In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RUBEN PHILLIP FRANCO,

Defendant and Appellant.

Case No. S233973

Court of Appeal, Second Appellate District, Case No. B260447
Los Angeles County Superior Court, Case No. VA125859
The Honorable Roger Ito, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

For the purpose of the distinction between felony and misdemeanor forgery, is the value of an uncashed forged check the face value (or stated value) of the check or only the intrinsic value of the paper it is printed on?

INTRODUCTION

Applying longstanding rules of statutory construction, the term "value" as used in Penal Code section 473, subdivision (b)[1] should be interpreted to mean the "face" or "stated" value of a forged instrument, as this would preserve the commonsense meaning most likely intended by the electorate in enacting Proposition 47. A punishment determination based on the forged instrument's face amount rationally reflects the defendant's culpability—the amount the defendant intended to take. In contrast, an intrinsic or fair market valuation would bear little if any rational relationship to culpability.

Unlike theft, which requires a taking, the essence of forgery is the "means" (i.e., possessing a forged check with the intent to defraud) as opposed to the "end" (i.e., obtaining property). For purposes of forgery, it is immaterial whether the instrument has any independent value because the crime is complete when the deceptive act is done with the requisite intent. It follows that because the crime is keyed to intent and requires no taking, valuation makes sense only in reference to the instrument's face or stated value. That is, to the extent a person would *potentially* be defrauded by acting upon a forged check as *genuine*, the stated value is the only relevant value, as it represents the controlling value of a check believed to be genuine.

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

In contrast, Franco's approach of determining the value of a forged check (its monetary worth, measured by the amount of money obtained or likely to be obtained) ignores the very nature of the crime of forgery, while focusing on concerns that are relevant only to theft-related offenses. Because forged checks have no legal value, factors such as the quality of the forgery and the likelihood of the instrument being honored should have no significance in determining "value." These factors are already accounted for in determining whether the instrument in question may properly form the basis of a forgery offense; an instrument that is so defective on its face that, as a matter of law, it is not capable of defrauding anyone, may not be the subject of forgery. But absent such a showing, the likelihood of actual loss should have no role in evaluating whether a forgery automatically qualifies as a misdemeanor, as the offense focuses on the defendant's intent to defraud and requires no proof of actual loss. In short, as the Court of Appeal found in rejecting Franco's argument, it would be absurd to believe the Proposition 47 voters intended to impose a $950 cutoff for misdemeanor punishment, while applying a theft-derived definition of value whereby every forged instrument would be deemed inherently worthless, instead of a commonsense, straightforward focus on the face amount, which would rationally inform the salient determination—whether a defendant's culpability is deserving of felony punishment.

STATEMENT OF THE CASE AND FACTS

On July 17, 2012, Jeni Muniz's purse, containing her checkbook, was stolen from her parked car while she shopped at a drugstore in Whittier. (1CT 20-21.) A few days later, Los Angeles County Sheriff's deputies contacted Franco on the street, searched Franco's wallet, and discovered one of Muniz's checks. The check bore a signature of "Jeni Muniz," it was made out for the amount of $1,500, and the payee was left blank. (1CT 4-7, 21-22.) Franco told the deputies that his employer, "Chris," had owed

him $200. Franco said that Chris had given him the check because it was a "bad check" and he could not cash it; Chris said that if Franco could cash the check, he could keep the money. (1CT 11-12, 15, 18-19.) Muniz denied signing her name on the check, and denied giving anyone permission to sign the check on her behalf. (1CT 21-22.)

On January 16, 2013, Franco pleaded guilty to one count of forgery (§ 475, subd. (a)) and one count of receiving stolen property (§ 496, subd. (a)). (1RT 4-9; 1CT 48-49.)[2] Franco was sentenced to prison for four years. Execution of sentence was suspended, and Franco was placed on formal probation for three years, with a condition that he serve 365 days in county jail. (1RT 7-9; 1CT 49-51.)

Almost two years later, Franco appeared in superior court for a probation violation hearing. Franco apparently made an off-the-record request for his forgery conviction to be reclassified as a misdemeanor. (See 1ART 301.)[3] The trial court stated that notwithstanding the fact that the check was never tendered, it appeared that the offense would constitute a felony if the amount owed on the check exceeded $950. Franco's counsel argued that the amount written on the check had no relevance absent an attempt to cash it. The trial court denied the request to reclassify the forgery offense to a misdemeanor, finding that the amount written on the

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[2] In the instant proceeding, Franco's sole claim focuses on his forgery conviction. Franco's conviction for receiving stolen property is not at issue.

[3] The clerk's transcript on appeal does not include any written petition or application. Further, the reporter's transcript on appeal does not include any oral request made by Franco. At the outset of the probation violation hearing held on November 19, 2014, the court began by addressing an argument that had apparently been made off the record by Franco's counsel. The trial court characterized it as a "request for reclassification as a misdemeanor." (1ART 301-302.)

check was determinative. (1ART 301-302.) The trial court then found that Franco had violated the terms of his probation. Franco's probation was revoked, and the previously suspended sentence of four years was imposed. (1CT 62; 1ART 305-308.)

