S259999

In the Supreme Court of the State of California

In re

MOHAMMAD MOHAMMAD,

On Habeas Corpus.

Case No. _____

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

PETITION FOR REVIEW

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JANILL L. RICHARDS
Principal Deputy Solicitor General
PHILLIP J. LINDSAY
Senior Assistant Attorney General
RYAN B. MCCARROLL
Deputy Solicitor General
AMANDA J. MURRAY
Supervising Deputy Attorney General
*CHARLES CHUNG
Deputy Attorney General
State Bar No. 248806
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
(213) 269-6026
DocketingLAAWT@doj.ca.gov
Charles.Chung@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

COURT RULES

OTHER AUTHORITIES

TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent California Department of Corrections and Rehabilitation respectfully petitions for review of the published decision filed on November 26, 2019, by the Second District Court of Appeal, Division Five in *In re Mohammad Mohammad*, case number B295152. (Exh. A (Opn.).) No petition for rehearing was filed. This petition for review is timely. (Cal. Rules of Court, rule 8.500(e)(1).)

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

To reduce state prison populations while at the same time protecting public safety, the Governor authored and the voters enacted Proposition 57, the Public Safety and Rehabilitation Act of 2016. Proposition 57 made state prison inmates "convicted of a nonviolent felony offense" eligible for early parole consideration after completing the longest term of imprisonment imposed for any offense, excluding enhancements, consecutive sentences, and alternative sentences. (Cal. Const., art. I, § 32, subds. (a)(1), (a)(1)(A); see *Brown v. Superior Court* (2016) 63 Cal.4th 335, 353.) But the initiative was not self-executing; it charged the Department with adopting regulations "in furtherance" of its provisions. (Cal. Const., art. I, § 32, subd. (b).) It also directed the Secretary to certify that the adopted regulations "protect and enhance public safety." (*Ibid.*) Using its broad rulemaking authority, the Department has adopted a number of implementing regulations. (See Cal. Code Regs., tit. 15, §§ 3490-3497.) These regulations ensure that the voters receive what they were promised: a program that provides early parole consideration to tens of thousands of nonviolent offenders while keeping the public safe. (See generally Ballot Pamp., Gen. Elec. (Nov. 8, 2016) pp. 54-59 (Voter Guide).)

Twice in the last year, Division Five of the Second Appellate District has held a Proposition 57 implementing regulation to be inconsistent with the initiative. In both cases, the court has done so based on a limited and literal view of Proposition 57's text to the exclusion of other evidence of the voters' intent, and without the deference owed to administrative agency rulemaking. This Court has already granted review in the first of those cases, *In re Gadlin* (2019) 31 Cal.App.5th 784, which involves the application of regulations withholding early parole consideration from any inmate who "is convicted of a sexual offense that currently requires or will require registration as a sex offender" (Cal. Code Regs., tit. 15, §§ 3491,

subd. (b)(3), 3496, subd. (b)). (*Gadlin*, review granted May 15, 2019, S254599, reply brief filed Dec. 26, 2019.) The Court should similarly grant review in this case, in which the same panel invalidated title 15, section 3490, subdivision (a)(5). The regulation excludes from early parole consideration any inmate who "is currently serving a term of incarceration for a 'violent felony.'" (Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).) The court held that the Department must give early parole consideration to any inmate convicted of a violent felony so long as the inmate was also convicted of at least one nonviolent felony.

The reasons for granting review in this case are compelling. As set out below, this case presents several important questions of law that have immediate precedential and practical effects, and that should be settled now. The Court of Appeal's literal and crabbed reading of isolated text of Proposition 57 may encourage courts engaged in interpretation to routinely stop at the text of initiatives—which will in many cases thwart the voters' intent, as it did in this case. And it may push the law governing construction of initiatives in a direction that curtails the power of administrative agencies to fill in the details of voter-enacted programs. Further, the legality of the regulatory exclusion for violent offenders profoundly affects the scope of the program and public safety. Without the regulation, over 90,000 violent felons will now be eligible for early parole consideration. This result contradicts both the purpose of Proposition 57 and the description of the program provided in the Official Voter Information Guide and will place a significant administrative strain on the Department.

