id.* at p. 727.) The court therefore declined to consider ballot materials or any other extrinsic evidence to assess whether its construction aligned with voter intent. "There is nothing ambiguous about what section 32(a)(1) means in this case, and there is accordingly no cause to look beyond the text to ballot materials or other extrinsic evidence of the voters' intent." (*Ibid.*)

This Court granted the Department's timely petition for review.

ARGUMENT

I. PROPOSITION 57 PRECLUDES NON-VIOLENT PAROLE CONSIDERATION FOR INMATES CURRENTLY SERVING A SENTENCE FOR PENAL CODE SECTION 667.5 FELONIES

The Department was required to exclude mixed-offense inmates who are currently serving sentences for violent felonies listed in Penal Code section 667.5 from Proposition 57's nonviolent parole program. In the Department's view, an overly literal reading of Proposition 57, subdivision (a)—where inmates are automatically eligible for the nonviolent parole program if they have been convicted of *a* nonviolent offense—does not comport with the voters' intent. The text and context suggest that Proposition 57 is sufficiently ambiguous to require an examination of the ballot materials to discern voters' intent. In the voter guide, the Governor clearly informed voters that

inmates convicted of violent felonies listed in Penal Code section 667.5 would not be eligible for the nonviolent parole program. Voters were told that "[v]iolent criminals as defined in Penal Code 667.5(c) are excluded from parole," and the Department's regulations adhere to those limits. (Voter Information Guide, *supra*, rebuttal to argument against Prop. 57, at p. 59.)

Further, including mixed-offense inmates like Mohammad would cause the program to encompass nearly all the current inmate population, contrary to the more limited numbers disclosed to the voters by the Legislative Analyst. Such an interpretation would also lead to the anomalous result that an inmate who has been convicted of *more* crimes—a nonviolent felony plus a violent felony—would be entitled to an accommodation not afforded to an inmate who has been convicted of only a violent felony. This is not what the voters intended in enacting Proposition 57.

A. The Text and Statutory Context of Proposition 57 Do Not Expressly Address the Eligibility of Mixed-Offense Inmates Currently Serving a Sentence for a Section 667.5 Felony

Article I, section 32, subdivision (a)(1) of the California Constitution provides in full: "Parole Consideration: Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (Cal. Const., art. I, § 32, subd. (a)(1).) The "full term for the primary offense means the longest term of imprisonment imposed by the court for any

offense, excluding the imposition of an enhancement, consecutive sentence, or alternative sentence." (Cal. Const., art. I, § 32, subd. (a)(1)(A).) The question is whether this text is so clear and unambiguous that the Department should not have—and this Court cannot—look beyond the text of article I, section 32, subdivision (a) in discerning the voters' intent. A reasonable reading of this subdivision, viewed in context, shows that the voters' intent cannot be discerned from the text alone.

When interpreting voter initiatives, a court's "primary task" is "to ascertain the intent of the electorate … so as to effectuate that intent." (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 978-979; see also *People v. Gonzales* (2018) 6 Cal.5th 44, 50 ["Our principal objective is giving effect to the intended purpose of the initiative's provisions."]; *Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933 ["primary concern is giving effect to the intended purpose of the provisions at issue"].) Courts look "first to the words of the initiative measure, as they generally provide the most reliable indicator of the voters' intent." (*Arias*, *supra*, 46 Cal.4th at p. 979.) In doing so, a court ascribes "to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme." (*Cal. Cannabis Coalition*, *supra*, 3 Cal.5th at 933.)

