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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

Michael Scott, *et al.*,

Plaintiffs,

v.

Debra Bowen, Secretary of State of California;

Defendant.

CASE NO.: RG14712570

Memorandum in Support of Motion for Writ of Mandate

Dept. 31
Hearing Date: April 2, 2014 at 1:30
Reservation No. 1482644
Hon. Evelio Grillo
Action filed Feb. 4, 2014
No trial Date set

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All adult Californians have the right to vote unless they are "imprisoned or on parole for conviction of a felony" or are mentally incompetent. Cal. Const. art. II §§ 2, 4. The question in this case is whether people who are on two new forms of criminal-justice supervision that were created by California's 2011 Criminal Justice Realignment Act ("Realignment") – mandatory supervision and post-release community supervision ("PRCS") – can vote.

Despite the plain language of the constitutional provision at issue, Defendant Secretary of State takes the position that Californians under these new forms of supervision *cannot* vote. The Secretary concedes that these two forms of criminal-justice supervision are not "parole" and points to no ambiguity in that term. However, because, in her view, mandatory supervision is "akin" to parole and PRCS is the "functional equivalent" of it, she believes that it is appropriate to sweep these new categories of criminal-justice supervision into the Constitution's disenfranchising provision. She has instructed election officials that Californians under these types of supervision cannot vote and has created voter-registration forms and voter-information materials that prohibit these Californians from even registering to vote. As discussed below, Defendant's position is wrong for three major reasons:

First, her position is contrary to the plain language of article II § 4, which disenfranchises only individuals who are "on parole." The starting point for statutory and constitutional interpretation is the words of the enactments. *Prof'l Engineers in California Gov't v. Kempton,* 40 Cal. 4th 1016, 1037 (2007). Parole continues to exist as a form of criminal-justice supervision, and more than 47,000 Californians are currently on it. In enacting the Realignment statute, however, the Legislature has created mandatory supervision and PRCS as distinct *alternatives* to parole. Parole is now reserved for individuals convicted of very serious crimes; those convicted of less-serious crimes are placed on mandatory supervision and PRCS. People on these new types of community supervision are not on parole and therefore are not within the scope of Article II § 4.

Second, the Secretary's decision to deny the right to vote to thousands of Californians who are on community supervision programs created as alternatives to parole violates the established principle that laws and policies should be construed in favor of this fundamental right wherever possible.

Third, even if it were proper to ignore the constitutional and statutory language and instead try to determine whether these new forms of supervision are "close enough" to parole to justify stripping people of their constitutional rights, neither of them is functionally equivalent to parole as it existed in California when the voters adopted article II § 4 or even to parole as it exists today under Realignment.

Plaintiffs therefore ask this Court to hold that Californians cannot be denied their right to vote

simply because they are on mandatory supervision or PRCS, and to issue a writ of mandate to enforce this ruling.

Plaintiffs also ask this Court to hold that the Secretary's Memorandum is invalid because it was issued in violation of the notice-and-comment requirements of the Administrative Procedure Act, Gov't Code § 11340 *et seq.*

1. Background

Under article II § 2 of the California Constitution, every "United States citizen 18 years of age and resident in this State may vote," except those specifically excluded by other constitutional provisions. For many years, the California Constitution provided that a conviction for an "infamous crime" resulted in lifetime disenfranchisement. *See League of Women Voters of California v. McPherson*, 145 Cal.App.4th 1469, 1475-79 (2006). But in 1974 the voters amended the constitution to expand the franchise so that it now only bars people who are *currently* imprisoned or on parole from voting. *See id.* at 1478-79. Specifically, article II § 4 now states that

> The Legislature ... shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony.[1]

These provisions are self-executing, so that every Californian who meets the constitutional criteria has the right to vote. *See Flood v. Riggs*, 80 Cal.App.3d 138, 154 (1978).

From 1974 until 2005, there was a broad consensus that "imprisoned" referred only to imprisonment in the state prison, and that people who were incarcerated in county jail as a condition of felony probation had the right to vote. *See McPherson*, 145 Cal.App.4th at 1473-74 (2006). But in 2005, then-Secretary of State Bruce McPherson issued a letter to local elections officials instructing them that persons incarcerated in local jails as a condition of felony probation were ineligible to vote. *See McPherson*, 145 Cal. App. 4th at 1474.

The Court of Appeal soon held that this analysis was wrong. The Secretary had erred in relying on dictionary definitions of "imprisoned" and "convicted" to limit voting rights, because voting laws must be construed in favor of expanding voting rights whenever possible and these terms could be – and had already been – construed so as to expand rather than restrict the franchise. *See id.* at 1475-76;1480-82. The court therefore held that "imprisoned" refers only to state-prison custody. *Id.* at 1480-

[1] This provision was originally enacted as article II § 3 but was renumbered without change in 1976. *McPherson*, 145 Cal.App.4th at 1478-79.

84. It ordered the Secretary to inform local "elections officials that the only persons disqualified from voting by reason of article II § 4 are those who have been imprisoned in state prison or who are on parole as a result of the conviction of a felony." *Id.* at 1486.

McPherson conclusively determined the voting rights of everybody under California criminal-justice supervision as it existed in 2006: persons on parole under the jurisdiction and supervision of the state prison system and state parole agents could not vote; persons on probation within the jurisdiction and supervision of the courts and county probation officers had a right to vote. But in 2011 the Legislature fundamentally changed California's criminal-justice system by enacting Realignment, which maintained parole and probation but also created two new categories of supervision: mandatory supervision and post-release community supervision (PRCS). The purpose of Realignment is to reduce recidivism and facilitate community reintegration for people convicted of lower-level felony offenses. *See* Penal Code § 17.5. (All statutory references are to the Penal Code unless otherwise specified.)