Should it grant review in this case, the Court could order immediate briefing and hear *Gadlin* and this case together, or it could defer briefing until after this Court clarifies the law in its *Gadlin* decision. In any event, the Court of Appeal's decision in this case should not stand.

STATEMENT OF THE CASE

In 2011, Mohammad was convicted of 15 felonies, most of which were violent within the meaning of Penal Code section 667.5, subdivision (c). Specifically, he pleaded no contest to nine counts of second-degree robbery (Pen. Code, § 211) and six counts of receiving stolen property (Pen. Code, § 496, subd. (a)), and he admitted that all of his crimes were gang related (Pen. Code, § 186.22, subd. (b)). The court sentenced him to an aggregate determinate term of 29 years in state prison. (Opn. 2; Attachment to Petn. for Writ of Habeas Corpus, B295152, foll. p. 6, Attachment to Amended Petn. for Writ of Habeas Corpus, B295152.)[1]

On November 8, 2016, California voters approved Proposition 57. The initiative added article I, section 32 to the California Constitution, which, in relevant part, provides that "[a]ny 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).) It further provides that "[t]he 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." (*Id.*, subd. (b).)

---

[1] The aggregate term consisted of a principal term of three years for one of the counts of receiving stolen property, consecutive subordinate terms of eight months for each of the five remaining counts of receiving stolen property, consecutive subordinate terms of one year for each of the nine counts of second-degree robbery, a consecutive gang enhancement of four years on the principal term, consecutive gang enhancements of three years eight months on two of the violent subordinate offenses, and consecutive gang enhancements of one year on three of the nonviolent subordinate offenses. (Attachment to Amended Petn. for Writ of Habeas Corpus, B295152.)

The Department initiated a public rulemaking process and promulgated implementing regulations. (Cal. Code Regs., tit. 15, §§ 3490-3497.) The regulations generally provide that any inmate who qualifies as a "nonviolent offender" is eligible for early parole consideration. In order to qualify as a nonviolent offender, an inmate cannot be "currently serving a term of incarceration for a 'violent felony'" within the meaning of Penal Code section 667.5, subdivision (c). (Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).)

In 2018, after exhausting his administrative remedies, Mohammad filed a habeas petition in the superior court alleging that the Department erred in excluding him from early parole consideration. (See Attachment to Petn. for Writ of Habeas Corpus, B295152, foll. p. 6.) The court denied the petition, explaining that Mohammad is not a nonviolent offender under the current regulations in light of his several convictions for the violent crime of second-degree robbery. (*Ibid*.)

In 2019, Mohammad challenged the regulations by filing a habeas petition in the Court of Appeal, Second Appellate District, Division Five. On November 26, 2019, the Court of Appeal issued a 13-page published decision granting the writ. (Opn. 14.) The court looked to the text of Proposition 57 for affirmative evidence that "a 'consecutive sentence' is disqualifying if it is a consecutive term for a violent felony." (Opn. 8.) Not finding express permission for the regulatory exclusion, the court concluded that the regulation was "at war" with the text. (Opn. 10.) In addition, the court declined to consider any evidence of voter intent beyond the text of the initiative. (Opn. 10.) The court ordered the Department to consider Mohammad for Proposition 57 parole. (Opn. 8-10, 14.) It further ordered the Department to repeal title 15, section 3490, subdivision (a)(5) of the California Code of Regulations and to make changes to the regulations as necessary to conform to its decision. (Opn. 14.)

The Department did not request rehearing, and the Court of Appeal's decision became final on December 26, 2019.

REASONS FOR GRANTING REVIEW

I. THE COURT SHOULD GRANT REVIEW TO CLARIFY WHETHER AND WHEN COURTS SHOULD MOVE BEYOND THE TEXT OF AN INITIATIVE TO UNDERSTAND THE VOTERS' INTENT

The Court of Appeal held that "[t]here 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." (Opn. 10.) 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) are precluded from considering other sources of the voters' intent.

This Court has discouraged narrow and overly literal interpretations of initiatives, which may work against intent. (See, e.g., *People v. Valencia* (2017) 3 Cal.5th 347, 358-360; *Arias v. Superior Court* (2009) 46 Cal.4th 969, 979 [stating that "literal construction" of an initiative is not proper "when such a construction would frustrate the manifest purpose of the enactment as a whole"].) The Court of Appeal was aware of these precedents. (Opn. 11.) Still, it refused to read beyond an isolated phrase in subdivision (a)(1), resulting in real, adverse consequences for the early parole consideration program.