Franco appealed, arguing that the trial court erred in denying his request to reclassify his forgery conviction as a misdemeanor. Franco maintained that the value of the check should be measured by its intrinsic value, which was less than $950.[4] The Second Appellate District, Division Seven, affirmed. (*People v. Franco* (2016) 245 Cal.App.4th 679, review granted June 15, 2016, S233973.) In a published opinion, the court rejected Franco's claim that the intrinsic value of the check was determinative for purposes of evaluating a check's "value" under section 473, subdivision (b). The court held that when viewed in the context of forgery, the word "value," as used in section 473, subdivision (b), must correspond to the face value of the check in order to avoid absurd consequences. (*Id.* at p. 684.)[5] This Court granted Franco's petition for review.

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[4] Franco also raised other issues on appeal which are not before this Court.

[5] See also *People v. Gonzales* (2016) 6 Cal.App.5th 1067, 1072, fn. 6 ["When viewed in the context of forgery, the word 'value' as used in section 473(b) must correspond to the stated value of the instrument as opposed to its inherent value [citation] in order to avoid the absurd consequences of a monetary limit that would not have any meaning [citation]."], review granted Feb. 15, 2017, S240044; *People v. Salmorin* (2016) 1 Cal.App.5th 738, 744-745 ["for purposes of resentencing under Proposition 47, the value of a forged check is the face value of the check"]; but see *People v. Lowery* (2017) 8 Cal.App.5th 533, rev. granted April 19, 2017, S240615.

ARGUMENT

I. FOR PURPOSES OF SECTION 473, SUBDIVISION (B), THE TERM "VALUE" MEANS THE "STATED" OR "FACE" VALUE OF THE FORGED INSTRUMENT

In the context of check forgery, it is immaterial whether the instrument has any independent value. Liability focuses on the means and intent to defraud, and does not require proof of actual loss. In this context, consistent with the reasoning of the Court of Appeal in this case, the most commonsensical, straightforward interpretation of the term "value" is the check's "stated" or "face" value because it reflects the defendant's criminal intent. Franco's contrary interpretation, that "value" means "intrinsic" or "actual monetary worth," is inconsistent with forgery law and would lead to absurd results.

A. Standard of Review and Relevant Principles of Statutory Interpretation

Reviewing courts independently determine issues of law, such as the interpretation and construction of statutory language. (*Bruns v. E-Commerce* (2011) 51 Cal.4th 717, 724.)

The interpretation of a ballot initiative is governed by the same rules that apply in interpreting a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796; *People v. Rizo* (2000) 22 Cal.4th 681, 685.) It is well-settled that the objective of statutory construction is to ascertain and effectuate legislative intent. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) Because the statutory language is generally the most reliable indicator of intent, a reviewing court looks first to the words of the statute, giving them their usual and ordinary meaning and construing them in in the context of the statutory scheme. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.) However, "[t]he words must be construed in context and in light of the statute's obvious nature and

purpose," and "[t]he terms of the statute must be given a reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intention." (*Madrigal v. Victim Compensation and Government Claims Board* (2016) 6 Cal.App.5th 1108, 1113.) In so doing, the interpretation "should be practical, not technical, and should also result in wise policy, not mischief or absurdity." (*Id.* at pp. 1113-1114.) As a corollary, "a specific provision should be construed with reference to the entire statutory system of which it is a part, in such a way that the various elements of the overall scheme are harmonized," so as to respect the "policy sought to be implemented . . . , and to this end, titles of acts, headnotes, and chapter and section headings may properly be considered in determining legislative intent." (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 489.) "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source." (*In re Harris* (1989) 49 Cal.3d 131, 136, citing *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11 ["The adopting body is presumed to be aware of existing laws and judicial construction thereof"].)

If the language of the statute is ambiguous and supports more than one reasonable interpretation, a reviewing court looks to a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, the legislative history, the statutory scheme of which the statute is a part, and contemporaneous administrative construction, as well as questions of public policy. (*In re Derrick B.* (2006) 39 Cal.4th 535, 539.) For a statute passed via a ballot initiative, the reviewing court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900; see also *People v. Floyd* (2003) 31 Cal.4th 179, 187-188 [ballot pamphlet information is a valuable aid in construing the

intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation marks omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative so as to effectuate the electorate's intent. (*Robert L., supra*, 30 Cal.4th at p. 901.)

B. In the Context of a Forged Financial Instrument, the Plain Meaning of "Value," as Used in Section 473, Subdivision (b), is the Instrument's "Stated" or "Face" Value

Prior to Proposition 47, forgery statutes did not refer to the "value" of the forged instrument for purposes of distinguishing between a felony and a misdemeanor. As enacted by Proposition 47, section 473, subdivision (b) now makes certain types of forgery (forgery related to a check, bond, bank bill, note, cashier's check, traveler's check, or money order) a misdemeanor if the "value" of the instrument does not exceed $950. (Official Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 6, p. 71.) Viewed in the context of the statutory language, where the term "value" is used to modify forged financial instruments that have no meaningful value in the legal sense, but are likely to include a stated amount commensurate with the intended fraud, the plain meaning of "value" is the "stated" or "face" value of the instrument. This plain meaning is also evident when viewing the term "value" in the unique context of forgery law, which, unlike theft, does not require a taking and instead focuses on the means, coupled with the intent to defraud, as opposed to an actual loss.