In December 2011, the Secretary issued another memorandum to local elections officials instructing them that people on PRCS cannot vote because they are on the "functional equivalent" of parole, again relying on a dictionary definition of the critical term. *See* Plaintiffs' Verified Petition ("Pet."), Ex. A, Secretary of State Memorandum CC/ROV 11134 at 2-3, 11-13. ("Secretary's Memorandum") In a footnote, she also disenfranchises the thousands of Californians who are on mandatory supervision – which she calls "post-sentencing probation" – on the grounds that this new form of supervision is "more akin" to parole than probation. *Id.* at 13 n.6.

The Secretary's website, voter-registration forms, and other materials all follow these conclusions and inform would-be voters that they are "not eligible" to vote if they are "on parole, mandatory supervision, or post release community supervision."[2] *See* Pet. at 13-14, ¶¶ 31-32 & Ex. B-D. In particular, her voter-registration form requires that applicants swear under penalty of perjury that they are not "serving a sentence for a felony pursuant to subdivision (h) of Penal Code section 1170 [the mandatory-supervision statute], or on post release community supervision." *See id.,* Ex. C.

2. Parties

Plaintiff Michael Scott is 52 years old, married, and works full time in San Francisco. He is currently on PRCS and expects to continue on it through the end of 2014. *Id.* at 4 ¶ 11. Plaintiff Leon

[2] A true copy of this webpage is attached to the Petition as Exhibit B. *Accord* http://www.sos.ca.gov/elections/sharing-ideas/voting-rights-californians.htm

Sweeting also expects to be on PRCS through the end of 2014, and Plaintiff Martin Cerda expects to be on mandatory supervision through at least the end of 2014. *Id.* at 4 ¶¶ 12-13.

Plaintiffs Scott, Sweeting, and Cerda would like to be able to register and vote while they are on these forms of supervision without putting themselves in danger of being accused of committing a crime or violating the terms of their release by registering or voting, or by certifying on the Secretary's voter-registration form that they are not on PRCS or serving a sentence under § 1170(h). *See* Pet. at 4, ¶¶ 11-13; Elec. Code §§ 18100(a), 18560(a). They are all otherwise eligible to vote in California. Pet. at 4, ¶¶ 11-13.

Plaintiff All of Us or None ("AOUON") is an organization that is dedicated to fighting discrimination against formerly incarcerated people. *Id.* at 4-5 ¶ 14. It works to inform individuals with felony convictions of their voting rights and leads voter education, outreach, and registration efforts throughout California and the Bay Area. As a result of the Secretary's Memorandum, it cannot in good faith inform people on mandatory supervision or PRCS that they can register to vote or assist them in doing so, because doing so would expose it, its staff, and the people it seeks to register to prosecution. *See id.*; Elec. Code § 18100(a).

Plaintiff League of Women Voters of California ("LWVC") is a nonpartisan political organization with over 7,500 members throughout the state. Pet. at 5, ¶ 15. It signed the ballot arguments in favor of adopting the 1974 initiative to expand the right to vote, continues to encourage informed and active participation of California citizens in government, and works to increase voter registration and participation in elections. *Id.*[3] Plaintiffs AOUON and LWVC bring this suit as interested organizations and on behalf of their taxpayer and other members. *See Common Cause v. Board of Supervisors*, 49 Cal.3d 432, 439–40 (1989); Code Civ. Proc. § 526a.

Plaintiff Dorsey Nunn is the Executive Director of Legal Services for Prisoners with Children and the co-founder of AOUON. Pet. at 5-6, ¶ 16. He has received numerous awards for his work on issues relating to the rights of formerly incarcerated people. *Id.*

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[3] Petitioners AOUON and LWVC previously petitioned the Court of Appeal and Supreme Court for an original writ declaring that all Californians sentenced under Realignment have the right to vote, but those courts summarily declined to hear the matter. Pet. at 15, ¶ 37. Where an appellate court declines to exercise original jurisdiction, this does not constitute a decision on the merits, and a petitioner may accordingly bring suit in Superior Court. *See Funeral Directors Ass'n v. Board of Funeral Directors and Embalmers*, 22 Cal.2d 104, 110 (1943).

Plaintiff George Galvis is the Executive Director of Communities United for Restorative Youth Justice. He is a member of AOUON and a recipient of the 2013 California Peace Prize from the California Wellness Foundation. He lives in Alameda County. *Id.* at 6, ¶ 17. Plaintiffs Nunn and Galvis bring this suit as taxpayers to prevent the Secretary from continuing to misinform voters and elections officials about the voting rights of people on mandatory supervision and PRCS. *See id.* at 5-6, ¶ 16, 17; Code Civ. Proc.§ 526a.

Defendant California Secretary of State Bowen is the state's chief elections officer with the duty to ensure "elections are efficiently conducted and that state election laws are enforced." Gov't Code § 12172.5. Her office issued the Memorandum and voter-registration and information materials here at issue. Pet. at 6, 13-14, ¶¶ 18, 29-32 & Ex. A-D. Counties, including Alameda County, follow this memorandum and refuse to register otherwise eligible Californians on mandatory supervision and PRCS. *See id.* at 6, 14, ¶¶ 18, 33 and Ex. E.

3. Summary of Argument

Defendant's position is wrong for several reasons. First, it disregards the text of the California constitution and the Realignment statute: the constitution disenfranchises only people the Legislature has placed on *parole*; and under Realignment, mandatory supervision, PRCS, and parole are statutorily defined as three distinct legal categories, governed by separate statutory schemes. Defendant's attempt to conflate them cannot supersede the Legislature's unequivocal decision to place people convicted of less-serious crimes on these new forms of community supervision rather than on parole.

Second, Defendant's position and analysis are at odds with the established rule that courts will not interpret a statute to "disenfranchise any voter if the law is reasonably susceptible of any other meaning." *McPherson*, 145 Cal. App. 4th at 1482 (quoting *Otsuka v. Hite*, 64 Cal. 2d 596, 603-04 (1966)[4]); *contra* Ex. A, Secretary's Memorandum, at 11-12.