If the language is clear and unambiguous, the "plain meaning of the language governs." (*People v. Colbert* (2019) 6 Cal.5th 596, 603.) Still, this Court has been cautious about truncating its analysis at the initiative's text. This Court has

often discouraged narrow and literalist interpretations where it would work against the purpose of an initiative or statute. (See, e.g., *City of Alhambra v. County of Los Angeles* (2012) 55 Cal.4th 707, 726 [explaining that literal construction cannot prevail over contrary legislative intent].)[12] A literal construction of an initiative will not control when "such a construction would frustrate the manifest purpose of the enactment as a whole." (*Arias*, *supra*, 46 Cal.4th at p. 979.) Courts do not adhere to "a strict, literal interpretation of its words"; they instead strive for "a practical commonsense construction consistent" with the probable intent of the framers. (*Provigo Corp. v. Alcoholic Beverage Control App. Bd.* (1994) 7 Cal.4th 561, 567.) "'The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*Ibid.*, quoting *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735; see also *Calatayud v. State of Cal.* (1998) 18 Cal.4th 1057, 1068 [rejecting literal interpretation when it did not "conform to the spirit of the act"].)

The text of section 32, subdivision (a) does not explicitly address the eligibility of mixed-offense inmates currently serving a sentence for a violent felony listed in Penal Code section 667.5,

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[12] See also *Baker v. Workers' Comp. App. Bd.* (2011) 52 Cal.4th 434, 444-445 [rejecting literal construction that Legislature did not intend]; *Arias*, *supra*, 46 Cal.4th at p. 979; *Webster v. Superior Court* (1988) 46 Cal.3d 338, 344; *Laurel Heights Improvement Assn. v. Regents of U. of Cal.* (1988) 47 Cal.3d 376, 401-402; *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245.

and cannot be said to plainly and unambiguously apply to them. On the one hand, section 32, subdivision (a)(1) can be read, as the Court of Appeal did, to apply to mixed-offense inmates. The provision applies to "*any* person" who has been "convicted of *a* nonviolent felony offense," once that inmate has completed the full term of his primary offense. (Cal. Const., art. I, § 32, subd. (a)(1)(A), italics added.) Together, "any" and "a" could in theory be read to require parole consideration for every person convicted of at least one singular nonviolent felony offense, including inmates who also have been convicted of a violent felony offense. That is the conclusion adopted by the court below. (*In re Mohammad*, *supra*, 42 Cal.App.5th at p. 725; *id.* at 726 ["The phrase 'a nonviolent felony offense' takes the singular form, which indicates it applies to an inmate so long as he or she commits 'a' single nonviolent felony offense—even if that offense is not his or her only offense."].)

That reading may find additional support in the definition of the clause "full term for the primary offense," as the court below reasoned. (*In re Mohammad*, *supra*, 42 Cal.App.5th at p. 726.) That provision assumes that an inmate may have been convicted of other, non-primary offenses, resulting in potential consecutive sentences. (Cal. Const., art. I, § 32, subd. (a)(1)(A).) And section 32, subdivision (a)(1), does not explicitly limit parole eligibility to those convicted of "only" nonviolent felony offenses, and says nothing about disqualifying individuals with violent secondary or other offenses. Stopping at the text of section 32, subdivision (a), the Court of Appeal concluded that the silence

was intentional: The failure to *exclude* mixed-offense inmates meant voters deliberately *included* them within the scope of Proposition 57's reforms when it used the terms "any" and "a." (*In re Mohammad*, *supra*, 42 Cal.App.5th at p. 726.)

But that is not the only—or even most reasonable—reading of section 32, subdivision (a)(1). It could also be construed to apply to inmates who were convicted solely of nonviolent offenses, and not to apply to inmates convicted of both violent and nonviolent offenses. The absence of express instructions on how to treat mixed-offense inmates is more reasonably interpreted to "reveal[] ambiguities" sufficient to justify a broader inquiry into the voters' intent. (See *In re Reeves* (2005) 35 Cal.4th 765, 770.) Instead of taking textual silence as evidence of a deliberate choice on the part of the voters, silence should instead suggest that "the terms of a statute provide no definitive answer" to its interpretation and is therefore ambiguous. (*People v. Hazelton* (1996) 14 Cal.4th 101, 105.)

