In the Supreme Court of the State of California

In re
GREGORY GADLIN,
On Habeas Corpus.

Case No. S254599

Second Appellate District, Division Five, Case No. B289852
Los Angeles County Superior Court, Case No. BA165439
The Honorable William C. Ryan, Judge

SUPPLEMENTAL BRIEF OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

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QUESTION PRESENTED AND SHORT ANSWER

By order dated October 8, 2020, the Court requested that the parties serve and file supplemental briefs addressing the following question: "Did the California Department of Corrections and Rehabilitation exceed its authority under article I, section 32 of the California Constitution by promulgating regulations excluding from nonviolent offender parole consideration inmates *currently* convicted of nonviolent offenses requiring registration pursuant to Penal Code section 290?" (Italics added).

The Department did not exceed its authority in promulgating a regulation excluding from the nonviolent parole program inmates with a current conviction for a sex offense requiring registration under Penal Code section 290.[1] The Department's regulations in effect deem those offenses not to be "nonviolent felony offense[s]" under section 32, subdivision (a)(1). Inmates in custody for those offenses are thus ineligible for the nonviolent parole program.

To the extent the supplemental question assumes that sexual offenses that require registration under section 290, but that are not among the violent felonies listed in section 667.5, subdivision (c), *necessarily* are "nonviolent" for purposes article I, section 32, the Department respectfully submits that any such assumption is error. The phrase "nonviolent felony offense" does not mean all offenses that are not listed as violent felonies in

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[1] All further statutory references are to the Penal Code unless otherwise noted.

section 667.5, subdivision (c). The voters did not enact a parole program guaranteeing eligibility to any inmate convicted of "a felony offense that is not a violent felony as enumerated in the Penal Code." Rather, they enacted a parole framework contemplating inclusion only of inmates convicted of a "nonviolent felony offense"—a term that has no settled meaning or statutory definition—and charged the Department and Secretary by subdivision (b) with interpreting that term and creating and implementing the program through rulemaking.

SUMMARY OF ARGUMENT

Proposition 57's one-line description of the nonviolent parole program left much for the Department to interpret and implement.[2] In undertaking that obligation, the Department was necessarily informed by the ballot materials and by public comment. As a result, the Department chose to approach its administrative charge not by creating a comprehensive list of felony offenses that are "nonviolent," but instead by enacting exclusionary criteria that, through their operation, determine which inmates are eligible for the program. Those criteria function to define a pool of eligible inmates who have committed a "nonviolent felony offense" for purposes of article I, section 32, subdivision (a).

[2] Subdivision (a)(1) 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."

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As applied to inmates currently convicted of a sex offense, the regulatory criteria exclude inmates whose sex offense is a violent felony listed in section 667.5. The criteria also exclude inmates whose current sex offense requires registration under section 290. That exclusion reflects the Department's reasonable interpretation of "nonviolent felony offense"—a phrase that "'does not have a meaning defined by statute or commonly understood by the electorate'" (*People v. Valencia* (2017) 3 Cal.5th 347, 373, quoting *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 902). The Department expressly noted in its rulemaking that the phrase "nonviolent felony offense" does not simply describe any offense not listed in section 667.5. (Apr. 30, 2018 Final Statement of Reasons (FSOR), p. 57; see also *People v. Morales* (2016) 63 Cal.4th 399, 406.)[3]

The Department's exclusion of inmates currently convicted of section 290 sex offenses is consistent with voter intent, carrying out Governor Brown's plain-language promise that the program would "exclude sex offenders[.]" (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) argument against Prop. 57 and rebuttal, pp. 58-59.)[4] That promise would be inconsistent with an expansive reading of the phrase "nonviolent felony offense" to mean all

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[3] Excerpts of the Final Statement of Reasons are attached as exhibits F and H to the Department's Notice of Errata to Supplemental Motion for Judicial Notice, filed September 3, 2020.

[4] The ballot materials are available at <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> [as of October 18, 2020].