Third, even if the Secretary were correct that she could disregard the constitutional and statutory text and instead disenfranchise thousands of Californians who are on forms of supervision that she unilaterally asserts are *similar* to parole, people on mandatory supervision and PRCS would still retain the right to vote, because these two new categories of supervision are not the functional equivalents of parole, not as it existed in 1974, or as it exists today.

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[4] *Otsuka* was overruled on other grounds in *Ramirez v. Brown*,9 Cal. 3d 199 (1973), *rev'd, Richardson v. Ramirez,* 418. U.S. 24 (1974).

Fourth, disenfranchising people who have been released back into the community under Realignment conflicts with the Legislature's express intent that Realignment promote the "reintegration back into society" of people convicted of less-serious felony offenses. *See* § 17.5(a)(5).

Finally, Defendant's Memorandum constitutes an improper underground regulation. The Administrative Procedure Act ("APA") prohibits a state agency from issuing or using any materials that "implement, interpret, or make specific" any law without going through the statutory notice-and-comment procedure. Gov't Code §§ 11340.5, 11342.600. Because the Secretary failed to comply with the APA before issuing and using the Memorandum, it is void, as are the voter-registration and information materials that incorporate its conclusions. The failure to follow the APA also means that the Memorandum's conclusion and reasoning are not entitled to any judicial deference or weight.

Plaintiffs therefore ask this Court to hold that Californians cannot be denied their constitutional right to vote simply because they are on mandatory supervision or PRCS and that the Memorandum is an invalid underground regulation.

4. The categories of criminal justice supervision at issue

Understanding the distinct categories of criminal-justice supervision at issue is central to understanding why mandatory supervision and PRCS are not parole.

4.1 Parole as it existed when the voters amended the state constitution to expand the franchise

In 1974, when voters amended the constitution to expand the franchise, California's parole system allowed the Department of Corrections (CDC, now the CDCR) to allow state prisoners to serve part of their prison sentences in constructive, rather than actual, custody. *See People v. Jefferson*, 21 Cal.4th 86, 94-95 (1999). Under the indeterminate sentencing law (ISL) then in effect, courts had no sentencing discretion; they would impose "the term prescribed by law" and let the CDC set the actual prison sentence. *Id.* at 94; *see generally* Albert Lipson & Mark Peterson, *California Justice under Determinate Sentencing: A Review and Agenda for Research* (RAND 1980) at 43-46 ("RAND").[5] Then, the CDC would decide whether to grant parole based largely on the department's assessment of the prisoner's conduct in prison and whether he posed a risk to public safety. *See Jefferson,* 21 Cal.4th at 94-95. Prisoners who were not deemed ready for parole would serve their whole sentence in actual physical custody in state prison and would not be placed on parole at all. *See id.* at 95. Similarly, prisoners who did not want to abide by parole conditions could reject parole and instead serve out their

[5] *Available at* http://www.rand.org/content/dam/rand/pubs/reports/2005/R2497.pdf

terms in state prison. *In re Peterson*, 14 Cal.2d 82, 84-85 (1939).

Importantly, ISL parole was a part of the prison term, not a form of supervision that followed it: Persons "on parole … continued to serve their terms of imprisonment." *Jefferson*, 21 Cal.4th at 94-95; *see also Peterson*, 14 Cal.2d at 85. Persons on parole remained in the "constructive custody of the [CDC's] Adult Authority" and under its exclusive jurisdiction and supervision. *Jefferson*, 21 Cal.4th at 95. If the Authority violated a person's parole it would send the person back to state prison to serve the entire remaining part of his term. *See In re Grey*, 11 Cal.3d 554, 556 (1974); RAND 1980 at 45-46. The length of parole was not fixed by statute; it simply lasted until the prison term set by the CDC expired. *See In re Grey*, 11 Cal. 3d at 554, 556; *Peterson*, 14 Cal.2d at 85.

In 1974, 11,549 Californians were on parole, a rate of 55 per 100,000 residents.[6] Most of these individuals had been convicted of serious crimes: in fact, more than half of those on parole had been convicted of homicide, rape, robbery, or burglary.[7]

4.2 Parole under the Determinate Sentencing Law (DSL)

The population within the state prison system – both those in actual custody and those in constructive custody on parole – changed dramatically under the 1977 Determinate Sentencing Law. Under the DSL, the court sets a fixed prison sentence, and a prisoner who has served this sentence is entitled to be released onto parole, regardless of whether he can show that he has changed his ways. *See Jefferson*, 21 Cal.4th at 95. Until 2013, the CDCR continued to exercise complete jurisdiction over persons on parole: it set the terms of parole; its agents supervised persons on parole and decided whether to institute revocation proceedings; and CDCR officials presided over revocation hearings. Violations led to a physical return of the individual to state prison. *Id.* at 95-96.

The adoption of the DSL and the "countless increases in criminal sentences enacted by the Legislature or in initiative measures in succeeding years," combined with the failure of the system to

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[6] *See* Cal. Dep't of Corrections, *California Prisoners 1974 and 1975*, at 97 (Table 36) *available at* http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/CalPris/CALPRISd1974_75.pdf . There were an additional 24,741 Californians in state prison. *Id.* at 5 (Table 1). The state's population was 21,173,000. Cal. Dep't of Justice, *Crime in California 2012*, at 62 (Table 49) *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd12/cd12.pdf .

[7] 52.7% of the 10,787 males on parole had been convicted of these crimes (10.1% homicide, 23.7% robbery, 2.8% rape and 16.1% burglary). *California Prisoners 1974 and 1975, supra* note 6, at 100. Of the 762 women on parole, 14.6% had been convicted of homicide, 8.3% of robbery, and 7.1% of burglary, and 5.5% of assault. *Id.* at 101.

prepare inmates to reintegrate into society after release, caused the state's prison and parole populations to skyrocket. *Coleman v. Schwarzenegger*, 922 F.Supp.2d 882, 908-09 (E.D. Cal. 2009); *see* RAND at 11-15. For example, parole terms were increased from one year to three years, and then to 10 years for some offenses. *See id.* at 6, 45-46; *see also* §§ 3000(b)(1), (2).