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1. In the context of a forged financial instrument, which by definition has no meaningful legal value, and which is likely to contain a stated value, the stated value of the instrument was likely intended

A term may have multiple meanings when viewed in isolation, and therefore should be viewed in the context of the surrounding language appearing in the statute. (See *Life Technologies Corp. v. Promega Corp.* (2017) 137 S.Ct. 734, 740 [although the word "substantial" is ambiguous when viewed in isolation, the context in which the word appeared in the statute ("all or a substantial portion of the components of a patented invention") resolved the ambiguity and pointed to a quantitative rather than a qualitative meaning]; see also *United States v. Williams* (2008) 553 U.S. 285, 294 ["[A] word is given more precise content by the neighboring words with which it is associated"].)

As two leading commentators explain, legal meaning will typically depend on context. "Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." (Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012).) "Most common English words have a number of dictionary definitions, some of them quite abstruse and rarely intended. One should assume the contextually appropriate ordinary meaning unless there is reason to think otherwise. Sometimes there *is* reason to think otherwise, which ordinarily comes from context." (*Id.* at p. 70, italics in original; see also *People v. Garcia* (2017) 2 Cal.5th 792, 805 [words and phrases should be construed according to their statutory context].)

Dictionary definitions for the term "value" include "a fair return or equivalent in goods, services, or money for something exchanged"; "the monetary worth of something"; "relative worth, utility, or importance"; and "a numerical quantity that is assigned or is determined by calculation or

measurement." (Merriam Webster's Collegiate Dict. (10th ed. 1997) p. 1305.) But the context of the statutory language used in section 473, subdivision (b), as well as the history and purpose of laws prohibiting forgery, compel a finding that the electorate intended "value" to mean the stated numerical quantity on the face of the forged instrument.

In section 473, subdivision (b), the term "value" is used to modify a list of seven specific financial instruments that may be used to commit forgery. It is important to note that while forgery may be committed via a variety of different instruments (see, e.g., §§ 470-476), the seven instruments selected for inclusion in Proposition 47 (check, bond, bank bill, note, cashier's check, traveler's check, or money order) share a common feature: each is a financial instrument that typically contains a "face" or "stated" value which represents the purported monetary worth of the instrument, assuming it is genuine. A forged instrument has no "value" in the legal sense, aside from the intrinsic value of the paper on which the instrument is written. (*People v. Cuellar* (2008) 165 Cal.App.4th 833, 838-839; *United States Rubber Co. v. Union Bank & Trust Co.* (1961) 194 Cal.App.2d 703, 708-709.) Since a forged instrument will never have a legal value exceeding $950, and because the seven types of instruments selected for misdemeanor forgery treatment are likely to have a stated value, the most logical inference is that in this context, the "stated" value was intended. (See *Madrigal v. Victim Compensation and Government Claims Board, supra*, 6 Cal.App.5th at pp. 1113-1114 [a statute should be interpreted to avoid absurd results].)

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2. The essence forgery is the defendant's means and intent to defraud, and, unlike theft offenses, the crime is completed before any loss occurs; in this context, the plain meaning of "value" is the "stated" value, as this amount is commensurate with the defendant's culpability

Interpreting "value" as "stated" value is consistent with the history and purpose of laws prohibiting forgery, which differ in crucial ways from theft-related offenses. Understanding the critical distinctions between forgery and theft-related offenses makes clear that recourse to intrinsic or market value is appropriate to the latter, but anomalous to the former.

Under California law, the crime of forgery derives from the common law definition of forgery. (See *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 385-387.) At common law, forgery was defined as the "false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability." (*People v. Bendit* (1896) 111 Cal. 274, 280, internal quotation marks omitted, citing 2 Bish. Cr. Law (8th Ed.) § 523.) California's main forgery statute, section 470, differs from the common law to the extent it "enumerates a very large number of writings as subjects of forgery." (*Id.* at p. 280;[6] see also 2 Witkin, Cal. Crim. Law (4th ed. 2012)

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[6] Section 470, subdivision (a) states in relevant part that "[e]very person who, with the intent to defraud, knowing that he or she has no authority to do so, signs the name of another person or of a fictitious person to any of the items listed in subdivision (d) is guilty of forgery." Subdivision (d) provides in relevant part that "[e]very person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery: any check, bond, bank bill, or note, cashier's check, traveler's check, money order . . . ."

(continued...)

Crimes Against Property § 166, Listed Writings; see also §§ 470a, 470b, 471.5, 472, 474-476 [addressing various instruments that may form the basis of a forgery conviction].) But aside from enumerating the specific documents that may be the subject of forgery, the definition of forgery as codified in the Penal Code has remained consistent with the common law definition. (*Bendit, supra*, 111 Cal. at p. 280.)