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offenses not listed in section 667.5 as violent felonies. And the Department's exclusion of inmates currently convicted of sex offenses is supported by its express determination that even section 290 offenses not defined as violent or serious elsewhere in the Penal Code "involve[] some degree of physical force, coercion, or duress with the victim, often a minor." (FSOR, p. 59.) By its operation, the regulatory program excludes all persons currently convicted of section 290 offenses, which the Department concluded, in the main, involve some physical force, coercion, or duress and therefore are *not* nonviolent. Any concern that the regulation may exclude inmates based on a section 290 offense whose elements have no "degree of violence" (see FSOR, p. 59) is properly addressed in those cases in which the issue is squarely presented.[5]

[5] The Department is aware of two habeas matters challenging inmates' exclusions based on current section 290 offenses now before the Court—one where review has been granted, and one where the petition for review is pending. (*In re Ellington*, review granted Apr. 1, 2020, S260851 [current disqualifying offenses are misdemeanor sexual battery, Pen. Code, § 243]; *In re Febbo* (2020) 52 Cal.App.5th 1088, 1095-1096, petn. for review pending, petn. filed Sept. 4, 2020, S264287 [current disqualifying offense is felony indecent exposure, Pen. Code, § 314].) In addition, the Court has granted review of a petition for writ of mandate challenging the regulatory exclusion of sex offenders. (*Alliance for Constitutional Sex Offense Laws v. Cal. Dept. of Corrections and Rehabilitatio*n (2020) 45 Cal.App.5th 225, review granted May 27, 2020, S261362.)

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ARGUMENT

I. ELIGIBILITY FOR NONVIOLENT PAROLE CONSIDERATION CANNOT BE DETERMINED FROM THE BARE TEXT OF ARTICLE I, SECTION 32, SUBDIVISION (A)

The Department will not here repeat the standards that apply in interpreting ballot initiatives, and in reviewing agency quasi-legislative actions of the type at issue here, as they have been fully briefed and are well known to this Court. (See OBM 23-24, 34 and RBM 20 [circumstances where agency interpretations are entitled to great weight]; OBM 25-27, 29-30, 32 and RBM 8-9, 15 [voter intent governs construction of law enacted by initiative; overly literal, out-of-context interpretations avoided; ballot materials can shed light on voter intent].) The Department will, however, note three important aspects of this case that establish that the phrase "nonviolent felony offense" in subdivision (a) is undefined and is not limited to offenses that fall outside section 667.5's list of violent felonies.

First, the phrase "nonviolent felony offense" is not defined in the text of article I, section 32. As Justice Chin observed in his dissent in *Brown v. Superior Court* (2016) 63 Cal.4th 335, 360, "the constitutional provision never defines the term 'non-violent felony offense.'" (See also *In re Gadlin* (2019) 31 Cal.App.5th 784, 793-794 (conc. opn. of Baker, J.) ["Section 32(a) states the rule—that those convicted of a 'nonviolent felony offense' and sentenced to state prison are eligible for parole consideration—but the key term, nonviolent felony offense, is noticeably left undefined . . . even though it cannot be applied in practice without further definition."]; *In re Febbo*, *supra*, 52 Cal.App.5th

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at p. 1100 ["Section 32 (a)(1) leaves the term 'nonviolent felony offense' undefined and does not refer to any other constitutional or statutory provision to supply a definition"].) Subdivision (a) does *not* state that "[a]ny person convicted of a violent felony offense as defined in Penal Code section 667.5 and sentenced to state prison shall be eligible for parole consideration . . . ." As the Legislative Analyst stated in describing the effect of the proposal, "the measure and current law do not specify which felony crimes are defined as nonviolent . . . ." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Prop. 57, analysis by the Legislative Analyst, p. 56.)[6] While the drafters of Proposition 57 could have written that limitation into the proposed provision—thereby more specifically defining the class of eligible inmates—they did not do so, and the voters therefore did not endorse any such limitation in voting "yes" on Proposition 57. (See *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 56 [declining to read the word "special" out of the phrase "special taxes"; observing that "the drafters knew how to say 'any' taxes when that is what they meant"].)[7] The Court should decline to rewrite subdivision (a).[8]

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[6] The Legislative Analyst assumed for the purposes of analysis that "a nonviolent felony offense would *include* any felony offense that is not specifically defined in statute as violent." (*Ibid.*, italics added.)

[7] In the words of the Department, "[i]f the drafters wanted to limit parole consideration to only those inmates incarcerated for a violent felony as defined in Penal Code section 667.5, subdivision (c), they could have done so. But they did not." (FSOR, p. 59.)