Thus, by the end of 2010, just before the passage of Realignment, California's parole population had soared to 107,667, a rate of 284 per 100,000 Californians, more than five times the 1974 rate.[8] This is so even though the crime rates for both violent and non-violent crimes were much lower in 2011 than in 1974.[9] Moreover, this exponentially larger parole population included many more persons convicted of low-level crimes; by 2010, only 18.1% of persons on parole had been convicted of the four serious crimes that comprised more than 50% of the parole population in 1974.[10]

4.3 Realignment's new categories of supervision: mandatory supervision and PRCS

The Legislature enacted the 2011 Criminal Justice Realignment Act to reverse this 25-year trend of putting more and more people convicted of low-level offenses in prison, onto parole, and then cycling them back into prison for violations. *See* § 17.5(a). The Legislature has explicitly stated that Realignment is meant to "improve public safety outcomes among adult felons and facilitate their reintegration back into society" by "realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs" instead of parole. § 17.5(a)(5); *see People v. Clytus*, 209 Cal. App. 4th 1001, 1004-05 (2012) (discussing Realignment's broad changes to California's sentencing system).

Realignment maintained parole as one system of post-correctional supervision, but significantly narrowed its scope to include *only* those convicted of serious felonies. Those convicted of low-level felonies are instead placed on one of two *new* types of community supervision, overseen by county probation departments and the court: mandatory supervision and PRCS. This is a critical component

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[8] *CDCR Annual Report 2011 - Year at a Glance* at 12, *available at* http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf. The prison population stood at 162,821. *Id.* The state's population was 37,826,160. *Crime in California 2012*, *supra* note 6 at 62 (Table 49).

[9] The violent crime rate in 2011 was 413.3 crimes per 100,000 population; in 1974, it was 602. *Crime in California 2012*, *supra* note 6 at 6 (table 1). For property crimes, the 2011 rate was 2,593.7 per 100,000 Californians, less than half the 1974 rate of 6,137.7. *Id.*

[10] Homicide - 1.5%, robbery - 6.3%, rape - 0.4%, and burglary 9.9%. CDCR, *California Prisoners and Parolees 2010*, at 63, *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2010.pdf

of the Legislature's expressed intent to reduce recidivism by enacting Realignment; not only do these new forms of supervision avoid the social stigma associated with "parole," they are fundamentally different from it:

Mandatory supervision: Under Realignment, defendants without current or prior convictions for serious, violent, or sex-related crimes are sentenced to county jail, not to state prison. *See* § 1170(h). These county-jail sentences differ from state-prison sentences in a number of ways; most relevant here, a court may choose to "suspend execution of a concluding part of the term," and release the defendant onto mandatory supervision. §§ 1170(h)(5)(B)(i),(ii).

People on mandatory supervision are "supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." *Id.* Revocation proceedings also follow the same statutes and procedures that apply to probation violations. *Id.* The court retains jurisdiction over the defendant and has the sole authority to terminate supervision early. *Id.*

As of March 2013, there were 5,920 persons on mandatory supervision in California.[11]

Post-release community supervision ("PRCS"): People convicted of non-serious, non-violent, non-sex-related offenses but whose prior record makes them ineligible to serve their sentences in local jails are no longer placed on parole when they leave state prison; instead, they are placed on PRCS. *See* §§ 3000.08(b), 3451(a). PRCS is not part of the prison term; instead, it is period of supervision that people serve "*after* serving a prison term." *Id.* (emphasis added). It is mandatory; a person cannot reject PRCS and choose to remain in custody. *See id.*

Unlike parole, PRCS is locally run. Each county board of supervisors is required to create a PRCS supervision strategy. § 3451(c). County probation departments are in charge of supervising people on PRCS. *See People v. Cruz*, 207 Cal. App. 4th 664, 672 (2012). Petitions to revoke or modify release are filed with the superior court under the same provisions that apply to petitions to revoke probation. *See* §§ 1203.2, 3454, 3455. If the court finds a violation, it may take a number of steps, such as returning the person to supervised release with additional conditions, which may include up to six months of county jail time, or revoke and terminate release, imposing up to six months in county jail. *See* § 3455. Individuals on PRCS are not under the CDCR's jurisdiction and cannot be sent to prison

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[11] *See* Chief Probation Officers of California, *California Realignment Dashboard*, Exhibit I to Plaintiffs' Request for Judicial Notice. This website does not provide more recent data.

for violations. *See* §§ 3457, 3458. [12] PRCS can last a maximum of 3 years. *See* § 3451(a).

As of March 2013, there were 33,524 persons on PRCS in California.[13]

4.4 Parole after Realignment

Realignment continues to mandate state parole supervision for individuals convicted of serious and violent felonies, those sentenced to an indeterminate three-strikes term, and those classified as high-risk sex offenders or mentally-disordered offenders. §§ 3000.08(a)(1)-(5). Persons on parole for murder or for certain sex offenses are still returned to prison for a violation, although others are sent to jail. §§ 3000.08(a)(4),(f), (h). The CDCR still sets parole conditions and CDCR parole agents supervise people on parole, although revocation hearings are now heard by a court. *See id.*; § 3056(a).

Persons on parole are subject to restrictions that people on PRCS and mandatory supervision are not. *See, e.g.,* § 3003.5(a) (paroled sex offender may not live with other registrant); §§ 3004 & 3010 (electronic monitoring as parole condition); § 3053.5 (abstention from alcohol as parole condition); § 3053.8 (exclusion from parks as parole condition); *compare* § 3067 (terms and conditions of parole) with § 3453 (terms and conditions of PRCS). Other conditions expressly apply both to persons on parole and to those on PRCS. *See e.g.*, § 3003 (persons released on parole *or* PRCS must be returned to last county of residence); § 3060.7 (notice to high-risk-classification persons on parole *or* PRCS); § 3067 (search clause for parole), § 3453(f) (search clause for PRCS).