This Court's approach in *Reeves* is instructive. There, the Court considered whether limits to worktime custodial credits for inmates convicted of a violent felony also limited an inmate's ability to accrue credits if he had been concurrently sentenced on both nonviolent and violent felony offenses. (*In re Reeves*, *supra*, 35 Cal.4th at pp. 768-769.) The statute provided that "any person who is convicted of a [violent felony] shall accrue no more than 15% of worktime credit[.]" (*Id.* at p. 768.) Like Proposition 57, the statute at issue in *Reeves* was silent as to the treatment of inmates with both nonviolent and violent

convictions. The "seemingly plain language" could be construed to limit worktime credits for both an inmate's nonviolent and violent sentences, or not apply to any part of the inmate's nonviolent felony offense, or to support "[o]ther possible interpretations," as well. (*Id.* at p. 770.) Whatever the force of any one construction, this Court held as a threshold matter that "the conclusion that [the statute] is ambiguous, at least as applied to the facts of this case, seems inescapable." (*Id.* at pp. 770-771.) Just as in *Reeves*, section 32's silence about its application to mixed-offense inmates may not reflect any considered intent (*id.* at p. 770); it is "reasonably susceptible of more than one meaning" and therefore ambiguous (*Arias*, *supra*, 46 Cal.4th at p. 979 see also *Gonzales*, *supra*, 6 Cal.5th at p. 52.)

The statutory context, too, confirms ambiguity. To ensure the voters' intent is carried out, this Court has regularly found ambiguity in seemingly clear language when "considered in the context of the statute and initiative as a whole." (*People v. Valencia* (2017) 3 Cal.5th 347, 358.) Thus, even where words "may appear clear and unambiguous when viewed in isolation," this Court has observed that "ambiguity regarding the intended meaning" may become "apparent when this language is viewed in context." (*Id.* at p. 360.)[13] That context can include an uncodified

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[13] See also *Colbert*, *supra*, 6 Cal.5th at p. 603 ["unadorned" language alone cannot establish that a statute is unambiguous]; *Hazelton*, *supra*, 14 Cal.4th at p. 105 [provision ambiguous when "read in the context" of the statute as a whole]; *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 818 [though the term "governing body" may be clear in isolation, it is ambiguous

preamble, statements of purpose and intent, and introductory provisions. (*Id*. at p. 362.) When the "central objectives" of an initiative "appear[] inconsistent" with a plain reading of statutory language, this Court has concluded that it is ambiguous. (*Valencia*, *supra*, 3 Cal.5th at pp. 363-364; see also *id.* at p. 363 [observing that literal interpretation of language was in tension with assurances in preamble that measure would not reduce sentences on dangerous crimes].)

The larger context here confirms that the text of section 32, subdivision (a)(1) is ambiguous and could be read to exclude mixed-offense inmates serving sentences for violent felonies listed in Penal Code section 667.5. The text of the provision focuses on individuals "convicted of a *nonviolent* felony offense," signaling attention to a class of nonviolent individuals who may be considered for parole consistent with the proposition's stated purposes. (Cal. Const., art. I, § 32, subd. (a)(1), italics added.) The constitutional context also speaks to the overriding importance of public safety. The preamble to section 32 states that one "[p]urpose and intent" of the initiative is to "[p]rotect and enhance public safety" and "[p]revent federal courts from indiscriminately releasing prisoners." (Voter Information Guide, *supra*, text of Prop. 57, § 2, at p. 141.) The same is said in section 32 itself, which declares that the provisions "are hereby enacted to enhance public safety, improve rehabilitation, and

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when considered in the context of the statute]; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249 [meaning of constitutional amendment ambiguous in context of the whole Constitution].

avoid the release of prisoners by federal court order[.]" (Cal. Const., art. I, § 32, subd. (a).) Subdivision (b), too, requires the Department to "adopt regulations in furtherance of" section 32, while also certifying "that these regulations protect and enhance public safety." (Cal. Const., art. I, § 32, subd. (b).)