As the Court of Appeal recognized, 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." (Opn. 10, italics added.) This absurd outcome should have counseled against adopting this interpretation. (See, e.g., *Cal. School Employees Assn. v. Governing Bd.* (1994) 8 Cal.4th 333, 340 ["We

need not follow the plain meaning of a statute when to do so would 'frustrate[] the manifest purposes of the legislation as a whole or [lead] to absurd results'"], citing *People v. Belleci* (1979) 24 Cal.3d 879, 884, internal quotations omitted.)

The result also contravenes the promises repeatedly made to voters, including by the Governor, that violent offenders would be excluded from the program. (Voter Guide, *supra*, rebuttal to argument against Prop. 57, p. 59.) Considering violent offenders like Mohammad for nonviolent parole is an unintended outcome that courts should strive to avoid when construing an initiative measure. (See, e.g., *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 118 [rejecting interpretation because "[n]othing in the legislative history of the initiative suggests that the voters intended that result"].)

Moreover, the Court of Appeal itself acknowledged that its refusal to consider the materials in the Voter Guide "bespeaks a certain self-aware naivete about what most voters do and do not read before going into the voting booth." (Opn. 11.) Voters are not career legislators who regularly write and parse proposed laws. Nor should they have the responsibility to return repeatedly to the ballot box to obtain what they are promised. (See Opn. 11 ["[i]f voters want a different result, the ballot box is open . . . to change what the Constitution now says"].) Rather, voters should be able to rely on the clear promises made by the government in the Voter Guide about an initiative's scope and reach.

Review offers the opportunity not only to clarify the law, but to restore to the voters the program they intended. "For a court to construe an initiative statute to have substantial unintended consequences strengthens neither the initiative power nor the democratic process . . . ." (*Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 930.)

II. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE IMPORTANT ROLE OF AGENCIES IN IMPLEMENTING ADMINISTRATIVE PROGRAMS ENACTED BY INITIATIVE

The Court of Appeal was dismissive of the Department's critical role in implementing Proposition 57, stating that its "regulatory approach is founded on a misinformed offender-based premise." (Opn. 9.) But Proposition 57 established only a bare framework for an early parole consideration program for nonviolent offenders and expressly contemplated that the Department and its Secretary would fill in the details of that program by regulation, consistent with the voters' intent and public safety. (Cal. Const., art. I, § 32, subd. (b).) The Court should grant review to clarify whether and to what extent an expert agency's regulatory efforts designed to carry out a complex administrative program enacted by the voters are entitled to deference.

The Department has deep expertise on the issues surrounding parole and public safety, and, in addition, has broad quasi-legislative rulemaking authority that preexisted Proposition 57. (*See In re Cabrera* (2012) 55 Cal.4th 683, 688.) The Legislature has recognized the Department's "primary objective" is to maintain "public safety," meaning "public safety achieved through punishment, rehabilitation, and restorative justice." (Pen. Code, §§ 1170, subd. (a)(1), 5000.) It is the core job of expert administrative agencies like the Department to "to implement, interpret, or make specific the law enforced" in addition to make rules that "govern its procedure." (Gov. Code, § 11342.600; see, e.g., *Assn. of Cal. Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 393; *Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1013-1014.) In many cases, as with Proposition 57, the lawmaking body outlines the "fundamental policy determinations" and vests an agency with "reasonable grants of power" to

interpret, apply, and implement the legislation. (*People v. Wright* (1982) 30 Cal.3d 705, 712.)

In the Department's view, while Proposition 57 specified that an inmate "convicted of a nonviolent felony offense" would be eligible for early parole consideration (Cal. Const., art. I, §32, subd. (a)), the use of the singular article "a" did not clearly mean that any nonviolent felony required consideration for early parole. The measure did not elaborate on the quoted phrase, and other indicia of the voters' intent suggested that any violent felony should be disqualifying (see previous section). The uncertainty as to the meaning of "convicted of a nonviolent felony offense" is the type of ambiguity that is appropriately resolved through agency rulemaking. (See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245-247 [observing that subsequent legislative and regulatory definitions "resolved" the alleged uncertainties in the constitutional provision].)