It is well recognized that forgery differs from theft in a crucial way: theft requires a taking, while forgery does not. (See *People v. Neder* (1971) 16 Cal.App.3d 846, 852; compare § 470-476 [forgery statutes do not include a "taking" element] with § 484 [definition of theft requires a "taking"].) Unlike theft, where the essential act is a taking, the "real essence" of forgery is not concerned with the "end," i.e., what is obtained or taken by the forgery, but rather the "means," i.e., the act of signing the name of another with the intent to defraud, or of falsely making a document or of uttering the document with the intent to defraud. (*Id.* at pp. 852-853; see also *People v. Horowitz* (1945) 70 Cal.App.2d 675, 687 [the intent to defraud another constitutes the essence of the crime of forgery, and the fact of forgery may imply an intention to defraud].)

Similarly, unlike theft-related offenses, forgery does not require proof that anyone was actually defrauded or suffered a loss as a result of the defendant's actions. (See *People v. Turner* (1896) 111 Cal. 278, 280-281 [if the counterfeit writing might *possibly* deceive another, and it was prepared with intent to deceive and defraud another, it is immaterial

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Section 475, subdivision (a) states: "Every person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470 with intent to defraud, knowing the same to be forged, altered, or counterfeit, is guilty of forgery."

whether any person was actually injured]; *People v. Baender* (1924) 68 Cal.App. 49, 59 [to establish a forgery, it is unnecessary to prove that someone was actually defrauded, if the instrument might possibly deceive another, and was prepared with the intent to deceive and defraud another]; see also CALCRIM Nos. 1930-1932 ["It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's actions"]; CALJIC No. 15.03 ["The existence of a specific intent to defraud is an essential element of the crime of forgery, but it is not necessary to complete the crime that any person be actually defrauded or suffer a loss by reason of the forgery"].)

The crime of forgery is completed before any actual loss is suffered. (*People v. Parker* (1967) 255 Cal.App.2d 664, 672; *Buck v. Superior Court* (1965) 232 Cal.App.2d 153, 162; *People v. McAffery* (1960) 182 Cal.App.2d 486, 493; *People v. Morgan* (1956) 140 Cal.App.2d 796, 800-801; *People v. Horowitz*, *supra*, 70 Cal.App.2d at p. 688.) In order to understand the manner in which value functions in the context of forgery, the crucial point is that because a forgery is complete "when the act is done with the requisite intent," it necessarily follows that *"[w]hether the instrument forged has independent value is unimportant."* (*Buck v. Superior Court*, *supra*, 232 Cal.App.2d at p. 162, italics added.)

In stark contrast, because theft offenses require a taking, any assessment of culpability is necessarily tethered to a determination of the property's monetary value. As this Court recently explained, the Penal Code's definition of theft "requires courts to determine the value of property obtained by theft based on 'reasonable and fair market value.'" (*People v. Romanowski* (2017) 2 Cal.5th 903, 914 [quoting § 484, subd. (a) ["In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test."].) Thus, when a forged instrument is the object of a theft offense, courts have no

choice but to determine the instrument's market value in that manner. In that context—as well as in the analogous context of conversion[7]—"a forged check does not have a value equal to the amount for which it is written. [Citation.] The check's value is 'a nullity'; it is merely 'an order to pay [citation] and is of no value unless accepted.'" (*People v. Cuellar*, *supra*, 165 Cal.App.4th at pp. 838-839 [quoting *United States Rubber Co. v. Union Bank & Trust Co.*, *supra*, 194 Cal.App.2d at pp. 708-709] [holding a forged check could not be the subject of a conversion].) Absent any market value for theft purposes, the value of a forged instrument is merely the "slight intrinsic value by virtue of the paper it was printed on." (*People v. Cuellar*, *supra*, 165 Cal.App.4th at pp. 838-839.)

Thus, for theft purposes, it makes perfect sense to construe value as intrinsic or market value, but it hardly follows that the same meaning should be imported into a statute intended to assess a defendant's culpability for forgery. Read in isolation, section 473, subdivision (b)'s reference to "value" may appear ambiguous because it is not expressly qualified by terms such as "face" or "stated." But when interpreting words of a statute, the reviewing court should take into account context, the object of the legislation, the evils to be remedied, and existing law. (*In re Derrick B.*, *supra*, 39 Cal.4th at p. 539.) Viewing the term "value" in the context of forgery law, and the evils to be remedied by laws targeting forgery, it is most likely that the voters intended "value," as used to modify the seven

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[7] Conversion is defined as the "wrongful exercise of dominion over the property of another." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240, internal quotation marks omitted, citing *Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 208.) The elements of a conversion claim include: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. (*Lee v. Hanley*, *supra*, 61 Cal.4th at p. 1240; *Welco Electronics, Inc. v. Mora*, *supra*, 223 Cal.App.4th at p. 208.)

types of forgery designated as eligible for misdemeanor treatment under Proposition 47, in a sense that would comport with the statute's purpose—assessing the culpability of persons guilty of forgery.

A comparison of section 490.2, the provision that reduces certain theft offenses to misdemeanors under Proposition 47, with its forgery analogue, section 473, subdivision (b), shows that the initiative recognized the presence or absence of a taking as the key factor in distinguishing theft crimes from forgeries: Where the former refers to misdemeanor punishment for those who "obtain[] any property by theft where the value of the money, labor, real or personal property *taken* does not exceed nine hundred fifty dollars ($950)," (§ 490.2, italics added), the latter refers to the "value of the check, bond, bank bill, note, cashier's check, traveler's check, or money order," (§ 473, subd. (b)), without any reference to a taking, much less to whether the defendant successfully obtained money through the forgery—one of the rare instances in which Franco argues it could be shown that a forged check's value exceeded $950. (AOBM 29-30.)