As of January 22, 2014, there were 47,525 persons on parole in California, more than four times as many as were on parole in 1974.[14]

5. Argument

5.1 The text of article II § 4 does not disenfranchise Californians on mandatory supervision and PRCS

The starting point in interpreting a constitutional or statutory provision is the text of the provision. *Kempton*, 40 Cal.4th at 1037. Here, article II § 4 calls for disenfranchisement of individuals who are "on parole." As the Secretary herself concedes, individuals on PRCS and mandatory supervision are not on parole. Following Realignment, each of these categories of criminal-justice supervision is

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[12] "The Department of Corrections and Rehabilitation shall have ***no*** jurisdiction over any person who is under post-release community supervision...." § 3457 (emphasis added).

[13] *See California Realignment Dashboard, supra* note 11.

[14] *See* CDCR, *Weekly Report Population as of Midnight January 22, 2014, available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad140122.pdf. An additional 133,775 were in state prison. *Id.*

distinct, and in fact the Legislature created these new categories as *alternatives* to parole. *See Briggs v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106, 1117 (1999) ("Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.").

This is not a case where the Court is being called upon to interpret a provision that is otherwise undefined in the law. To the contrary, "parole" is a legislative creation, not a natural category with some fixed meaning outside of the law; the Legislature created it 1893 and has changed it repeatedly since then, both before and after 1974. *See In re Fain*, 145 Cal.App.3d 540, 554-56 & nn.10-16 (1983). In enacting the constitutional provision at issue here, the electorate is presumed to have been aware of the Legislature's broad authority to modify or eliminate parole, either entirely or for people convicted of specified felonies. *See Way v. Superior Court*, 74 Cal. App.3d 165, 169, 172-73 & n.5 (1977) (upholding retroactive shortening of certain parole terms as part of change from indeterminate to determinate sentencing); *see generally People v. Rhodes*, 126 Cal.App.4th 1374, 1385 (2005).

This presumption is bolstered by the context in which article II § 4 uses the term parole. *See Kempton*, 40 Cal. 4th at 1037. Article II § 4 includes an "express recognition of the Legislature's authority" to "implement [its] voting disqualifications" in that it states that the "Legislature shall provide" for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony. *Ramirez v. Brown*, 9 Cal. 3d 199, 204 (1973), *rev'd on other grounds* sub nom. *Richardson v. Ramirez*, 418 U.S. 24 (1974). Thus, just as the Legislature defines "mentally incompetent" under article II § 4, *see* Elec. Code § 2208 *et seq.*, it also defines parole. And when it makes reasonable changes to these definitions, the class of persons who may be disenfranchised for mental incompetence or being on parole changes accordingly. *See in re Jovan B.*, 6 Cal. 4th 801, 816, 818-19 (1993); *People v. 8,000 Punchboard Card Devices*, 142 Cal. App. 3d 618, 619-21 (1983) (constitutional provision stating that "the Legislature by statute may authorize cities and counties to provide for bingo games" authorizes the Legislature to change the definition of "bingo").

The state constitution disenfranchises only two categories of people for felony convictions: those who are imprisoned or on parole. Realignment maintained parole for people convicted of serious felonies but eliminated it for those less-serious offenses and instead created two new rehabilitative forms of local supervision, each governed by its own statutory scheme, for them. By using three

distinct terms to describe these three different types of supervision, the Legislature created three distinct legal categories, only one of which – parole – is covered by article II § 4.[15] *See Briggs*, 19 Cal.4th at 1117. Thus, although article II § 4 continues to disenfranchise Californians who are on parole, it simply does not apply to people who are on mandatory supervision and PRCS. Just as the Legislature's decisions in recent decades to create new crimes and increase sentences have had the effect of disenfranchising tens of thousands of Californians, its decision to eliminate parole for people convicted of less-serious offenses under Realignment means that these individuals can vote when they are released from custody.

The Court of Appeal recently applied a similar analysis in a case that required it to determine whether a decades-old law applied to people sentenced under Realignment. *See People v. Prescott*, 213 Cal.App.4th 1473 (2013). California has long required defendants to repay the cost of their appointed counsel if they can do so, but has presumptively exempted "defendant[s] sentenced to state prison" from having to pay. § 987.8(g)(2)(B). Prescott was convicted of a felony and sentenced to five years. *Prescott,* 213 Cal.App.4th at 1475-76. Before Realignment, this would have been a prison sentence; but because of the new law, he instead received a sentence that did not exist before Realignment: a five-year felony county-jail sentence. *See id.*

Prescott argued that because his sentence was the equivalent of the pre-Realignment prison sentences covered by the exception, he should not have to pay his attorneys fees. *Id.* at 1476-78. But the Court of Appeal disagreed and held that even though the "only difference" between the state-prison sentence that he would have received before Realignment and the county-jail sentence he actually received was the type of facility where he was housed, the statutory language showed that the attorney-fees exception did not include this new type of sentence: its "plain language is clear. The [statute] applies only to a defendant sentenced to state prison, not to defendants sentenced to county jail" under Realignment. *Id.* at 1477, 1478 n.2.