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Second, Proposition 57's proposal for a parole program was not written on a blank slate. In 2016, there was already in place a Department-created parole consideration program, the nonviolent second-strike parole program, designed to comply with federal court orders requiring the State to substantially reduce its prison population. (OBM 13-14.) That program excluded registered sex offenders. (*Ibid.*)

Proposition 57's preamble states that the three purposes of the nonviolent parole program described in article I, section 32, are to:

> 1. Protect and enhance public safety.
> 2. Save money by reducing wasteful spending on prisons.
> 3. Prevent federal courts from indiscriminately releasing prisoners.

(Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Prop. 57, text of proposed law, p. 141.) If the voters also intended to require the Department to change its then-current practices to include in the nonviolent parole program persons currently convicted of sex offenses requiring registration under section 290, one would expect that purpose to be similarly and prominently stated. But that intent is found nowhere in the text.

(. . . continued)

[8] Although this Court has used the term "nonviolent offense" in some cases as shorthand to describe offenses not listed in section 667.5, it is not "commonly understood" to have only that meaning, and there is no basis to assume that the electorate used the term in that limited sense. (See *Valencia*, *supra*, 3 Cal.5th at p. 373.)

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Lastly, article I, section 32, subdivision (a) is not self-executing. Rather, subdivision (a) describes a parole program at the framework level, and subdivision (b) charges the Department with interpreting and implementing subdivision (a). In the words of Justice Baker in his concurrence below, “the precise scope of who is meant to benefit from early parole consideration relief is left fuzzy at the margins.” (*In re Gadlin*, *supra*, 31 Cal.App.5th at p. 793.)

Under subdivision (b) and its general rulemaking power (see OMB 28), the Department has considerable discretion in drawing the lines for inmate eligibility (while staying within the boundaries of subdivision (a)), and the Secretary has the power to send the Department’s regulations back if, in the Secretary’s view, that exercise of discretion does not sufficiently “protect and enhance public safety.” (Cal. Const., art. 1, § 32, subd. (b).) The very structure of section 32 and its reliance on agency rulemaking to fill in the details of the nonviolent parole program, and on the Secretary to certify that the Department’s interpretation and implementation of subdivision (a) ensures public safety, is strong evidence that eligibility for the program cannot be decided by the text of subdivision (a) alone or any commonly understood meaning of “nonviolent felony offense” as being a synonym for any felony not listed in section 667.5.

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II. IN INTERPRETING AND IMPLEMENTING SUBDIVISION (A), THE DEPARTMENT REASONABLY CONSIDERED VOTER EXPECTATIONS AND THE "DEGREE OF VIOLENCE" INVOLVED IN SECTION 290 OFFENSES

This Court will "interfere [with agency regulatory action] only where the agency has clearly overstepped" its authority. (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356.) Here, the Department did not overstep in interpreting and implementing the phrase "nonviolent felony offense" and deciding to exclude inmates with current section 290 convictions. Instead, it designed a program to meet the voters' expectations and ensure public safety by excluding inmates convicted of sex offenses whose elements have a degree of violence.

The Department began by doing what this Court repeatedly does in determining the intent of the voters; it looked to the ballot materials. (See, e.g., *Valencia*, *supra*, 3 Cal.5th at p. 364; see also OBM 26; RBM 8-9.) And the ballot materials were unequivocal. Governor Brown, the proposition's chief proponent, responded to very pointed statements by the opponents of Proposition 57 about who would be eligible for the program. They contended that:

> Prop. 57 authorizes EARLY PAROLE for a RAPIST who drugs and rapes a victim, because its authors call him non-violent . . . .
>
> Prop. 57 AMENDS CALIFORNIA'S CONSTITUTION to give these new early parole rights to criminals who are convicted of many violent and horrible crimes, including: RAPE of an unconscious victim; HUMAN SEX TRAFFICKING; ASSAULT with a deadly weapon; LEWD ACTS against a 14-year-old . . . .

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(Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Prop. 57, rebuttal to argument in favor of Proposition 57, p. 58.)

The opponents further contended that:

> The authors of Proposition 57 claim it only applies to "non-violent" crimes, but their poorly drafted measure deems the following crimes "non-violent" and makes the perpetrators eligible for EARLY PAROLE and RELEASE into local communities:
>
> - Rape by intoxication
> - Rape of an unconscious person
> - Human Trafficking involving sex act with minors
>
> . . . .
>
> - Lewd acts against a child 14 or 15 . . . .

(*Id.*, argument against Proposition 57, p. 59.) These assertions presumably were based on the fact that the crimes noted are not listed as violent felonies in section 667.5.