As noted above, the seven instruments selected for inclusion in Proposition 47 are financial instruments likely to contain a "face" or "stated" value which represents the purported monetary worth of the instrument, assuming it is genuine. This fact, combined with the nature of the offense of forgery (which focuses on the defendant's intent to defraud and requires no proof of actual loss), strongly suggests that the electorate intended "face" or "stated" value to be controlling for purposes of section 473, subdivision (b). Simply put, when a defendant intends to defraud another with a financial instrument bearing a stated amount, that amount is the most reliable indicator of the severity of the offense, as it represents the amount intended to be misappropriated.

It is presumed that the drafters of an initiative and the voters who approve it are aware of existing statutory law and its judicial construction.

(*In re Harris*, *supra*, 49 Cal.3d at p. 136.) Thus, at the time the voters enacted Proposition 47, it is presumed that they were aware of the basic principles of forgery jurisprudence. Since forgery focuses on a *potential* loss as opposed to *actual* loss, and the offense includes those instruments that have the effect of defrauding one who acts upon them as *genuine*, in this context, the $950 threshold included in section 473, subdivision (b) should be interpreted as referring to the "face" or "stated" value. If the evil targeted by the offense of forgery is the *potential* that a person could be deceived into believing the instrument is genuine, and the offense requires proof of the defendant's intent to defraud, the stated value of the instrument is the most relevant value for purposes of measuring the seriousness of the offense. Accordingly, interpreting "value" as "face" or "stated" value is most consistent with the voters' intent.

By the same token, specific provisions like section 473, subdivision (b) "should be construed with reference to the entire statutory system of which it is a part," in order to ensure the various elements of the overall scheme are harmonized, consistent with the "policy sought to be implemented." (*Bowland v. Municipal Court*, *supra*, 18 Cal.3d at p. 489.) The fact that forgery and theft-related offenses are in different Penal Code chapters bolsters the reasonable inference that Proposition 47's forgery-related provisions were intended to be treated in accord with forgery, rather than theft, jurisprudence. (*See ibid.*) Thus, the same kind of analysis that supported treatment of theft-of-access-card offenses as a theft offense for purposes of applying Proposition 47's $950 misdemeanor cutoff—the placement of that offense in a Penal Code chapter titled, "Theft"—argues against doing so here. (See *People v. Romanowski*, *supra*, 2 Cal.5th at pp. 911-12.)

In *People v. Salmorin*, *supra*, 1 Cal.App.5th at page 745, the court recognized "value" should be interpreted in accord with the nature of

forgery. "In the context of forgery, . . . the word 'value' as used in section 473, subdivision (b), corresponds to the stated value or face value of the check." (*Ibid.*) Because a forgery is complete upon either "'the act of signing the name of another with intent to defraud and without authority, or of falsely making a document, or of uttering the document with intent to defraud,'" it follows that "[e]ach time a defendant forges a separate check with the requisite intent, he or she commits a discrete offense of forgery. Thus, a defendant who forges two $500 checks with fraudulent intent is guilty of two discrete crimes (two misdemeanors), while the same defendant who forges a single check of $1,000 with fraudulent intent is guilty of a single crime (one felony)." (*Id.* at p. 751, quoting *People v. Neder*, *supra*, 16 Cal.App.3d at p. 751.)

Ultimately, for purposes of statutory construction, the overriding objective is to ascertain and effectuate drafters' intent (*Horwich v. Superior Court*, *supra*, 21 Cal.4th at p. 276), by giving the statute's terms a reasonable and commonsense interpretation that is consistent with the drafters' apparent purpose and intention, so as to conduce to wise policy, rather than mischief or absurdity (*Madrigal v. Victim Compensation and Government Claims Board*, *supra*, 6 Cal.App.5th at pp. 1113-1114). Respondent's interpretation serves that objective. Because no loss need occur in a forgery, and the gravamen of the offense is the means coupled with the intent to defraud, it makes far more sense to evaluate the seriousness of the offense based on the stated amount of the financial instrument, as opposed to a factor such as the amount of actual loss, which is not directly relevant to any element of the offense.

3. The "fair market value" test is inapplicable in the context of forgery

In contrast, if, as Franco argues, the voters intended to tie the $950 misdemeanor/felony cutoff to market value (see AOBM 16-17), it would

mean that the voters intended to effectively reduce every forgery to a misdemeanor, but require a mini-trial to determine a fact wholly extraneous to forgery law—the amount of money a forger would likely obtain if he or she were successful. Likewise, Franco urges this Court to draw distinctions concerning a forged check's "value" based on factors including whether the check is actually cashed, whether the check is guaranteed or not, and whether the forgery is of such poor quality that it is unlikely to ever be cashed. (AOBM 10-20.) These proposed distinctions miss the mark, as they overlook the fact that a forgery is complete before any loss occurs. (*People v. Parker*, *supra*, 255 Cal.App.2d at p. 672.) In addition, a document may be the subject of forgery if it is merely capable of defrauding another; forgery laws aim to protect both gullible and cautious individuals. (*People v. Jones* (1962) 210 Cal.App.2d 805.) And focusing on whether a check is likely to be "guaranteed" or ultimately cashed by a financial institution overlooks the myriad of unsophisticated potential victims of check forgery, such as a private citizen or merchant accepting a check as a form of payment.