As *Prescott* demonstrates, the "Legislature's specific choice of the terms" in a statute matters. *In re Derrick B.*, 39 Cal.4th 535, 545-46 (2012). For example, when the Legislature labels a minor crime

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[15] In contrast, when the Legislature enacted Juvenile Realignment, it transferred state parole supervision of some wards to local agencies ("local parole") but retained the name "parole" to refer to this supervision. *See In re C.H.*, 53 Cal. 4th 94, 105-06 (2011) *superseded by statute on other grounds* as stated in *In re Edward C.,* -- Cal.App.4th---, 2014 WL 346611, at *4-*5 (Jan. 31, 2014); *see also* Welf. & Inst. §§ 1766-1767.6.

a misdemeanor, even though it functions as an infraction (in that it is punishable only by a small fine), that label is dispositive, and persons charged with it are entitled to the same rights as to those charged with any other misdemeanor. *See Tracy v. Municipal Court*, 22 Cal.3d 760, 765-66 (1978) (discussing former Health and Safety Code § 11357(b)). Similarly, a statute authorizing a court to order "any person" to register as a sex-offender if it made certain findings "at the time of conviction or sentencing" cannot apply to juveniles, because "'conviction' and 'sentencing' are terms of art usually associated with adult proceedings"; the Legislature's use of these terms instead of the corresponding terms that apply to juvenile proceedings – "adjudication" and "commitment" – means that the statute applies only to adults. *In re Derrick B.*, 39 Cal.4th at 539-540 & n.4, 542; *see id.* at 545; *see also, e.g., In re Joseph B.*, 34 Cal.3d 952, 955 (1983) (statute that refers to defendants and guilty pleas does not apply to minors because they are not technically defendants and do not technically plead guilty). Here, too, the language of the state constitution and Realignment statute is dispositive: article II § 4's exclusion applies only to people imprisoned or on parole, not to individuals who are on other forms of criminal-justice supervision such as mandatory supervision and PRCS.

5.2 The presumption in favor of voting further demonstrates that Californians on mandatory supervision and PRCS have the right to vote

Even if it were somehow possible to read the statutory and constitutional language so as to conflate parole with mandatory supervision and PRCS, the rule against unnecessarily restricting or abridging voting rights would rule out that interpretation:

> [I]n the absence of any clear intent by the Legislature or the voters [to restrict voting], we apply the principle that the exercise of the franchise is one of the most important functions of good citizenship, and no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning.
> *McPherson*, 145 Cal.App.4th at 1482 (quoting *Otsuka,* 64 Cal.2d 596).

Thus, in interpreting California election laws, "every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process," *Hedlund v. Davis*, 47 Cal.2d 75, 81 (1956), and a court will not read a law so as to restrict or abridge this right unless the "intent to do so [] appear[s] with great certainty and clearness." *People v. Elkus*, 59 Cal. App. 396, 404 (1922); *see also Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.").

Nothing in the text of Realignment suggests any legislative intent to disenfranchise people on mandatory supervision or PRCS; even the Secretary concedes that there is *no* indication anywhere that the Legislature intended to disenfranchise anybody when it enacted Realignment. *See* Memorandum at

14 ("there is no indication that the Legislature ever considered the issue" of Realignment's effect on voter eligibility). Thus, Californians in these new categories must be allowed to vote unless the *only* possible meaning of the constitutional and statutory language is that they are prohibited from doing so. Even if there were any doubt that otherwise-eligible Californians on mandatory supervision and PRCS can vote, the strong presumption in favor of the franchise would override it.[16]

5.3 The Secretary's approach conflicts with the constitutional and statutory text, ignores the presumption in favor of voting, and is unworkable

The Secretary concedes that people on mandatory supervision and PRCS are not "literally 'on parole,'" Memorandum at 12, but sets forth no compelling reason why the plain language of the California Constitution should nonetheless be ignored. It is only when the constitutional language leads to "absurd results" or is shown to be contrary to legislative intent that courts will do so. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 245 (1978); *see In re C.H.*, 53 Cal. 4th at 107. Here, there is nothing "absurd" that would result from applying the language of the California Constitution as it is written. To the contrary, such a result would be entirely consistent both with the intent of the 1974 electorate (which used a term of art – "parole" – that is a legislative creation) and with the intent of the Legislature that enacted PRCS and mandatory supervision as distinct *alternatives* to parole for people convicted of less-serious offenses. Indeed, even construing parole to include only parole itself, article II § 4 still disenfranchises 47,000 Californians, more than four times the number that were on parole in 1974. There is nothing absurd about allowing people who are not on parole to vote.

Defendant nevertheless would deny them the right to vote because she believes that PRCS is the "functional equivalent" of parole as defined by one dictionary, and summarily concludes that mandatory supervision is "akin" to it. Memorandum at 11-13. As discussed above, this approach conflicts not only with *McPherson,* but also with the plain constitutional text, as well as the Legislature's longstanding authority to fix the punishments for crimes and, specifically, to make changes to the state's parole system. Defendant fails to explain why she has taken this approach when nothing can be found in the constitutional or statutory language or in Realignment's legislative history

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[16] The Secretary fails to follow this judicial precedent and instead employs a presumption *against* voting, adopting a rule that "[a]bsent clear indicia of intent otherwise, PRCS should be viewed, from the standpoint of the electoral franchise, as indistinguishable from parole." Memorandum at 11-12; *cf. id.* at 17.

to suggest that people on these new forms of community supervision should be disenfranchised.

In any event, even under the Secretary's flawed approach, people under these new forms of supervision have the right to vote, because neither mandatory supervision nor PRCS is like parole as it existed in 1974, as it exists today, or even as it is defined in many dictionaries. When the Legislature or the voters use a legal "term of art" that has a pre-existing meaning in the law, they are presumed to know that meaning and to use the term in that same "precise sense." *Derrick B.*, 39 Cal.4th at 540 (citation omitted); *see McPherson*, 145 Cal.App.4th at 1482. Thus, even if article II § 4 did not give the Legislature the authority to define or change the meaning of parole, the word "parole" would mean parole as it as it existed in California in 1974.

As discussed above, 1974 parole was part of the term of imprisonment that was served in constructive, rather than actual, state custody, at the CDC's discretion and under its exclusive jurisdiction and control. When the prison term ended, so did parole. Thus, when the voters decided to amend the constitution to expand the franchise to include everybody who was not "imprisoned or on parole for conviction of a felony," only those individuals who were actually serving a state prison term or sentence, either in actual state custody or in constructive custody under state parole supervision remained ineligible to vote. In fact, the Legislative Analyst specifically informed voters that the 1974 measure would allow people to vote "when their prison sentences, including time on parole, have been completed." *See* Plaintiffs' Request for Judicial Notice Ex. H p.36.

