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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Court should grant review to resolve important questions of law on the proper interpretation of article I, section 32 of the Constitution—Proposition 57—and to ensure that the parole program for nonviolent offenders approved by the voters is implemented consistent with their intent. The Court of Appeal's published decision departs from this Court's jurisprudence by stopping at the text of the voter-approved initiative without any consideration of the initiative's overall purpose, the broad rulemaking authority possessed by the Department of Corrections and Rehabilitation to carry out the initiative, and the voters' intent.

Petitioner Mohammad Mohammad opposes review on three main grounds: that there is no split of authority in the courts of appeal; that the decision below applies only to inmates with a nonviolent primary offense; and, relatedly, that the practical result of the court's very literal interpretation is not sufficiently absurd to justify looking beyond the initiative's plain text.

None of these arguments should defeat this Court's review.

The Department seeks review not because there is a split in authority, but rather because this case presents important questions of law about how courts should determine the voters' intent in construing initiatives, particularly where authoritative sources made specific promises about how an initiative will operate if passed. The result in this case—that a person convicted of violent felonies has the opportunity for nonviolent parole simply because he or she was also convicted of a nonviolent felony—contravenes promises repeatedly made to voters in the Official Voter Information Guide, including by the Governor, that violent offenders would be excluded from the program. While Mohammad attempts to minimize the real-world consequences of the decision, the Court of Appeal did not limit its holding as Mohammad suggests. The court repeatedly stated that

any nonviolent conviction makes an inmate parole eligible once they serve the full term of their primary offense. (Opn. 6, 8-10.) The decision would appear to apply to the approximately 90,000 violent offenders statewide with at least one nonviolent conviction; adding these violent offenders to the pool of parole-eligible inmates would dwarf the approximately 26,500 nonviolent offenders who, in the Department's view, are the intended beneficiaries of the voters' parole program.

The Court should grant the petition for review.

REASONS FOR GRANTING REVIEW

I. THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW ABOUT HOW TO DETERMINE VOTER INTENT IN CONSTRUING AND IMPLEMENTING INITIATIVES

Mohammad states that there is no need for the Court's intervention to secure uniformity of decision here, because there is no split of decision, and because the Court of Appeal was aware of the precedents warning against a literal reading of constitutional provisions. (Ans. 6.)

This misses the point. The Department requests review not to resolve a split, but "to settle an important question of law" (Cal. Rules of Court, rule 8.500(b)(1)). In the decision below, the Court of Appeal engaged in a limited and literal reading of article I, section 32 of the Constitution, much as it did in *Gadlin*,[1] to invalidate a regulation adopted through the Department of Corrections and Rehabilitation's broad rulemaking authority. This decision, like *Gadlin*, raises important questions of constitutional interpretation and the scope of agency rulemaking to carry out a voter initiative. That the court below was aware of this Court's precedents and yet reached the result it did only emphasizes the need for this Court's

[1] *In re Gadlin* (2019) 31 Cal.App.5th 784, review granted May 15, 2019, S254599, reply brief filed Dec. 26, 2019.

review and clarification of the law. Both *Gadlin* and this case illustrate the confusion in the courts of appeal as to the proper construction of voter-approved initiatives—particularly those that enact a framework program and rely on a state agency's rulemaking to carry out the program.

This Court should grant review to clarify whether and under what circumstances the text of an initiative can be so unambiguous that courts (and implementing agencies, exercising their rulemaking authority) are precluded from considering other sources of the voters' intent.

II. THE COURT OF APPEAL'S DECISION WILL HAVE SERIOUS AND UNINTENDED PRACTICAL EFFECTS ON THE NONVIOLENT PAROLE PROGRAM

As discussed in the petition, the Court of Appeal itself recognized that its decision results in a program whereby "'a defendant who is 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.'" (PFR 11, citing Opn. 10, italics added.) This result cannot have been intended by the voters.

Mohammad argues that the Attorney General's office did not ask the Court of Appeal to "disregard" the plain meaning of the constitutional text to avoid this outcome and cannot now "enlist this Court to do so." (Ans. 6.) He misunderstands the issue. Respondent did not argue in the proceedings below that the court should disregard the plain meaning of article I, section 32. Rather, respondent argued that the text did not preclude the court from considering other indicia of the voters' intent, and that any reading of the text should be informed by its overall purpose and the voters' intent as expressed in the ballot materials. (Return to Order to Show Cause 14-21.)

Mohammad also attempts to limit the practical effect of the decision below by asserting that it applies only to inmates like Mohammad whose primary offense is nonviolent, and that respondent has overstated the

practical effects of the decision. (Ans. 7-8.) This is based on the Court of Appeal's observation that Mohammad's circumstances are "unusual" because "an inmate becom[ing] eligible for early parole consideration before serving time for any of his or her violent felony offenses will not frequently arise." (Opn. 12; Ans. 8.)

The Court of Appeal did not make parole eligibility contingent on the nonviolent nature of an inmate's primary offense, however, and the court's reasoning does not incorporate Mohammad's proposed limitation. At the beginning of its analysis, the court looked at the constitutional text and determined that, the singular "a" in "convicted of *a* nonviolent felony offense" indicates that "*any* nonviolent felony offense component of a sentence will suffice." (Opn. 6, italics added.) The court then repeated this conclusion, holding that the text's meaning was unambiguous, and that "an inmate who is serving an aggregate sentence for more than one conviction will be eligible for an early parole hearing if *one of those convictions* was for 'a' nonviolent felony offense." (Opn. 8-9, italics added.) And, in a summary of its holding, the Court of Appeal stated that article I, section 32 "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*." (Opn. 10, italics added.)

As stated in the petition for review, there are more than 90,000 inmates statewide who are convicted of both violent and nonviolent felony offenses. (PFR 15.) Following the decision below, the Department will likely face requests for nonviolent parole consideration from all of these violent offenders that are ineligible under the Department's regulations. This would impose a staggering burden on the Department, resulting in a sudden four-fold increase in the population of parole-eligible inmates—a significantly larger nonviolent parole program than the one previewed for the voters who approved Proposition 57. (PFR 15-16.)

The Court should grant review to ensure the voters' intent is realized, and the Department is allowed to reasonably implement the nonviolent parole program consistent with that intent.

CONCLUSION

The petition for review should be granted.

Dated: February 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY TO ANSWER TO PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 1,234 words.

Dated: February 3, 2020

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Attorney General of California

/S/ **CHARLES CHUNG**

CHARLES CHUNG
Deputy Attorney General
Attorneys for Respondent

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No.: **B295152**

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REPLY TO ANSWER TO PETITION FOR REVIEW

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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 February 3, 2020, at Los Angeles, California.

S. Figueroa
Declarant

Signature

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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

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