Moreover, to the extent a check is so poorly forged or is made out for such an outlandish amount that it stands no real chance of being honored, such factors are already accounted for in determining whether that document may properly be the subject of forgery, i.e., whether a forgery conviction may stand. Unless the document is so clearly void on its face that it is not capable of defrauding another, the document may form the basis of forgery. (*People v. Jones*, *supra*, 210 Cal.App.2d at p. 808; see also *People v. McKenna* (1938) 11 Cal.2d 327, 332.) Once the document is found to be the proper subject of forgery, its quality should not be further "graded" for purposes of determining the "value," because the offense is completed without a loss being suffered.

Also weighing against the use of a "reasonable and fair market value" test in the context of forgery is that such a test is based on the assumption that an item may be sold, and that there is a willing buyer and willing seller. (See *People v. Romanowski*, *supra*, 2 Cal.5th at p. 915.) In the context of forgery, there is no willing buyer and seller; rather, by definition, the defendant is aiming to defraud another by misrepresenting the nature of the forged item. How much the item might be worth to a willing buyer, who has knowledge of the forged nature of the item, is irrelevant. The harm targeted by forgery is that an unwitting person will be deceived. Thus, any value measured by a willing buyer and seller, with equal knowledge of the item's validity, would have little if any application to the forgery context.

Given the very nature of the offense of forgery, which in many instances punishes mere possession of a forged document with the intent to defraud (see §§ 470, 475), forgeries of the items specified in section 473, subdivision (b) will almost always involve instruments lacking any *actual* value beyond the nominal value of the paper on which the instrument in question is written. Thus, in this context, it is highly unlikely that the voters intended the term "value" to be interpreted as "actual value." Rather, a more logical interpretation is that the voters intended "value" to mean "stated" or "facial" value. (See *In re J.W.* (2002) 29 Cal.4th 200, 210 [courts may avoid a statutory interpretation that would result in absurd consequences that the Legislature could not have intended].)

In arguing that "value" should be measured as monetary worth or fair market value, Franco relies primarily on the reasoning set forth in *People v. Lowery*, *supra*, 8 Cal.App.5th at pages 536 through 541. (AOBM 14-17.) But the analysis in *Lowery* was based on an improper reliance on theft-related principles, which, as discussed above, are inapplicable in the unique context of forgery.

In *Lowery*, the defendant was convicted of possessing a fictitious check (§ 476) after he attempted to cash a check written in the amount of $1,047, but was ultimately refused when the cashier suspected it was not genuine. (*Lowery*, *supra*, 8 Cal.App.5th at p. 536.) The trial court denied the defendant's request for resentencing under Proposition 47, finding that the stated amount of the check exceeded the applicable $950 threshold. (*Id.* at pp. 536-537.) The appellate court reversed, concluding that "value," as used in section 473, subdivision (b), means actual monetary worth. (*Id.* at pp. 539-541.) The court noted that the ordinary meaning of "value" in the economic context is the actual monetary worth of an object, typically measured by fair market value. (*Id.* at p. 539, citing *Manhattan Sepulveda, Ltd. v. City of Manhattan Beach* (1994) 22 Cal.Ap.4th 865, 870.) The court observed that this definition had long been applied to the Penal Code for purposes of various theft-related offenses. (*Id.* at pp. 539-540, citing *People v. Cook* (1965) 233 Cal.App.2d 435, 437.)

Lowery's reliance on the "fair market value" test used in theft and other economic contexts is misplaced. In the forgery context, fair market valuation has no reasonable application, since a "fair market" simply does not exist. Rather than a willing buyer and seller, a forgery necessarily involves one person trying to defraud another. Thus, applying the ordinary meaning of value in the broader economic context to the forgery context would violate the fundamental principle of statutory interpretation that requires words to be construed in context and in light of the statute's obvious nature and purpose, and given a reasonable and commonsense interpretation consistent with the Legislature's apparent purpose and intention, in order to avoid mischief or absurdity. (*Madrigal v. Victim Compensation and Government Claims Board*, *supra*, 6 Cal.App.5th at pp. 1113-114.)

The *Lowery* court also noted that, generally speaking, a forged instrument is a legal nullity with no "value" other than intrinsic value. (*Lowery*, *supra*, 8 Cal.App.5th at pp. 540-541, citing *People v. Cuellar*, *supra*, 165 Cal.App.4th at 838, and *United States Rubber Co. v. Union Bank & Trust Co.*, *supra*, 194 Cal.App.2d at pp. 708-709.) The court acknowledged that if the value of a forged check is never more than the paper on which it is written, the $950 limit contained in section 473, subdivision (b) would be meaningless, and courts should avoid a construction making any word surplusage. (*Lowery*, *supra*, 8 Cal.App.5th at pp. 540-541.) In an effort to avoid this result, the court concluded that a forged check *may* have a monetary value equal to its written value, depending on such factors as whether the check was actually cashed or likely to be cashed. (*Id.* at p. 541.)