Mandatory supervision has little in common with 1974 parole. Only those whose current and past offenses are classified as non-serious can be placed on mandatory supervision. People on mandatory supervision are not serving a state prison term in constructive custody; they have not been sentenced to state prison at all, and even their county jail term is suspended while they are supervised in the community. The court sets the release date, the term and conditions of mandatory supervision, and retains jurisdiction to punish violations. That these individuals remain "under the jurisdiction of the court" is also a "critical distinction" between them and persons on parole for the purposes of voting eligibility. *McPherson*, 145 Cal.App.4th at 1480. County probation officers, not state parole agents, supervise them. Judges, not the CDCR, hear violations, using the same procedures that govern probation-violation hearings. And prison is not an option for violations. Even if the Secretary were correct that mandatory supervision is "more akin" to parole than to probation, this still does not mean that mandatory supervision is parole for the purposes of voting rights.

Nor is PRCS "indistinguishable from" or "functionally equivalent" to "parole," much less parole

as it existed when the voters adopted article II § 4. *Contra* Memorandum at 11-12. Only people convicted of non-serious, non-violent crimes are eligible to be placed on PRCS; those convicted of more serious crimes are instead placed on parole. The court, not the prison authority, determines when a prisoner will be released to PRCS. People on PRCS are not serving their term of imprisonment; instead, they have completed that term and are serving a separate part of their sentence. The conditions of PRCS are set by a special statute or by the county, not by the CDCR. County probation officers supervise them and decide whether to initiate revocation proceedings; judicial officers determine whether to revoke PRCS using the same procedures they would use to adjudicate a probation violation; they then decide what punishment to impose. The maximum punishment for a violation is six months in county jail, rather than completion of the remaining sentence that a 1974 parole violation would entail.

Moreover, to the extent it matters, mandatory supervision and PRCS also differ from parole as it exists today. Under Realignment, parole is reserved for people convicted of serious offenses; mandatory supervision and PRCS are reserved for those convicted of less-serious offenses. People on parole remain under the supervision of state parole agents, not the county probation officers that supervise people convicted of less serious crimes. As discussed above, people on parole are governed by a different statutory scheme, with different terms and conditions, than are those on mandatory supervision and PRCS.

Thus, even if Defendant did have the authority to disenfranchise people who are on supervised-release programs that are similar to or the "functional equivalent" of or "akin" to parole, people on mandatory supervision and PRCS would still fall outside her expansive interpretation of the state constitution's narrow voter-disqualification provision.

5.4 Disenfranchising Californians living in the community under Realignment undermines the Legislature's goals and fails to further the State's interest in preventing voter fraud

To avoid interpreting "parole" to mean "parole," the Secretary would have to demonstrate that applying the plain language would lead to absurd results or be contrary to clearly expressed legislative intent. As shown above, no absurd results would flow from applying the plain language of Article II § 4. Nor would such an interpretation undermine legislative intent. In fact, the contrary is true: The Legislature created mandatory supervision and PRCS as less-stigmatizing, "community-based" "improved supervision strategies" to help "facilitate [low-level offenders'] reintegration back into society" and thus reduce recidivism, a goal that the state's parole system was failing to accomplish. § 17.5(a)(1), (5). Allowing people in these new forms of community supervision to vote is entirely

consistent with, and furthers, these goals because, as Professor Jeff Manza explains, the "best available research suggests strongly that disenfranchising convicted felons living in their communities from participating in elections harms their reintegration." Declaration of Jeff Manza at 3. "[I]ndividuals who are subject to disenfranchisement laws speak of disenfranchisement as a symbol that they do not belong, and that they are outsiders in their own community."[17] In contrast, "the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society" and "voting appears to be part of a package of pro-social behavior that is linked to desistance from crime."[18] Thus, "restoring voting rights for non-incarcerated felons [has] a modest but significant impact on reducing recidivism," Manza Dec. at 4; *see id.* at 3-4, and "disenfranchisement may actually increase criminal activity across-the-board for all criminal offenders, regardless of class or type of offense."[19] Construing "parole" to mean "parole" is thus entirely consistent with the goals of Realignment.

There are no counterbalancing factors that would justify expanding disenfranchisement to include groups not mentioned in article II § 4. The rationale behind felony disenfranchisement is not to punish individuals convicted of a felony but rather "to deter election fraud." *Ramirez*, 9 Cal.3d at 206; *Otsuka*, 64 Cal. 2d at 602-03.[20] When the voters approved Proposition 10, they recognized, as have the courts, that this historical need for felony disenfranchisement no longer exists. *See* Argument in Favor of Proposition 10, Plaintiffs' Request for Judicial Notice, Ex. H p.38; *see also Ramirez*, 9 Cal.3d at 211-17; *Collier v. Menzel*, 176 Cal. App. 3d 24, 34-35 (1985) More recent scholarly work confirms that there is "no empirical evidence that suggests ex-felons…are at a higher risk of committing election-related offenses" and that felon disenfranchisement is ineffective at reducing fraud.[21] Nor would disenfranchising people under community supervision serve any other legitimate governmental interests. *See* Manza Dec. at 4-5. It is thus not surprising that some 60% of Americans believe that people convicted of felonies should be allowed to vote as soon as they are released from custody.

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[17] Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 414 (2012).

[18] Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 213, 214-15 (2004).

[19] Hamilton-Smith & Vogel, *The Violence of Voicelessness*, *supra* note 17, at 429.

[20] *Otsuka* was overruled on other grounds by *Ramirez*. *See Ramirez,* 9 Cal.3d at 211.

[21] Hamilton-Smith & Vogel, *The Violence of Voicelessness*, *supra* note 17, at 413, citing Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 25 (Dedi Felman ed., 2006).