This case is particularly worthy of this Court's review because the Department exercised its authority in a way that is eminently reasonable. Its exclusion of violent offenders from early parole consideration closely follows this Court's observation in *Brown* that the Proposition 57 program "would apply only to prisoners convicted of non-violent felonies" (*Brown*, *supra*, 63 Cal.4th at p. 352) or, put another way, to a particular "class of offenders, so long as their offense was nonviolent" (*id.* at p. 353). So too is the exclusion of violent offenders consistent with the nonpartisan materials in the Voter Guide, which repeatedly described Proposition 57 as providing early parole consideration for "nonviolent offenders." (Voter Guide, *supra*, analysis of Prop. 57, pp. 56, 58.) Even the proponents of Proposition 57 promised the voters that "[*v*]*iolent criminals* as defined in Penal Code 667.5(c) are excluded from parole." (*Id.*, rebuttal to argument against Prop. 57, p. 59, original italics.)

III. THE COURT SHOULD GRANT REVIEW BECAUSE, AS A PRACTICAL MATTER, THE VALIDITY OF THE VIOLENT OFFENDER EXCLUSION FROM NONVIOLENT PAROLE CONSIDERATION PRESENTS AN IMPORTANT QUESTION OF LAW

The court's cursory invalidation of the Department's violent offender exclusion warrants further review by this Court, if only because of the very real practical effects it will have on the scope and administration of the early parole consideration program and public safety.

In analyzing Proposition 57's proposed program, the Legislative Analyst wrote: "As of September 2015, there were about 30,000 individuals in state prison who would be affected by the parole consideration provisions of the measure. In addition, about 7,500 of the individuals admitted to state prison each year would be eligible for parole consideration under the measure." (Voter Guide, *supra*, analysis of Prop. 57, p. 56.) These numbers are in line with the current population of parole-eligible inmates under the Department's regulations, which is approximately 26,527 inmates.

But there are more than 90,000 inmates statewide who (i) are currently incarcerated for both violent and nonviolent felonies, (ii) were excluded from Proposition 57's parole process under the Department's regulations, and (iii) would now be eligible should the Court of Appeal's decision stand. Following the Court of Appeal's decision, the number of parole-eligible inmates will balloon to approximately 119,375 inmates—nearly a *four-fold increase* from what the voters expected. This would encompass virtually all 124,363 state inmates currently in the Department's custody. (See Division of Correctional Policy Research and Internal Oversight, Weekly Report of Population as of Dec. 18, 2019 <https://www.cdcr.ca.gov/research/wp-content/uploads/sites/174/2019/12/Tpop1d191218.pdf> [as of December 22, 2019].) Flooding the nonviolent

parole process with nearly all the violent offenders in the Department's custody would not only frustrate the voters' intent, but also burden the Board of Parole Hearings, increase the risk that persons who may reoffend will be released, and encumber the process to the detriment of the nonviolent offenders who are Proposition 57's intended beneficiaries.[2] This Court should grant review to examine more closely whether the regulation is within the Department's broad rulemaking authority and consistent with the text and intent of Proposition 57.

[2] The decision below creates constitutional problems where none existed before. The Department's regulations treat all violent offenders equally, disqualifying all from early parole consideration. (See Cal. Code Regs., tit. 15, § 3490, subd. (a)(5).) Without the regulatory exclusion, those violent offenders who committed additional nonviolent crimes are favored. This disparity in treatment raises equal protection concerns. (See, e.g., *People v. McKee* (2010) 47 Cal.4th 1172, 1202.) Courts must avoid construing a law in way that would create constitutional problems so long as "any other possible construction remains available." (*People v. Garcia* (2017) 2 Cal.5th 792, 804, internal quotations omitted.) This is another signal that a more searching analysis of voter intent with respect to the validity of the Department's regulation is warranted.

CONCLUSION

The Court should grant the petition for review.

Dated: January 6, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JANILL L. RICHARDS
Principal Deputy Solicitor General
PHILLIP J. LINDSAY
Senior Assistant Attorney General
RYAN B. MCCARROLL
Deputy Solicitor General
AMANDA J. MURRAY
Supervising Deputy Attorney General

/S/ **CHARLES CHUNG**

CHARLES CHUNG
Deputy Attorney General
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 2,856 words.