The analysis in *Lowery* is flawed, as it conflates the value of the forged instrument with the value of the property actually taken or likely to be taken by means of the forged instrument. Even when a fictitious check is accepted and cashed, this does not mean that the check itself has a monetary worth of the stated amount. Rather, a defendant who received property in exchange for the fictitious check would have done so based on fraud, and by convincing another person that the check was authentic. Such a transaction would not transform the monetary worth of the check to the stated value. Rather, the forged check is merely the tool used to obtain money via fraud.

In sum, the "fair market value" definition should not control in a circumstance such as this, where the context of the surrounding statutory language, and the purpose of laws against forgery, reveal that the plain meaning of "value" is the "stated" or "face" value.

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C. The Official Voter Information Guide for Proposition 47 Suggests That the Electorate Intended "Stated" or "Face" Value

Even if there were some ambiguity about the statutory language as read in context, other indicia of intent show that section 473, subdivision (b) refers to the stated or face value of a forged instrument. The language used by the Legislative Analyst in the Official Voter Information Guide for Proposition 47 further supports a finding that the "face" or "stated" value was intended for purposes of the seven types of forgery designated for mandatory misdemeanor treatment. (See *People v. Rizo*, *supra*, 22 Cal.4th at p. 685 [in interpreting a voter initiative, if the statutory language is ambiguous, the reviewing court may look to other indicia of the voters' intent, particularly the analyses contained in the official ballot pamphlet].) In summarizing the proposed reduction in penalties for certain crimes, under the subheading of "Check Forgery," the Legislative Analyst provided the following analysis:

> Under current law, it is a wobbler crime to forge a check of any *amount*. Under this measure, forging a check *worth* $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft in connection with forging a check.

(Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35, italics added (Voter Information Guide).)

In the first sentence of the above paragraph, the use of the word "amount" in connection with the verb phrase "forge a check" strongly suggests that the stated amount was being described, as opposed to the monetary worth of the forged check. The next sentence explains that under Proposition 47, "forging a check worth $950 or less" would always be a misdemeanor, unless the offender also commits identity theft. In context, nothing suggests that "worth" was meant in a different sense than

"amount." Thus, the Legislative Analyst's interchangeable use of the words "amount" and "worth" in successive sentences suggests that in the context of check forgery, the term "value" was intended to describe the stated amount as opposed to monetary worth. To infer that the use of "worth" implied an intent to incorporate a "monetary worth" standard, as the court did in *People v. Lowery*, *supra*, 8 Cal.App.5th at page 540, and as Franco argues (AOBM 13-20), only makes sense if one ignores the prior use of "amount" and overlooks the essential difference between the importance of value in the forgery and theft contexts.

The Legislative Analyst's summary of the proposed reduction in penalty for the closely related crime of "Writing Bad Checks" (see § 476a) provides further support for the conclusion that the "stated amount" was intended for purposes of forgery. Specifically, under the subheading of "Writing Bad Checks," the Legislative Analyst explained:

> Under current law, writing a bad check is generally a misdemeanor. However, if the check is worth more than $450, or if the offender has previously committed a crime related to forgery, it is a wobbler crime. Under this measure it would be a misdemeanor to write a bad check unless the check is worth more than $950 or the offender had previously committed three forgery related crimes, in which case it would remain a wobbler crime.

(Voter Information Guide, p. 35.)

The statutory language for "writing bad checks," however, uses the term "amount" rather than value:

> However, if the total amount of all checks, drafts, or orders that the defendant is charged with and convicted of making, drawing, or uttering does not exceed ~~four hundred fifty dollars ($450)~~ *nine hundred fifty dollars ($950)*, the offense is punishable only by imprisonment in the county jail for not more than one year . . . .

(Voter Information Guide, text of Prop. 47, § 7, p. 71.)

Again, the interchangeable use of the term "worth" in the Legislative Analyst's summary, and "amount" in the proposed text of the amendment to section 476a, suggests that the voters understood these terms as having the same meaning. As is the case with forgery, in the context of writing a check with insufficient funds, the most straightforward and common sense interpretation of the word "worth" is that it denotes the stated amount as opposed to actual monetary worth. The fact that the terms "amount" and "worth" were used interchangeably in the Voter Information Guide reinforces this view.

Franco argues that the drafters of the amendment to section 473 could have used the same term "total amount" as was used in section 476a, subdivision (b), but chose not to do so, thereby evincing an intent that "value" in the context of forgery means actual monetary worth, rather than stated value. (AOBM 22.) There is a more likely explanation, however. Consistent with the Legislative Analyst's interchangeable use of the words "amount" and "worth" in describing the proposed reduction in penalty for forgery (Voter Information Guide, p. 35), and the interchangeable use of the terms "worth" and "total amount" in the Legislative Analyst's summary of the reduction in penalty for writing bad checks in the text of the proposed amendment to section 476a (*id.* at p. 71), it appears that it was assumed that "value" and "worth" meant the stated amount in the contexts of both forgery and writing checks with insufficient funds. Certainly, nothing indicates an intent to affirmatively jettison reliance on the "amount" in favor of the importation of a fair market value definition applicable to theft, rather than forgery. Nor does Franco offer a reason why Proposition 47's drafters would prescribe a fair market valuation for forging checks, but a stated amount valuation for writing bad checks.