Manza Dec. at 4-5.[22]

At a civil rights conference at Georgetown University earlier this month, U.S. Attorney General Eric Holder called on states to reconsider and repeal felony disenfranchisement laws and policies, citing a study by a parole commission in Florida that found recidivism rates dropped among those who were permitted to vote again and specifically decrying the stigmatizing and isolating effects of felon disenfranchisement.[23] Article II § 4 continues to disenfranchise nearly 50,000 Californians who are on parole because they have been convicted of serious felonies and remain under state CDCR supervision; there is no reason to expand its scope beyond parole to include the additional tens of thousands who were not convicted of serious crimes and therefore not on parole.

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Thus, construing parole to include mandatory supervision and PRCS would contravene both the plain language of the state constitution and the Realignment statute, as well as the presumption in favor of voting and against disenfranchisement. Such a construction would prevent thousands of Californians from voting for no important state reason, with no indication that either the voters or the Legislature intended such a result.

5.5 The Secretary's Memorandum is an unlawful underground regulation.

California's Administrative Procedure Act serves to ensure that "those persons or entities whom a regulation will affect have a voice in its creation." *Morning Star Co. v. State Bd. of Equalization,* 38 Cal.4th 324, 333 (2006) (citation omitted). It therefore requires state agencies to engage in a formal notice-and-comment procedure before they "issue [or] utilize … any guideline, criterion, bulletin, manual, [or] instruction" that falls within its broad definition of a regulation, except as specifically excepted by statute. Gov't Code § 11340.5. The APA in turn defines regulation broadly to include

> every rule, regulation, order, or standard of general application … adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.
> *Id.* § 11342.600.

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[22] *See* Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 Pub. Op. Q. 276, 283 (2004), *available at* http://www.soc.umn.edu/~uggen/Manza_Brooks_Uggen_POQ_04.pdf.

[23] *See* Del Quentin Wilber, *Felons Should Regain Voting Rights After Sentences, Holder Says*, Bloomberg News/SF Chronicle, Feb. 11, 2014, *available at* http://www.sfgate.com/default/article/Felons-Should-Regain-Voting-Rights-After-5224882.php; Manza Dec. at 6.

An agency guideline or bulletin that falls within this broad definition but has not gone through the APA's formal notice-and-comment procedures is an invalid "underground regulation." *Clovis Unified School Dist. v. Chiang*, 188 Cal.App.4th 794, 805, 809 (2010); *see Morning Star*, 38 Cal.4th at 333-36. For example, the Court of Appeal recently held that a state agency's "advisory" memorandum that informed businesses of the agency's interpretation of a statute constituted an invalid underground regulation because it had been issued without going through the APA procedures. *See California Grocers Association v. Department of Alcoholic Beverage Control*, 219 Cal.App.4th 1065 (2013).

The Secretary of State's office is authorized to "adopt regulations to assure the uniform application and administration of state election laws." Gov't Code § 12172.5(d). When it does so, it must follow the APA. *County of San Diego v. Bowen*, 166 Cal.App.4th 501, 516 n.21 (2008). The Memorandum is a regulation because it is a "guideline," "bulletin," or "instruction" that purports "to implement, interpret, or make specific" California election law. *Id.* at 516-18; *see Morning Star Co.*, 38 Cal. 4th at 335 ("[A]bsent an express exception, the APA applies to all generally applicable administrative interpretations of a statute."); *California Grocers Association*, 219 Cal.App.4th at 1073-74 (lead opn. of Blease, P.J.); *id.* at 1077 (Duarte, J., concurring); *id.* at 1079-80 (Hull, J. concurring).

The Memorandum does not fall within any of the APA's exceptions. Importantly, many of the Secretary's other publications and memoranda are exempt from the APA under Government Code § 11340.9(f) because they simply restate or summarize applicable statutes and holdings of cases. *See Morning Star*, 38 Cal.4th at 336-37. But the Memorandum goes far beyond what that narrow exception allows. *See id.* at 336 ("to the extent any of the contents of the statement of policy or procedure depart from, or embellish upon, express statutory authorization and language, the agency [] need[s] to promulgate regulations.") (citations omitted).

By issuing the Memorandum and related materials without complying with the APA, Defendant has disenfranchised tens of thousands of Californians without giving them – or anyone else outside of her office – any opportunity to object or provide any input into her decision to restrict this fundamental right. This is precisely the type of unilateral rulemaking that the APA is designed to prevent. The Memorandum therefore constitutes a "void" underground regulation. *County of San Diego*, 166 Cal.App.4th at 520. It also means that the Memorandum is "invalid for a substantial failure to comply with" the APA, Gov't Code § 11350(a), as are the Secretary's registration forms and other materials that rely on it. *See Clovis*, 188 Cal.App.4th at 805.

5.6 The Memorandum and its conclusions are not entitled to any deference

A Court gives no weight or deference to an underground regulation or to an agency's interpretation of law adopted in violation of the APA. *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 581-82 (2000). And even if the Memorandum were not an underground regulation, the Court would not defer to its conclusion or reasoning because it must apply independent judgment when interpreting the state constitutional right to vote and the Realignment statute. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 11-15 (1998); *Malick v. Athenour*, 37 Cal.App.4th 1120, 1128 (1995) ("The trial court was not required to defer to the election department's interpretation of the law ....").

5.7 Mandate is the proper remedy

Mandate lies to require the Secretary to inform local election officials of the law as decided by this Court. *McPherson*, 145 Cal.App.4th at 1486. It also lies to challenge underground regulations and actions taken under them. *Clovis*, 188 Cal.App.4th at 809.

6. Conclusion

Plaintiffs therefore ask that this Court issue a peremptory writ of mandate requiring Defendant to take the following actions:

1. Withdraw Memorandum CC/ROV 11134 because it was issued in violation of the APA and misstates the governing law.
2. Issue a new memorandum informing all county clerks and elections officials that otherwise-eligible Californians on mandatory supervision or PRCS have the right to vote.
3. Amend her voter-registration and information materials and procedures to reflect this Court's holding.

Respectfully submitted,

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