In response, the Governor informed the voters that Proposition 57 "[d]oes NOT and will not change the federal court order that excludes sex offenders, as defined in Penal Code 290, from parole." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) Prop. 57, rebuttal to argument against Proposition 57, p. 59.) As explained in the Opening Brief, this statement was Governor Brown's assurance that the Department's existing policy—formulated in response to the federal court order—of excluding sex offenders from nonviolent parole consideration would continue if Proposition 57 was enacted. (OBM 15-16, 31-32.) An expansive reading of "nonviolent felony offense" that would *require* parole consideration for inmates convicted of any sex offense that is not a violent felony under section 667.5 is inconsistent with that

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assurance. The Department reasonably took Governor Brown's promise of continuity into account in drafting its eligibility criteria.

But the Department did not end its assessment with the ballot materials. It further looked at the nature of the offenses that require registration under section 290, in the context of inmates then serving sentences in the State's prisons. (FSOR, p. 59.) It noted that of the approximately 22,400 inmates "required to register for a sex offense based on a current or prior felony conviction, the vast majority (18,087) are convicted of a violent offense listed under Penal Code section 667.5, subdivision (c)." (*Ibid.*) Those offenses are:

> (3) Rape as defined in paragraph (2) or (6) of subdivision (a) of Section 261 or paragraph (1) or (4) of subdivision (a) of Section 262.
> (4) Sodomy as defined in subdivision (c) or (d) of Section 286.
> (5) Oral copulation as defined in subdivision (c) or (d) of Section 287 or of former Section 288a.
> (6) Lewd or lascivious act as defined in subdivision (a) or (b) of Section 288.
> . . . .
> (11) Sexual penetration as defined in subdivision (a) or (j) of Section 289.
> . . . .
> (16) Continuous sexual abuse of a child, in violation of Section 288.5.
> . . . .
> (18) Rape, spousal rape, or sexual penetration, in concert, in violation of Section 264.1.

(§ 667.5, subd. (c).) The Department further noted that "[a]n additional 1,076 inmates are convicted of a serious felony listed under Penal Code section 1192.7, subdivision (c), and include

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such crimes as rape of an unconscious person, and lewd and lascivious acts with a child under fourteen." (FSOR, p. 59.) Counting violent and serious sex offenses listed in sections 667.5 and 1192.7 encompassed 85 percent of inmates required to register under section 290.

Turning to the remaining 15 percent of inmates required to register as sex offenders, the Department determined that these "3,256 inmates are convicted of sex offenses that are not listed as a violent or serious felony, but in which the offense involves some degree of physical force, coercion, or duress with the victim, often a minor. Examples include incest, pimping of a minor under sixteen, sexual battery, and lewd and lascivious acts with a fourteen or fifteen year old victim where the perpetrator is at least ten years older." (FSOR, p. 59.)

The Department did not conclude that these remaining offenses are "nonviolent" as the term is used in subdivision (a). To the contrary: As the Final Statement of Reasons provides, the Department "determined that these sex offenses demonstrate a sufficient degree of violence and represent an unreasonable risk to public safety to require that sex offenders be excluded from nonviolent parole consideration." (FSOR, p. 59.)[9] "Accordingly, the regulations expressly exclude inmates who are 'convicted of a sexual offense that requires registration as a sex offender under

[9] A plain-language list of sex offenses requiring registration may be found in the court of appeal's decision in Justice Baker's concurrence. (*In re Gadlin*, *supra*, 31 Cal.App.5th at pp. 792-793.)

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Penal Code section 290' from the nonviolent parole consideration process." (*Ibid.*) This was not an overstep, but rather a reasonable, authorized act of agency discretion and judgment.

III. The Department Had Discretion to Determine the Manner in Which to Implement Subdivision (a)

As set out in the Department's previous briefing, the regulations operate not by expressly defining a list of all offenses that are deemed "nonviolent," but rather by a set of regulatory criteria that exclude certain inmates; those inmates who are not excluded are eligible to participate in the program. (OBM 20.)