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D. The Rule of Lenity is Inapplicable

In some contexts, the absence of an explicit instruction requires that a penal law be construed in the defendant's favor. But that "rule of lenity" is inapplicable here for two reasons. First, the rule "applies "'only if the court can do no more than guess what the legislative body intended; there must be an *egregious* ambiguity and uncertainty to justify invoking the rule."'" (*People v. Nuckles* (2013) 56 Cal.4th 601, 611, citation omitted.) Here, this Court can do far more than merely "guess" about legislative intent: the context in which the term "value" appears, used to modify bogus financial instruments that have no true monetary value, strongly suggests that the stated amount was intended. This commonsense meaning is merely reinforced by the purpose of forgery law, which targets the means, coupled with the intent to defraud, as opposed to an actual taking of property.

Second, the rule of lenity exists to guarantee fair warning in advance that certain conduct will be criminal and will subject a person to particular penalties. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 313.) The rule's purposes would not be served by applying it here. Franco had fair warning when he committed forgery that his offense could be punishable as either a misdemeanor or a felony. He now seeks on the benefit of statutory changes that postdate his crime and that could not have affected his original decision to break the law.

II. EVEN UNDER FRANCO'S PROPOSED DEFINITION OF "MONETARY WORTH," AS MEASURED BY THE WORTH OF THE MONEY OR PROPERTY TAKEN OR LIKELY TO BE TAKEN VIA THE FORGED INSTRUMENT, FRANCO FAILED TO MEET HIS BURDEN OF ESTABLISHING ELIGIBILITY UNDER PROPOSITION 47

Franco proposes that the "value" of a forged instrument means its "monetary worth." But, faced with the fact that a forged instrument itself has no true monetary worth in the legal sense, Franco focuses on the

property actually taken, as well as factors increasing the likelihood that property will be taken. Thus, he essentially proposes that monetary worth be measured by the worth of the money or property actually taken or likely to be taken with the forged instrument. (AOBM 17-20.) Even under this proposed definition, because a petitioner bears the burden of establishing eligibility under Proposition 47, Franco has not carried his burden of demonstrating eligibility.

Section 1170.18, sets forth the process whereby persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. (§ 1170.18, subd. (a).) "Upon receiving a petition under subdivision (a), the court shall determine whether *the petitioner satisfies* the criteria for subdivision (a)." (§ 1170.18, subd. (b), italics added.) Consistent with this language, this Court has stated that the petitioner has the ultimate burden of proving he or she is eligible for resentencing. (*People v. Romanowski*, *supra*, 2 Cal.5th at p. 916, citing Evid. Code § 500; see also *People v. Johnson* (2016) 1 Cal.App.5th 953, 965 [petitioner has initial burden of establishing eligibility by presenting evidence]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449-450 [petitioner has burden of establishing that value of property taken did not exceed $950]; *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 ["it is entirely appropriate to allocate the initial burden of proof to the petitioner to establish the facts upon which his or her eligibility is based"].)

Here, the check in question was written out for the amount of $1,500. Franco pled guilty, thereby admitting all elements of the charged offense. (See *In re Basinger* (1988) 45 Cal.3d 1348, 1363 [a guilty plea necessarily admits every element of the charged offense].) Forgery requires proof of intent to defraud, and also requires that the document be capable of defrauding another person who believes it to be genuine. (*People v. Jones*,

supra, 210 Cal.App.2d at pp. 808-809.) Franco made no attempt to establish that the forgery was so poor in quality that it was unlikely to deceive another, or that a person could have been defrauded in an amount other than $1,500.

Given Franco's implicit admission that he possessed the forged check with the intent to defraud, it should be presumed that he would have acted in accordance with this intent to defraud and would have uttered the check in an attempt to pass it off as genuine. Based on these facts, which Franco made no attempt to dispute, it was likely that the uttering of the forged check would have resulted in a taking of money or property worth $1,500. Accordingly, even under Franco's proposed definition of "monetary worth," as measured by the money or property taken or likely to be taken by way of the forged check, Franco failed to meet his burden of establishing eligibility under Proposition 47.

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CONCLUSION

Respondent respectfully requests that the decision of the Court of Appeal be affirmed.

Dated: July 11, 2017

Respectfully submitted,

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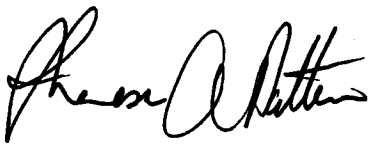
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7,692 words.

Dated: July 11, 2017

XAVIER BECERRA
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **People v. Ruben Phillip Franco**

No.: **S233973**

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 collection and processing of correspondence for mailing with the United States Postal Service. 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.

On **July 11, 2017**, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

The Honorable Roger Ito
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On **July 11, 2017**, I caused **Original & eight (8)** copies of the **RESPONDENT'S ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FEDEX, Tracking # 8107 9097 3401.**

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 **July 11, 2017**, at Los Angeles, California.

Sylvia Sevilla-Farr
Declarant

Signature

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