Dated: January 6, 2020

XAVIER BECERRA
Attorney General of California

/S/ **CHARLES CHUNG**

CHARLES CHUNG
Deputy Attorney General
Attorneys for Respondent

Exhibit A

Filed 11/26/19

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re MOHAMMAD MOHAMMAD on Habeas Corpus.	B295152 (Los Angeles County Super. Ct. No. BH011959)

ORIGINAL PROCEEDINGS in habeas corpus. Superior Court of Los Angeles County, William C. Ryan, Judge. Petition granted.

Michael Satris, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Phillip J. Lindsay, Senior Assistant Attorney General, Amanda J. Murray, Supervising Deputy Attorney General, and Charles Chung, Deputy Attorney General, for Respondent.

In this proceeding challenging an aspect of regulations promulgated to implement the Public Safety and Rehabilitation Act of 2016 (Proposition 57), we give effect to the oft-repeated maxim that the best and most reliable indicator of the intended purpose of a law is its text. (*National Federation of Independent Business v. Sebelius* (2012) 567 U.S. 519, 544; *West Virginia University Hospitals, Inc. v. Casey* (1991) 499 U.S. 83, 98; *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933 [the enacted text is typically the best and most reliable indicator of the intended purpose of constitutional provisions and statutes, including those adopted via voter initiative] (*California Cannabis*).)

I. BACKGROUND

On January 20, 2012, petitioner Mohammad Mohammad pled no contest to nine counts of second degree robbery (Pen. Code, § 211), which are violent felonies under Penal Code section 667.5, subdivision (c),[1] and six counts of receiving stolen property (Pen. Code, § 496, subd. (a)), which are nonviolent felonies under the same statutory definition. The trial court designated one of the receiving stolen property counts of conviction (count 11) as Mohammad's principal sentencing term, and ordered the sentences imposed for the remaining convictions to run

---

[1] "Penal Code section 667.5, subdivision (c) defines 23 criminal violations, or categories of crimes, as violent felonies—including murder, voluntary manslaughter, any robbery, kidnapping, various specified sex crimes, and other offenses." (*In re Edwards* (2018) 26 Cal.App.5th 1181, 1188, fn. 3 (*Edwards*).)

consecutively as subordinate terms. Mohammad's aggregate sentence was 29 years in prison.

Four years later, on November 8, 2016, California voters approved Proposition 57. The proposition added section 32, subdivision (a) to Article I of California's Constitution (hereafter "section 32(a)"), and it reads: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term of his or her primary offense." (§ 32(a)(1).) The newly enacted constitutional provision further states "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." (§ 32(a)(1)(A).) Proposition 57 directed the Department of Corrections and Rehabilitation (CDCR) to adopt regulations "in furtherance of these provisions" and to "certify that these regulations protect and enhance public safety." (Cal. Const., art. I, § 32, subd. (b).)

After CDCR encountered problems with an initial set of implementing regulations it promulgated (see generally *Edwards*, *supra*, 26 Cal.App.5th 1181), CDCR promulgated new regulations effective in 2019. When defining those inmates who will be eligible for early parole consideration, CDCR's rulemaking took a different approach than the constitutional provision—focusing less on the nature of an offense committed by a person (i.e., "a nonviolent felony offense") and more on the person who commits one or more crimes.

Specifically, for determinately sentenced inmates like Mohammad, CDCR's regulations adopt a definition of "nonviolent *offender*" (emphasis ours) to circumscribe eligibility: "A

nonviolent offender, as defined in subsections 3490(a) and 3490(b), shall be eligible for parole consideration by the Board of Parole Hearings under [the early parole consideration regulations at California Code of Regulations, title 15, sections 2449.1 et seq.]." (Cal. Code Regs., tit. 15, § 3491.) Subsection 3490(a), in turn, describes a "'determinately-sentenced nonviolent offender'" by exclusion, not inclusion: "An inmate is a 'determinately-sentenced nonviolent offender' if none of the following are true: [¶] (1) The inmate is condemned to death; [¶] (2) The inmate is currently incarcerated for a term of life without the possibility of parole; [¶] (3) The inmate is currently incarcerated for a term of life with the possibility of parole; [¶] (4) The inmate is currently serving a determinate term prior to beginning a term of life with the possibility of parole; [¶] (5) The inmate is currently serving a term of incarceration for a 'violent felony'; or [¶] (6) The inmate is currently serving a term of incarceration for a nonviolent felony offense after completing a concurrent determinate term for a 'violent felony.'" (Cal. Code Regs., tit. 15, § 3490, subd. (a); see also Cal. Code Regs., tit. 15, § 3490, subd. (c) ["'Violent felony' is a crime or enhancement as defined in subdivision (c) of section 667.5 of the Penal Code"].) The fifth criterion, excluding from the nonviolent offender definition inmates who are currently serving a term of imprisonment for a violent felony, appears to be the operative criterion in this proceeding.[2]