Requiring the Department to implement a broad program that extends nonviolent parole consideration to individuals serving sentences for violent felonies identified in Penal Code section 667.5 would be in tension with those stated goals. Crimes listed in Penal Code section 667.5 have been singled out by the Legislature as particularly dangerous. The Legislature in Penal Code section 667.5, subdivision (c), stated that it "finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person." (Penal Code, § 667.5, subd. (c).) Similarly, in 1980, when it amended other sections of the Penal Code, the Legislature stated that the "legislative intent in enacting subdivision (c) of Section 667.5 of the Penal Code was to identify these 'violent felonies' and to single them out for special consideration in several aspects of the sentencing process." (Stats. 1980, ch. 132, § 1(b), p. 305; *People v. Henson*, (1997) 57 Cal.App.4th 1380, 1385–86.)

The text and context thus "reveal[] ambiguities" sufficient to justify a broader inquiry into the voters' intent on how to treat mixed-offense inmates. (*In re Reeves*, *supra*, 35 Cal.4th at p. 770.)

B. Extrinsic Evidence, Practical Results, and Common Sense Confirm the Voters' Clear Intent to Exclude Mixed-Offense Inmates Currently Serving a Sentence for a Section 667.5 Violent Felony Offense

Because the language of Proposition 57 is ambiguous and the terms of the amendment provide "no definitive answer" about its application to mixed-offense inmates, courts "may resort to extrinsic sources" to determine a term's meaning. (*Hazelton*, *supra*, 14 Cal.4th at p. 105.) Those extrinsic sources include "the materials that were before the voters" (*Valencia*, *supra*, 3 Cal.5th at p. 364), and this Court relies "in particular on the analyses and arguments contained in the voter information guide, along with the text of the initiative, in identifying the statute's purpose and determining how it should be construed." (*Briggs v. Brown* (2017) 3 Cal.5th 808, 873 (dis. opn. of Cuellar, J.).)

Inquiry into intent beyond the bare text of a provision is particularly important in the initiative context. As this Court has repeatedly acknowledged, "*the people* reserve to themselves the powers of initiative and referendum." (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 341 [quoting Cal. Const., art. IV, § 1], italics in original.) That power is "one of the most precious rights of our democratic process," and this Court has called it a "solemn duty" to "jealously guard the sovereign people's initiative power." (*Ibid.*)

As this Court has observed, "[v]oters have neither the time nor the resources to mount an in depth investigation of a proposed initiative. Often voters rely solely on the title and summary of the proposed initiative and never examine the actual

wording of the proposal." (*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com.* (1990) 51 Cal.3d 744, 770, quoting *Schmitz v. Younger* (1978) 21 Cal.3d 90, 99 (dis. opn. of Manuel, J.).) To aid voters undertaking the "daunting process of considering a new statute or constitutional amendment at the ballot box, state law directs the Secretary of State to prepare a voter information guide." (*Briggs*, 3 Cal.5th at p. 873 (dis. opn. of Cuellar, J.).) By law, the guide "must include a complete copy of each proposed measure, the arguments and rebuttals for and against, and an analysis prepared by the Legislative Analyst." (*Ibid.*, citing Elec. Code, §§ 9082, 88001.) The guide is often the "primary means by which voters inform themselves about the policy choices in an election, and this [C]ourt considers it a key resource in determining the meaning and validity of the laws enacted by voter initiative." (*Ibid.*; see, e.g., *Valencia*, *supra*, 3 Cal.5th at p. 364.)

The guide here confirms that voters did not intend to include mixed-offense inmates currently serving a sentence for a violent felony listed in Penal Code section 667.5 in the nonviolent parole program enacted by Proposition 57. Voters were specifically promised by the Governor that "[v]iolent criminals as defined in Penal Code 667.5(c) are excluded from parole." (Voter Information Guide, *supra*, rebuttal to argument against Prop. 57, at p. 59.) That promise provides direct evidence that Proposition 57 does not reach mixed-offense inmates serving time for a violent felony offense. (*Ibid.*) And the Governor twice assured voters—invoking this Court's language in *Brown v. Superior*

Court, *supra*, 63 Cal.4th at p. 341—that "parole eligibility under Prop. 57 applies, '*only to prisoners convicted of non-violent felonies.*'" (*Ibid.*, italics in original; see also *id.*, argument in favor of proposition 57, at p. 58.)