The Department acknowledges that as part of determining eligibility, the regulations utilize a definition for a "nonviolent offender" that does not take into account any conviction for a sex offense that requires registration under section 290, but is not a violent felony listed in section 667.5. (See Cal. Code Regs., tit. 15, §§ 3490, 3495.) This does not mean that, as a matter of law, such an inmate is "convicted of a nonviolent felony offense" as that phrase is used in article I, section 32, subdivision (a) and therefore constitutionally entitled to participate in the nonviolent parole program. Eligibility is determined by application of *all* of the relevant regulations, and the regulations exclude any inmate convicted of a section 290 sex offense (*id.*, §§ 3491, subd. (b)(3), 3496, subd. (b))—which, as discussed, the Department found involve "some degree of violence." (FSOR, p. 59.)

One might argue that it would have been clearer or preferable if the Department's regulation excluded inmates based on section 290 convictions in the same part of the regulations

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that exclude inmates based on section 667.5 convictions (e.g., as a subsection in Cal. Code Regs., tit. 15, §§ 3490, 3495). In fact, the regulations were initially framed this way, but the Department moved the section 290 exclusion to a different part of the regulations for an administrative reason. In the Final Statement of Reasons, the Department explained that the change "is necessary because some inmates who are required to register as a sex offender are serving a term for a crime that is not a violent felony under Penal Code section 667.5, subdivision (c) and are considered to be 'nonviolent offenders' for other purposes, such as credit earning." (FSOR, p. 15-16.)[10] But, the Department explained, these inmates "remain ineligible for the parole consideration process to effectuate the intent of Proposition 57." (*Ibid.*)

Nothing in section 32 required the Department to carry out its rulemaking obligation in any particular manner. Administrative agencies have considerable discretion to determine the best manner or approach to address a regulatory challenge where—as here, and as is almost always the case—there is no single, "objectively correct" regulatory response. (See *Am. Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 475.) Courts are "in no position to attempt to reach an independent decision as to whether the [administrative agency] actually used the best method of

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[10] The Final Statement of Reasons without Exhibits is available at <https://tinyurl.com/Prop57FSOR> [as of Oct. 18, 2020].

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accomplishing the statutory objective; even to undertake such a task would be to frustrate the legislative policy of reliance upon the special competence of the [agency]." (*Ralphs Grocery Co. v. Reimel* (1968) 69 Cal. 2d 172, 180; see also *Am. Coatings*, *supra*, 54 Cal.4th at p. 475 ["We will not disturb the [agency's] judgment simply because there is evidence, even substantial evidence, supporting a different [regulatory] categorization"].) The precise mechanism by which the regulations operate to exclude an inmate from participating in the nonviolent parole program based on a current section 290 offense is irrelevant, provided the regulations function in a constitutionally permissible manner, judged by the text and intent of article I, section 32. And they do.

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IV. ANY PRACTICAL IMPRECISION IN THE OPERATION OF THE SECTION 290 SEX OFFENSE EXCLUSION DOES NOT CALL THE ENTIRE EXCLUSION INTO QUESTION

Legislatures in their lawmaking and agencies in their rule- and policy-making often must make categorical distinctions and in so doing, are not held to a standard of operational perfection. (See *Am. Coatings*, *supra*, 54 Cal.4th at p. 475; *Ralphs Grocery*, *supra*, 69 Cal. 2d 172 at p. 180.) This is a habeas challenge, but it is helpful to note the standard for facial constitutional challenge in considering the level of precision expected of the law. "Even under the least onerous phrasings of the test," a challenger must show that the law or policy at issue will operate unconstitutionally in at least "the generality" or the "vast majority" of cases. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 218.)

Any concerns about the regulations' exclusion of inmates based on a current section 290 offense, as it might operate at the margins, are most appropriately addressed in those cases where the issue is squarely presented.

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CONCLUSION

If the Court holds in this case that the Department erred in considering Gadlin's past sex offenses requiring registration under section 290 and, on that basis, improperly excluded him from the nonviolent parole program, that holding should not call into question the Department's regulation excluding inmates having current convictions for such offenses, based on the Department's determination that section 290 sex offenses have some degree of violence and therefore are *not* nonviolent, or the Secretary's certification that the regulations ensure public safety.

Dated: October 19, 2020 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL BRIEF OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION** uses a 13-point Century Schoolbook font and contains 3,408 words.

Dated: October 19, 2020

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

Case Name: In re Gregory Gadlin Case No.: S254599

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 October 19, 2020, I electronically served the attached

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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 October 19, 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:

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The Honorable William C. Ryan
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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 19, 2020, at Los Angeles, California.

J. Garcia	*/s/ J. Garcia*
Declarant	Signature

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