---

[2] Subsection (a)(5) of California Code of Regulations, title 15, section 3490—with its use of the word "currently"—can be read to indicate it was necessary to analyze the particular component of Mohammad's aggregate sentence that he was then serving to determine his eligibility for parole consideration. It is unclear

In December 2017, Mohammad requested an early parole hearing pursuant to Proposition 57, arguing he had completed the three-year term of his nonviolent primary offense (receiving stolen property). CDCR denied the request, relying on a 1996 Court of Appeal decision interpreting a sentencing credit calculation statute to conclude Mohammad should be deemed ineligible for Proposition 57 relief because he was a "violent offender and thereby ineligible for the non-violent parole process." (See generally *People v. Ramos* (1996) 50 Cal.App.4th 810, 817 ["[B]y its terms, [Penal Code] section 2933.1 applies to the offender not to the offense and so limits a violent felon's conduct credits irrespective of whether or not all his or her offenses come within section 667.5"].) Mohammad pursued his claim for early parole consideration through all levels of CDCR administrative review, and CDCR's position never wavered. As CDCR's third-level appeal decision interpreted the department's own regulations, "one of [Mohammad's] non-controlling cases is Second Degree Robbery and this offense makes all of his offenses to be considered violent during this term."

After unsuccessfully seeking habeas corpus relief in the superior court, Mohammad filed a petition for writ of habeas corpus here. We appointed counsel for Mohammad and issued an order to show cause.

---

whether CDCR undertook such an analysis when declaring him ineligible for early parole consideration, but as we go on to explain, CDCR did determine Mohammad is ineligible for Proposition 57 relief and the Attorney General defends that decision under the aforementioned subsection (a)(5). We shall proceed on the understanding that CDCR's denial of early parole consideration to Mohammad rested on its determination that he was currently serving a term of incarceration for a violent felony.

II. DISCUSSION

The issue we decide is whether CDCR's implementing regulations that condition eligibility for early parole consideration on status as a "nonviolent offender" are consistent with the constitutional provision that authorizes their promulgation. As we shall explain, they are not. 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. Mohammad was convicted of a nonviolent offense, among others, and he has completed the full term of his primary offense. That means he is now entitled to early parole consideration notwithstanding CDCR's regulatory exclusion to the contrary—which we shall invalidate. But that does not mean he is entitled to parole. The only certain consequence of our decision is that the Board of Parole Hearings will be busier; they must evaluate the parole worthiness of a category of inmates that CDCR's regulations incorrectly bar from getting before the parole board at all.

A. Controlling Legal Principles

"'In order for a regulation to be valid, it must be (1) consistent with and not in conflict with the enabling statute and (2) reasonably necessary to effectuate the purpose of the statute. (Gov. Code, § 11342.2.)' (*Physicians & Surgeons Laboratories,*

Inc. v. Department of Health Services (1992) 6 Cal.App.4th 968, 982[ ]; see *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal.App.3d 747, 757[ ] (*Henning*).) Therefore, 'the rulemaking authority of the agency is circumscribed by the substantive provisions of the law governing the agency.' (*Henning*, *supra*, at p. 757.) '"The task of the reviewing court in such a case is to decide whether the [agency] reasonably interpreted [its] legislative mandate. . . . Such a limited scope of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise. . . . [T]here is no agency discretion to promulgate a regulation which is inconsistent with the governing statute. . . . Whatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts. . . . Administrative regulations that alter or amend the statute or enlarge or impair its scope are void . . . ." [Citation.]' (*Id.* at pp. 757-758.)" (*Edwards*, *supra*, 26 Cal.App.5th at p. 1189.)