Voters were also repeatedly told that the measure would keep "dangerous criminals behind bars," "keep the most dangerous offenders locked up," and "keep[] the most dangerous criminals behind bars." (*Id.*, argument in favor of Prop. 57, at p. 58.) Voters were also promised that Proposition 57 would not "authorize parole for violent offenders." (*Id.*, rebuttal to argument against proposition 57, at p. 59.) The Legislative Analyst's summary also spoke of "nonviolent *offenders*," describing Proposition 57 as a measure to create a program for "parole consideration of nonviolent offenders" four separate times. (Voter Information Guide, *supra*, analysis of Legislative Analyst, at p. 56, italics added.) These more general assurances about keeping dangerous "offenders" and "criminals" in custody are also cues that voters intended to disqualify any inmate convicted of a violent felony from nonviolent parole consideration, regardless of whether he or she had also been convicted of some other offense.

The fact that the Legislative Analyst believed that this parole program was not intended to apply to mixed-offense inmates is also evident from the estimated number of individuals that would be affected. Voters were told that the measure would make approximately 30,000 inmates (of 128,000 in custody) eligible for parole consideration, and that the costs of conducting

"more parole considerations" would not subsume the financial benefits of releasing inmates early. (Voter Information Guide, *supra*, analysis of Legislative Analyst, at pp. 54, 56.) By enacting Proposition 57, voters accepted the costs of granting less than one quarter of the prison population (but still 30,000 inmates) an opportunity to seek early release. (*Ibid.*)

Including mixed-offense inmates expands parole eligibility to nearly all inmates in the Department's custody. In 2019, 90,000 inmates were mixed-offense inmates convicted of at least one violent felony. (Pet. for Review 15.) Thus, 119,375 out of 124,363 inmates housed in 2019 would have an opportunity for release before serving the full sentence imposed by a trial court, if Proposition 57 applied to mixed-offense inmates. (*Ibid.*)[14] Voters were never told that passing Proposition 57 would result in 96% of the prison population becoming eligible for parole consideration because that was not the intent of the initiative. To the contrary, voters could infer from the ballot materials that less than one quarter of the prison population would be eligible and were specifically told that violent offenders would remain in custody.[15]

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[14] The calculation of 119,375 inmates comes from adding the number of mixed-offense inmates plus inmates convicted of only a felony offense that is not listed in section 667.5. (Pet. For Review 15.)

[15] The Legislative Analyst also estimated that individuals eligible for early parole "currently serve about two years in prison before being considered for parole and/or released." (Voter Information Guide, *supra*, analysis by Legislative Analyst, at p. 56.) The analyst predicted that Proposition 57 would

Had voters intended to grant nearly all prisoners the opportunity for early release—except the 4% convicted of only violent felonies—"we would anticipate that this intent would be expressed in some more obvious manner," and not through an inaccurate prediction that less than a quarter of the prison population would qualify. (*People v. Skinner* (1985) 39 Cal.3d 765, 776; see also *Valencia*, *supra*, 3 Cal.5th at p. 364.) "[I]n the case of a voters' initiative," this Court "may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Valencia*, *supra*, 3 Cal.5th at p. 375.) "For a court to construe an

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accelerate parole eligibility by six months, and that "these individuals would serve around one and one-half years in prison before being considered for parole and or/released." (*Ibid.*) The analyst did not predict that someone like Mohammad potentially would be able to avoid 26 years of his 29-year aggregate term. Moreover, whereas the analyst predicted that the average full term for the primary offense would be one and one half years, the minimum sentence for all violent felonies—which the court below recognized would ordinarily be the primary offense—is at least two years in custody, confirming that the analyst believed that only nonviolent offenders were at issue. (See, e.g., Penal Code, § 213, subd. (a)(1)(B)(2) [2, 3 or 5 year sentence authorized for second degree robbery]; § 190 [15 years to life for murder in the second degree]; § 204 [2, 4, or 8 year sentence for mayhem]; § 215 [3, 5, or 9 years for carjacking]; §§ 220, 461 [2, 4, or 6 years for assault with intent to commit felony or burglary in the first degree]; §§ 208, 264, 287, 286, 288, 289, 451 [3, 6 or 8 years for rape, or sodomy or oral copulation of a child, sexual penetration of a child, lewd or lascivious acts with a child, arson of inhabited property, kidnapping]; § 264.1 [5, 7 or 9 years for rape of child]; § 288.5 [6, 12, or 16 years for continuous sexual abuse of a child]; § 11418, subd. (c) [3, 4, or 6 years for use of weapon of mass destruction].)

initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process[.]" (*Id.* at p. 386 (conc. op. of Kruger, J).)

A construction of an initiative should also avoid "anomalous … consequences." (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 280.) As the Court of Appeal itself acknowledged, a literal interpretation leads to unreasonable consequences: "It cannot be, the argument goes, that voters intended a defendant who is convicted of more crimes, i.e., both violent and nonviolent felonies, to be eligible for early parole consideration while a defendant convicted of fewer crimes, i.e., the same violent felony but no nonviolent felonies, is not." (*In re Mohammad*, *supra*, 42 Cal.App.5th at p. 727.) Nothing in the materials suggests that voters intended or embraced that arbitrary result.[16]

Every relevant consideration confirms the voters' intent to exclude mixed-offense inmates currently serving a sentence for a violent felony listed in Penal Code section 667.5, regardless of whether the inmate has also been convicted of a nonviolent

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[16] The Court of Appeal's construction likewise creates constitutional problems where none existed before. Under the Court of Appeal's approach, violent offenders who were convicted of additional nonviolent crimes are treated differently from inmates who were convicted of only violent felonies. This disparity in treatment may raise equal protection concerns. (*Valencia*, *supra*, 3 Cal.5th at p. 376.) Courts should avoid unnecessarily construing a law in a way that would create constitutional problems. (*People v. Garcia* (2017) 2 Cal.5th 792, 804.)

felony.[17] The Department's regulations track the scope of Proposition 57, and validly exclude Mohammad from parole consideration.

II. EVEN ASSUMING THE DEPARTMENT HAD DISCRETION TO INCLUDE MIXED-OFFENSE INMATES, IT DID NOT CLEARLY OVERSTEP ITS AUTHORITY IN EXCLUDING INMATES SERVING SENTENCES FOR SECTION 667.5 FELONIES

Even if this Court rejects the argument that Proposition 57 required the Department to exclude mixed-offense inmates currently serving a sentence for a felony set out in Penal Code section 667.5, the Department's regulations are valid as implementing Proposition 57's terms. The regulations are entitled to a presumption of validity. (*Assn. of Cal. Ins. Co. v. Jones* (2017) 2 Cal.5th 376, 389 (*ACIC*), citing *Credit Ins. General Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657 and Gov. Code, § 11343.6.) Here, the regulations are not alleged to be arbitrary, capricious or wholly lacking in evidentiary support. The only question before this Court is whether the agency has "clearly overstepped" its authority. (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356.) Mohammad cannot establish that the mixed-offense inmate exclusion at issue here, and as applied to him, is beyond the Department's rulemaking authority.

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[17] None of this is to suggest that voters intended to exclude *only* individuals serving a sentence for a violent felony listed in section 667.5 from Proposition 57's parole program. But the materials confirm that Proposition 57, at a minimum, plainly excludes inmates in custody for section 667.5 violent felonies.