"When construing constitutional provisions and statutes, including those enacted through voter initiative, '[o]ur primary concern is giving effect to the intended purpose of the provisions at issue. [Citation.] In doing so, we first analyze provisions' text in their relevant context, which is typically the best and most reliable indicator of purpose. [Citations.] We start by ascribing to words their ordinary meaning, while taking account of related provisions and the structure of the relevant statutory and constitutional scheme. [Citations.] If the provisions' intended purpose nonetheless remains opaque, we may consider extrinsic sources, such as an initiative's ballot materials. [Citation.]

Moreover, when construing initiatives, we generally presume electors are aware of existing law. [Citation.] Finally, we apply independent judgment when construing constitutional and statutory provisions. [Citation.]' (*California Cannabis*[, *supra*,]3 Cal.5th [at pp.] 933-934.)" (*Edwards*, *supra*, 26 Cal.App.5th at p. 1189.)

B. CDCR's Regulations, Which Focus on the Offender and Not the Offense, Are Inconsistent with the Constitution's Text

Section 32(a)(1) makes early parole hearings available to "[a]ny person convicted of a nonviolent felony offense" upon completion of "the full term of his or her primary offense." 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. This interpretation is reinforced by the term "primary offense," which demonstrates the provision assumes an inmate might be serving a sentence for more than one offense, i.e., a primary offense and other secondary offenses.

Section 32(a)(1)(A) also defines the "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." (Emphasis ours.) Nothing in the Constitution's text suggests a "consecutive sentence" is disqualifying if it is a consecutive term for a violent felony. This further reinforces our conclusion that the text the voters approved when passing Proposition 57 is in no way ambiguous: under 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 an early parole hearing if one of those convictions was for "a" nonviolent felony offense.

Mohammad was convicted of a nonviolent felony offense, receiving stolen property. There is no dispute that his primary offense as the Constitution defines it ("the longest term of imprisonment imposed by the court for any offense") is the principal term prison sentence he received for the count 11 receiving stolen property conviction. Nor is there any dispute that the "full term" in prison for that conviction, "excluding the imposition of an enhancement, consecutive sentence, or alternative sentence" was three years. Therefore, under the plain meaning of section 32(a)(1), Mohammad is eligible for early parole consideration now that he has served three years in prison.

CDCR's regulations dictate a different result, but only by impermissibly defining and limiting the universe of eligible inmates to "nonviolent *offenders*"—a term that does not appear anywhere in section 32(a)(1). The leap taken by CDCR from "a nonviolent felony offense" to a "nonviolent offender" is unjustifiable and inconsistent with the constitutional text. Indeed, the only justification CDCR gave Mohammad for denying relief—reliance on the inapposite *People v. Ramos*, *supra*, 50 Cal.App.4th 810 opinion—is telling. It suggests CDCR's regulatory approach is founded on a misinformed offender-based premise.

Section 32(a)(1) extends early parole consideration to persons "convicted of a nonviolent felony *offense*." Under section 32(a)(1)(A), an inmate who is "convicted of a nonviolent felony offense" not only remains eligible if he or she is sentenced to a

consecutive sentence, but in fact, becomes eligible for an early parole hearing *prior to* serving that consecutive sentence. There is just no escaping the conclusion that the text Proposition 57 added to the Constitution 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. The regulations CDCR promulgated are at war with that textual conclusion and therefore cannot stand.

In arguing the contrary in this proceeding, CDCR largely (and wisely) abandons the *People v. Ramos* rationale it relied on when denying Mohammad administrative relief and instead urges us to consider voter intent as purportedly reflected in the Proposition 57 summary and arguments included in the official ballot pamphlet. We decline. 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. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431, 444-445.)

We do acknowledge, however, that the argument for reaching a different result has some intuitive appeal. 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. But we look for evidence of the voters' intent, not intuition, and as our Supreme Court has said repeatedly, the best evidence we have is the text the voters put in the Constitution. (*De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 981; *California Cannabis*, *supra*, 3 Cal.5th at p. 933;

Professional Engineers in California Government v. Kempton (2007) 40 Cal.4th 1016, 1037 ["'Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language'"]; see also *People v. Valencia* (2017) 3 Cal.5th 347, 379 (conc. opn. of Kruger, J.) ["California cases have established a set of standard rules for the construction of voter initiatives. 'We interpret voter initiatives using the same principles that govern construction of legislative enactments. [Citation.] Thus, we begin with the text as the first and best indicator of intent'"].) The Constitution's text compels the result we reach, and we are not prepared to declare that result so absurd (see, e.g., *Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 638) as to disregard the Constitution's plain meaning—and, indeed, the Attorney General does not ask us to.