Section 32, subdivision (a) is not self-executing. Neither the term "nonviolent felony" nor the phrase "person convicted of a nonviolent felony offense" is defined in the provision. Section 32, subdivision (b) thus directs the Department to implement the nonviolent parole program through regulation. "The Department of Corrections and Rehabilitation shall adopt regulations in furtherance of these provisions, and the Secretary of the Department of Corrections and Rehabilitation shall certify that these regulations protect and enhance public safety." (Cal. Const., art. I, § 32, subd. (b).) It "is a textually explicit grant of authority that must at least extend to clarifying the margins of" who may benefit from parole consideration. (*In re Gadlin*, *supra*, 31 Cal.App.5th at pp. 793-94 (conc. op. of Baker, J.); see also *id.* at p. 793 (noting that Proposition 57 is "fuzzy at the margins").) Even before passage of Proposition 57, the Secretary possessed broad "substantive lawmaking power" to adopt quasi-legislative rules (*In re Cabrera* (2012) 55 Cal.4th 683, 688), and subdivision (b) explicitly confers on him and the Department the authority to "fill up the details" of section 32's parole scheme. (See *ACIC*, *supra*, 2 Cal.5th at p. 391, citing *Ford Dealers Assn.*, *supra*, 32 Cal.3d at pp. 362-363; Gov. Code, § 11342.600.)

The Department reasonably exercised its authority to "fill up the details" here. (*ACIC*, *supra*, 2 Cal.5th at p. 391.) Section 3490, subdivision (a)(5) is the product of the Department's assessment about whether public safety is promoted or thwarted through parole consideration of mixed-offense inmates. (Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).) That is a "quasi-

legislative endeavor, a task which necessarily and properly requires the [Department's] exercise of a considerable degree of policy-making judgment and discretion." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 800.) The Department's judgment to exclude section 667.5 violent felons from early parole consideration due to public safety considerations echoes the Legislature, which singled out the offenses in Penal Code section 667.5 as "crimes [that] merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person." (Penal Code, § 667.5, subd. (c).) It also aligns with voter intent that "[v]iolent criminals as defined in Penal Code 667.5(c) [be] excluded from parole." (Voter Information Guide, *supra*, rebuttal to argument against Prop. 57, at p. 59.) And the Secretary also exercised his judgment and expertise to certify that the implementing regulations enhance and protect public safety. (Cal. Code Regs., tit. 15, §§ 3490-3492, 3495-3497; see also, e.g., *Bell v. Wolfish* (1979) 441 U.S. 520, 547-548 [acknowledging "wide-ranging deference" to the prison administrators' exercise of expert judgment over policies and practices relating to order, discipline, and security].)

There can be no reasonable question that the regulation is "reasonably necessary to effectuate the purpose of the" initiative. (See *ACIC*, *supra*, 2 Cal.5th at p. 397.) As the court below conceded, the regulation has "intuitive appeal," by rejecting an unreasonable regime where an inmate convicted of "more crimes, i.e., both violent and nonviolent felonies" is "eligible for early

parole consideration while a defendant convicted of fewer crimes, i.e., the same violent felony but no nonviolent felonies, is not." (*In re Mohammad*, *supra*, 42 Cal.App.5th at p. 727.) It also avoids flooding the nonviolent parole process with nearly all the inmates in the Department's custody, limits the practical burdens on the Board of Parole Hearings, and assures that the voters "get what they enacted, not more and not less." (*Valencia*, *supra*, 3 Cal.5th at p. 375.)[18]

The Department has not clearly overstepped its authority in promulgating a regulation that excludes inmates currently serving time for a felony listed in Penal Code section 667.5. The regulation is valid as applied to Mohammad and similarly situated inmates, and he was properly denied the opportunity to seek nonviolent parole consideration.

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[18] Even if the Department's exclusion of multi-offense inmates is considered an interpretive rule, rather than a quasi-legislative one, the Department's formal regulation is entitled to "great weight and respect." (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

CONCLUSION

The judgment of the court of appeal should be reversed.

Dated: May 4, 2020

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CERTIFICATE OF COMPLIANCE

I certify that the attached Respondent's Opening Brief on the Merits uses a 13-point Century Schoolbook font and contains 7,678 words.

Dated: May 4, 2020

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

Case Name: **In re Mohammad Mohammad** Case No.: **S259999**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 4, 2020, at San Diego, California.

STEPHEN MCGEE	/s/ *Stephen McGee*
Declarant	Signature

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S259999**
Lower Court Case Number: **B295152**

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