It is also true that our rationale bespeaks a certain self-aware naivete about what most voters do and do not read before going into the voting booth. But that is a necessary ingredient of the initiative mechanism our Constitution permits. If courts are to have a sound, predictable means of adjudicating interpretive questions concerning popularly enacted laws (or any laws for that matter); and if government agencies and Californians are to have a reliable means of discerning their legal rights and obligations; privileging focus-group-tested ballot arguments, incomplete legislative analyses, or intuited voter intentions over clear textual provisions is not the answer. Indeed, that would invite confusion and manipulation of the initiative process. If voters want a different result, the ballot box is open every two years to change what the Constitution now says.

In the meantime, it bears emphasizing that Mohammad's case is an unusual one. The court at Mohammad's sentencing designated one of the receiving stolen property convictions—i.e., one of the *non*violent felonies—as the principal term of Mohammad's sentence. Often, however, an inmate convicted of both violent and nonviolent felonies will have the most serious of his or her violent felonies set as the principal term. Thus, the situation we confront in this case when an inmate becomes eligible for early parole consideration before serving time for any of his or her violent felony offenses will not frequently arise.[3]

Furthermore, for those inmates who are eligible for early parole consideration under section 32(a) as we read it today (and as it must be read), the ultimate parole determination to be made on the merits by the Board of Parole Hearings (Board) is not limited in the way that the eligibility determination is. The Board's decision on whether an inmate should be granted parole will take into account the inmate's full criminal history—nonviolent and violent offenses alike—when determining whether the inmate poses a risk to public safety. (Pen. Code, § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2449.4, subd. (b).) So the bottom line consequence of our decision today is that more inmates like Mohammad will receive individualized parole

---

[3] We also recognize it is possible prosecutors will exercise their charging discretion in multiple offense cases in a way that may affect early parole consideration eligibility. Prosecutorial discretion is an established feature of our criminal justice system (see, e.g., *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 82), and the manner in which prosecutors respond to the consequences of the change in law worked by Proposition 57 is immaterial to the issue we are asked to decide in this appeal.

consideration earlier than they otherwise would have. If the Board is convinced one of these inmates poses no unacceptable risk to public safety, the Board can approve the inmate for release; if instead there are violent aspects of an inmate's history that were not part of an early parole hearing eligibility determination, the Board can take those into account and issue a parole denial where it deems it prudent.

DISPOSITION

The petition for writ of habeas corpus is granted. CDCR is directed to treat as void and repeal California Code of Regulations, title 15, section 3490, subdivision (a)(5) and to thereafter make further changes as necessary to ensure its Proposition 57 implementing regulations are consistent with this opinion. Mohammad shall be evaluated for early parole consideration within 60 days of remittitur issuance.

CERTIFIED FOR PUBLICATION

BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.

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

Case Name: **In re Mohammad Mohammad on Habeas Corpus**
No.: **B295152**

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.

On January 6, 2020, I electronically served the attached

PETITION FOR REVIEW

by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on January 6, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

Michael Satris
satrislaw.eservice@gmail.com
Attorney for Petitioner
Served via TrueFiling

CAP – LA
capdocs@lacap.com
Served via email

Sherri R. Carter, Clerk of the Court
Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012
Attn: The Honorable William C. Ryan, Judge
Served via U.S. Mail

Los Angeles County District Attorney's Office
Courtesy copy sent via email

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 January 6, 2020, at Los Angeles, California.

S. Figueroa
Declarant

Signature

LA2019500266
54016420.docx

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **In re Mohammad Mohammad**
Case Number: **TEMP-RDD1BR84**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Charles.Chung@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW	Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Michael Satris Law Office of Michael Satris 67413	satrislaw.eservice@gmail.com	e-Serve	1/6/2020 4:04:17 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

1/6/2020
Date

/s/Susan Figueroa
Signature

Chung, Charles (248806)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm