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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

MICHAEL SCOTT, LEON SWEETING, MARTIN CERDA, ALL OF US OR NONE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, DORSEY NUNN, and GEORGE GALVIS, Plaintiffs, **v.** **DEBRA BOWEN, Secretary of State of California,** Defendant.	Case No. RG14712570 **ASSIGNED FOR ALL PURPOSES TO JUDGE: EVELIO GRILLO DEPARTMENT 31** **OPPOSITION TO PETITION FOR WRIT OF MANDATE** Date: April 2, 2014 Time: 1:30 p.m. Dept: 31 Judge: The Honorable Evelio Grillo Action Filed: February 4, 2014

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1 Since statehood, the California Constitution has prohibited voting by felons. Article II,
2 section 4 requires the Legislature to disqualify persons from voting who are "imprisoned or on
3 parole for the conviction of a felony." In 2011, the Legislature realigned the incarceration of
4 certain felons to provide for imprisonment in a county jail and for "post release community
5 supervision" ("PRCS"), a new category of parole following release. The statutes authorizing
6 PRCS refer to it as parole and the released inmates as "parolees," and PRCS treats them for all
7 practical purposes just as other felons on traditional parole, with the only difference being that
8 they are supervised by the county instead of the state. Accordingly, petitioners' claims that felons
9 on parole under PRCS are not subject to the voting disqualification for felons on parole at the
10 state level is a distinction without a difference, and has no merit. Similarly, individuals under the
11 newly-created mandatory supervision provisions of realignment are likewise still on "parole" and
12 disqualified from voting by the constitution.

13 Nowhere in the statutes or legislative history is there the slightest indication that, in
14 enacting criminal justice realignment, the Legislature intended to re-enfranchise felons sentenced
15 under this new scheme by removing them from the class of felons categorically prohibited from
16 voting by the Constitution. And this makes sense: the realigned prisoners were going to serve
17 the *same felony sentences* as they would have prior to realignment, just with county-run
18 institutions and programs instead of with the state.

19 Instead, it is clear that the Governor and Legislature enacted realignment in 2011 not to re-
20 enfranchise the affected felons, but to address a crisis in the California prison system. In one
21 swoop, the state planned to save money and reduce prison population by imprisoning certain
22 lower-level felons in county jails, estimated to cost approximately half of what it would cost to
23 imprison the same felons in state prison. Similarly, by creating PRCS, the state would save
24 money and improve efficiency by having counties supervise lower-level felons following their
25 release from imprisonment. This is a change in parole venue, but there is no evidence that the
26 Legislature changed their fundamental legal status as felons imprisoned or on parole.

27 Accordingly, the Secretary of State issued a memorandum informing local election officials
28 that realignment did not change the voting status of any individuals. The memorandum was

premised on the fact that prior to realignment, none of the convicted low-level felons were constitutionally entitled to vote, and nothing in the realignment provisions evinced an intent to re-enfranchise them.

Petitioners disagree, in effect contending that the Legislature *accidentally* re-enfranchised tens of thousands of individuals when it enacted realignment. Petitioners misread the California Constitution—a proper evaluation of the terms of realignment, the legislative intent behind the realignment legislation, and the relevant case law confirms that petitioners are incorrect.

In fact the Legislature expressly rejected petitioners' construction. In 2012, petitioners brought a nearly identical lawsuit in the First District Court of Appeal. After issuing a notice pursuant to *Palma v. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, and ordering full briefing, the Court of Appeal summarily denied the petition. On a 6-1 vote, the California Supreme Court denied review. Many of the current petitioners then sponsored AB 938, a bill that would have mandated that individuals on PRCS and mandatory supervision could vote. But this bill died in committee, apparently due to the concern that AB 938 violated article II, section 4. If the Secretary of State's construction of the constitution was incorrect, and had the Legislature intended to re-enfranchise individuals under realignment, it had the opportunity to do so in AB 938, and expressly rejected it.

BACKGROUND

I. Realignment Provisions

In April 2011, Governor Brown signed into law AB 109 (Stats. 2011, ch. 15), the primary criminal justice realignment bill. Other realignment clean-up legislation followed later in 2011 and continues to this day. The law changed both who goes to prison and what happens to those individuals after they are released from prison.

One of the most basic changes brought about by criminal justice realignment was changing how offenses would be classified as a "felony" in California. Prior to October 1, 2011, a felony was a crime punishable by death or imprisonment in state prison. (Former Pen. Code, § 17.) Effective October 1, 2011, the term "felony" includes crimes punishable by imprisonment in a county jail (Pen. Code, § 17) and applies only to persons sentenced on or after October 1, 2011.

(Pen. Code, § 1170, subd. (h)(6).) Criminal justice realignment did not, however, convert any offense from felony to misdemeanor status, or *vice versa*.

Criminal justice realignment provides that a number of pre-existing felonies are punishable by a term of imprisonment in county jail instead of state prison, unless the crime or a defendant's criminal history makes the defendant ineligible to serve their felony sentence in jail. (Pen. Code, § 1170, subd. (h).) This change applies only to criminal statutes that have been expressly amended to provide for a felony jail term where otherwise allowable. (*Ibid.*) Certain felons are categorically prohibited from serving a felony sentence in county jail. (*Id.*, subd. (h)(3).) These felons include those who have a prior or current serious or violent felony conviction, those required to register as a sex offender, or those convicted of a crime that received an aggravated white collar crime enhancement. (*Ibid.*) Under realignment, counties are permitted to contract with the California Department of Corrections and Rehabilitation ("CDCR") for the purpose of housing these and other serious felony offenders. (Pen. Code, § 2057.)

Criminal justice realignment also changed the state's parole system. California law generally provides that persons who have been sentenced to state prison for a felony are subject to up to three years of conditional release ("parole") supervised by CDCR. (See Pen. Code, § 3000.) After realignment, some of these felons will, upon release, be subject instead to PRCS supervised by a local entity. (Pen. Code, § 3000, subd. (a)(1).) Whether a felon is subject to traditional parole or PRCS is generally dependent upon the nature of the felony offense. Certain state prison inmates, such as those convicted of a serious or violent felony, certain habitual offenders, and those classified as a high-risk sex offender or mentally ill offender, are excluded from PRCS and are instead subject to state parole supervision. (Pen. Code, § 3000.08, subd. (a).) Parolees who were released prior to October 1, 2011 will generally continue to be supervised by state parole officers for the duration of their parole period regardless of the underlying criminal offense. (Pen. Code, § 3000.09.)

PRCS imposes statutorily-enumerated conditions of an individual's release from prison that closely track those of traditional parole conditions (Pen. Code, § 3453), and county authorities may impose additional conditions. (Pen. Code, § 3454.) Like traditional parolees, for example,

every person placed on PRCS is subject to search or seizure at any time, with or without a warrant. (Pen. Code, § 3465.)

II. The Secretary of State's Memorandum to County Election Officials

At the request of local election officials, on December 5, 2011 the Secretary of State issued a detailed 18-page memorandum which analyzed Article II, section 4. (See Respondent's Request for Judicial Notice ("Respondent's RJN", Ex. 1.) The memorandum reviewed the history of the realignment legislation and voting rights in California. (*Id.* at p. 2-12). The memorandum determined that "imprisoned" is a broader term than "in prison" and that realigned felons imprisoned in county jail instead of state prison have not regained the right to vote (*id.* at p. 9-11), a decision that is not challenged here. Further, the memorandum concluded that parole and PRCS are functionally equivalent, comparing numerous Penal Code provisions. (*Id.* At pp. 11-13.) Most importantly, the Secretary of State concluded that realignment "does not disenfranchise anyone who would have been eligible to vote under prior law," recognizing that "a construction of [realignment] that ignored these parallels would enfranchise thousands of convicted felons that were disenfranchised under prior law with no indication from the Legislature that it intended this result when it adopted [realignment]." (*Id.* at p. 17.)

III. The Previous Lawsuit

Approximately three months after the Secretary of State issued her memorandum, most of the parties who are petitioners here, represented by many of the same attorneys, filed a lawsuit in the First District Court of Appeal on March 7, 2012. (See Petition, ¶ 37; Respondent's RJN, Ex. 2.) On March 15, 2012, the Court issued an order pursuant to *Palma v. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, meaning that it was considering issuing a peremptory writ in the first instance. (Respondent's RJN, Ex. 2 & 3.) The Court ordered and received full briefing. (*Ibid.*) On May 17, 2012, the Court summarily denied the petition. Petitioners filed a petition for review with the California Supreme Court, but it was denied on a 6-1 vote. (Respondent's RJN, Ex. 2.) In dissent, Justice Kennard would have granted the petition and transferred the matter to the Court of Appeal for issuance of an opinion. (*Ibid.*)

IV. Petitioners' Unsuccessful Legislation

After the defeat in the Court of Appeal and California Supreme Court, many of the same groups that are petitioners here turned to legislative efforts. In February 2013, these groups helped sponsor AB 938, a bill that expressly would have allowed realigned felons to vote and provided that "parole" does not include a person on PRCS or on mandatory supervision. (Respondent's RJN, Ex. 4 & 5.) Ironically, the Legislature appears to have been concerned that AB 938 itself was unconstitutional, as merely changing the location of where an individual was serving his or her imprisonment or parole should not result in a change of voting status. (Respondent's RJN, Ex. 5, p. 5.) For example, one committee report indicated that given the PRCS and mandatory supervision are "functionally equivalent to parole," in that "they essentially require post release supervision by a government entity that if violated, can be revoked." (*Ibid*). Moreover, because article II, section 4 is self-executing (*Flood v. Riggs* (1978) 80 Cal.App.3d 138, 155), AB 938, "which excludes those that are on post release community supervision or on mandatory supervision under realignment under the definition of state parole, may not withstand constitutional scrutiny." (*Ibid.*) The bill was quickly amended in May 2013 to remove any language about the voting status of realigned felons. (Respondent's RJN, Ex. 6.) The amended bill has not advanced since hearings were cancelled in July 2013. (Respondent's RJN, Ex. 7.)

ARGUMENT

I. THE LEGISLATURE ENACTED CRIMINAL JUSTICE REALIGNMENT TO ADDRESS ISSUES UNRELATED TO FELON DISENFRANCHISEMENT

A. Prison Overcrowding Emergency

On November 30, 2010, the United States Supreme Court heard oral argument in a landmark case that challenged a three-judge panel's order to release California prisoners. (*Brown v. Plata* (2011) _ U.S. _, 131 S.Ct. 1910.) The case arose out of two separate class action lawsuits challenging conditions in California's prisons. Although a federal court in 2005 took the unusual step of appointing a receiver to oversee the state prisons' medical system (*id.* at pp. 1926-27), and in 2006 then-Governor Schwarzenegger declared a prison overcrowding emergency, the problems persisted to the point that the three-judge panel ordered the state in 2010 to reduce its prison population to 137.5% of capacity within two years. (*Id.* at p. 1928.) Such an

1 order could require a release of 38,000 to 46,000 prisoners. (*Ibid.*)

2 Approximately six months after the Supreme Court heard argument, it affirmed the panel's
3 order. The Court found that "[t]he degree of overcrowding in California's prisons is exceptional.
4 California's prisons are designed to house a population just under 80,000, but at the time of the
5 three-judge court's decision the population was almost double that." (*Id.* at pp. 1923-24.) The
6 Court directed the state to "implement the order without further delay." (*Id.* at p. 1947.)

7 **B. State Fiscal Crisis**

8 At the same time California was suffering through a prison overcrowding emergency, it was
9 also dealing with an unparalleled fiscal crisis. Due to the stock market decline and the real estate
10 collapse in late 2008, the state was billions of dollars in debt. (*Professional Engineers in*
11 *California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 1001.) Governor
12 Schwarzenegger declared a fiscal emergency in 2008. (*Id.* at p. 1002.) During mid-2009 the state
13 had so little cash on hand it had to issue registered warrants to pay its bills. (Woo & Shankman,
14 *California Lays Plans to Issue IOUs to Creditors*, Wall Street J. (July 2, 2009)
15 http://online.wsj.com/article/SB124648274812182537.html [as of Mar. 10, 2014].) Governor
16 Schwarzenegger again declared a fiscal emergency in 2010, and Governor Brown renewed the
17 declaration in early 2011. (*California Redevelopment Agency v. Matosantos* (2011) 53 Cal.4th
18 231, 250.) When Governor Brown took office, the state had a projected $25 billion deficit. (*Ibid.*)

19 **C. Confluence of Overcrowding and Fiscal Crisis and Proposed Solutions**

20 Of course, the state's fiscal problems did not alleviate its responsibility to deal with its
21 prison overcrowding emergency. In late 2006 the Governor issued a proclamation directing
22 CDCR to mitigate overcrowding by transferring inmates to out-of-state correctional facilities.
23 (*Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 759.) In
24 2007, the Legislature enacted AB 900, which authorized up to $7.4 billion in bonds for the
25 construction and renovation of prisons and to add additional beds to relieve overcrowding. (*Id.* at
26 p. 757.) However, the three-judge panel found these measures to be unsuccessful in alleviating
27 the massive overcrowding. (*Brown v. Plata, supra,* 131 S.Ct. 1910, 1938.)

28 Governor Brown took office in January 2011. By law, he was required to submit a

proposed budget to the Legislature by January 10. (Cal. Const., art. IV, §12, subd. (a).) Governor Brown proposed dealing with both the fiscal crisis and prison overcrowding in one swoop. As described by the nonpartisan Legislative Analyst, "[t]he centerpiece of the Governor's budget proposal is a major realignment of state and local program responsibilities" that shifted a variety of responsibilities to counties. (See Respondent's RJN, Ex. 8, p. 1.)

The Governor estimated that shifting lower-level felons to county jails would save the state $336 million and reduce the prison population by nearly 10,000 prisoners in 2011-12, with even greater future savings. (See Respondent's RJN, Ex. 8, p. 7.) Similarly, shifting responsibility for supervising parolees from the state to local governments would result in state savings of $239 million in 2011-12. (*Id.* at p. 12.) Finally, requiring that all parole violators be under local jurisdiction rather than returned to state prison would save the state more than $200 million a year and reduce the prison population by 6,300 inmates. (*Id.* at p. 10.)

II. FELON DISENFRANCHISEMENT IN CALIFORNIA

Since statehood, the California Constitution has prohibited voting by felons.[1] Prior to 1974, a person sentenced to prison following conviction of a felony ("infamous crime" in earlier versions of the Constitution) was banned from voting for life. There were many cases discussing what constituted an infamous crime, but "[u]ntil 1966, the disqualifying language "infamous crime" was judicially interpreted to include conviction of any felony." (*Flood*, *supra*, 80 Cal.App.3d at p. 145.)

However, in 1966, the California Supreme Court narrowed the class of crimes that could be considered "infamous" and thus result in disenfranchisement. (*Otsuka v. Hite* (1966) 64 Cal.2d 596, 599.) Then, in 1973, the California Supreme Court once again took up the issue, striking down the felon disenfranchisement provisions pursuant to the equal protection clause of the Fourteenth Amendment. (*Ramirez v. Brown* (1973) 9 Cal.3d 199, 216-217.) This decision was later reversed by the United States Supreme Court, which held that the Fourteenth Amendment

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[1] California's position on felon disenfranchisement is hardly unique. Almost all states, including every state in the Ninth Circuit, prohibit felons from voting. (*Farrakhan v. Gregoire* (9th Cir. 2010) 623 F.3d 990, 993.)

was not infringed by disenfranchising even those individuals who had completed their sentence and parole. (*Richardson v. Ramirez* (1974) 418 U.S. 24, 56.)

Responding to the vacuum left by the California Supreme Court's decision in *Ramirez* (prior to its overruling by the United States Supreme Court), in 1974 the Legislature proposed and the voters adopted Proposition 10, which amended article II, section 3 of the Constitution to give the right to vote to convicted felons after they have served their sentences and completed parole. (*Flood*, *supra*, 80 Cal.App.3d at pp. 148-149.) Subsequently renumbered, the language of that amendment remains unchanged in today's Constitution: "The Legislature . . . shall provide for the disqualification of electors while . . . imprisoned or on parole for the conviction of a felony." (Cal. Const., art. II, § 4.) As the ballot arguments make clear, the purpose of the 1974 amendment was to restore the right to vote to ex-felons after they are released and have "fully paid the price society has demanded." (Petitioners' RJN, Ex. H; see also *League of Women Voters v. McPherson* (2006) 145 Cal.App.4th 1469, 1482-1483 [discussing intent of proposition].) The measure also sought to ensure uniformity amongst California counties in light of the uncertainty caused by the California Supreme Court's decision—at the time, counties were deciding what to do with ex-felons on a case-by-case basis. (*Ibid.*) After the enactment of this provision, it was once again clear that "an elector convicted of *any* felony is temporarily disfranchised while serving a sentence of imprisonment or while undergoing an unexpired term of parole." (*Flood*, *supra*, 80 Cal.App.3d at p. 155, emphasis in original.)

In *League of Women Voters v. McPherson*, the Court found that individuals who were in county jail as a condition of probation after suspension of imposition or execution of sentence were not imprisoned for the conviction of a felony and were therefore eligible to vote. (*McPherson*, *supra*, 145 Cal.App.4th at p. 1475.) The Court also held where an offense is a "wobbler" and the court enters judgment imposing something other than imprisonment in state prison, the crime is a misdemeanor for purpose of article II, section 4. (*Id.* at p. 1485.)

Accordingly, a review of California's history on this issue makes clear that, prior to criminal justice realignment, persons convicted of any felony were lawfully disenfranchised by the California Constitution for the term of their imprisonment and duration of any parole.

III. THE LEGISLATURE EVINCED NO INTENT TO RE-ENFRANCHISE ANY FELONS

"The touchstone of statutory interpretation is the probable intent of the Legislature." (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 208.) "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.) "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) In addition, the Secretary of State's interpretation of article II, section 4 is entitled to deference. (See *Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 848, 859.)

The legislative intent and historical circumstances behind criminal justice realignment evince a clear intent to realign prison populations and help the state budget, not to create new rights or re-enfranchise any felons. The Governor's budget proposal listed the goals of realignment: protect essential public services; create an effective and efficient government structure; have government focus on core functions; assign program and fiscal responsibility to the level of government that can best provide the service; have interconnected services provided at a single level of government; provide dedicated resources to fund these programs; free up local funds not currently used on core services; provide as much flexibility as possible to the level of government providing the service; reduce duplication and overhead costs; and focus the state's role on appropriate oversight, technical assistance, and monitoring. (See Respondent's RJN, Ex. 9, pp. 18-19.) The Governor's budget proposal discussing CDCR recognizes that the great number of short-term, lower-level felons and parole violators incarcerated in state prisons has resulted in crowded conditions and inefficient prison operations. (See Respondent's RJN, Ex. 10, p. 131.) The proposal also recognized that the full implementation of realignment would save approximately $1.4 billion. (*Ibid.*)

The Legislative Analyst also focused on the cost-saving and overcrowding reduction focus of criminal justice realignment. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 31-32 [reports of Legislative Analyst are "cognizable

legislative history"].) The Legislative Analyst estimated that sentencing lower-level felons to county jails would save the state $336 million and reduce the prison population by nearly 10,000 prisoners in 2011-12, with savings to increase to $1.4 billion and a 38,000-inmate reduction by 2014-15. (See Respondent's RJN, Ex. 8, p. 7.) Similarly, shifting responsibility for supervising parolees from the state to local governments would result in state savings of $239 million in 2011-12, increasing to $726 million annually by 2014-15. (*Id.* at p. 12.) Finally, requiring all parole violators be under local jurisdiction rather than returned to state prison would save the state more than $200 million a year and reduce the prison population by 6,300 inmates. (*Id.* at p. 10.) The Legislative Analyst praised this latter proposal because it would reduce "the state's massive fiscal shortfall" and "put the state closer to meeting a [then] potential court-ordered reduction in the inmate population." (*Id.* at p. 11.)

Legislative committee reports are similar. The Senate and Assembly Budget Committee reports about AB 109 (Stats. 2011, ch. 15), the primary realignment bill, discuss the changes brought about by realignment but are completely devoid of any indication that any new voting rights were being granted to anyone subject to the proposal. (See Respondent's RJN, Exs. 11 & 12.) The Senate Rules Committee analysis of SB 87 (Stats. 2011, ch. 33), the budget bill that appropriates funds to implement the realignment, explains that the "realignment plan will enable the state to meet the order set out by a recent United States Supreme Court decision . . . to require the reduction of overcrowding in the state prison system."[2] (Respondent's RJN, Ex. 13, p. 10.) Finally, the Senate Committee on Budget and Fiscal Review bill analysis on ABx1-16 (Stats. 2011, ch. 13), one of the many realignment clean-up bills, makes no mention of enfranchisement or the granting of new rights, but does indicate that realignment "is expected to save the State up to $2 billion when it is fully implemented mainly from the reduction in State prison and parole activities." (Respondent's RJN, Ex. 14, p. 4.)

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[2] Of course, Penal Code section 17.5, subdivision (b) says that the purpose of realignment is not about reducing overcrowding, notwithstanding the overwhelming evidence in the legislative history to the contrary. Regardless, even if the purpose behind realignment were solely fiscal savings and improved efficiency, in no event is there any argument that the purpose of realignment was to grant new rights to affected felons or to re-enfranchise anyone.

Accordingly, the legislative history about realignment is entirely about improving efficiency and saving money. There is not one word about re-enfranchising parolees.

Inferring a major change in the law when such intent is not indicated on the part of the Legislature is not the proper analytical approach. "We think it highly unlikely that the Legislature would make such a significant change in the [law] without so much as a passing reference to what it was doing." (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 589; see also *In re Christian S.* (1994) 7 Cal.4th 768, 782 ["We are not persuaded the Legislature would have silently, or at best obscurely, decided so important and controversial a public policy matter and created a significant departure from the existing law"]; *Flood*, *supra*, 80 Cal.App.3d at p. 154 fn. 19 [when legislative history was silent, court refuses to read into statute an attempt to enfranchise parolees].) And, as our Supreme Court has recently noted, "[i]t would be unusual in the extreme for the [Legislature] . . . to adopt such a fundamental change only by way of implication. . . . As the United States Supreme Court has put it, the drafters of legislation "do[] not, one might say, hide elephants in mouseholes." (*California Redevelopment Association v. Matosantos* (2011) 53 Cal.4th 231, 260-261, quoting *Whitman v. American Trucking Assns., Inc.* (2001) 531 U.S. 457, 468.) It would indeed be an "elephant in a mousehole" if the Legislature were to grant new voting rights to tens of thousands of individuals without the slightest indication it intended to address the issue.

Petitioners try to overcome these basic propositions by relying on various cases to argue that "every reasonable presumption and interpretation" must be read in favor of eligibility to vote. (Petitioners' Brief, pp. 13-14.) This is an accurate statement of law, but this statutory construction argument must give way to the complete absence of legislative intent that would support the construction petitioners urge. "Constructional preferences 'are mere guides and will not be used to defeat legislative intent.'" (*People v. Frawley* (2000) 82 Cal.App.4th 784, 789, quoting *People v. Cruz* (1996) 13 Cal.4th 764, 782.) "Constructional preferences . . . are properly understood not as mechanical rules for the determination of statutory meaning but as aids in support of '[t]he fundamental task of statutory construction,' which is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law.'" (*Ibid.*)

Accordingly, the legislative intent and historical circumstances about realignment makes clear that the purpose of realignment was to improve efficiency and save money, not to create new rights or re-enfranchise felons.

IV. Felons on Post Release Community Supervision Are Still on Parole and Have Not Been Re-Enfranchised

Article II, section 4 of the California Constitution provides that individuals "on parole for the conviction of a felony" do not have the right to vote. People who are on PRCS have been convicted of a felony. PRCS is functionally equivalent to traditional parole in the California criminal justice system, and is even referred to as "parole" in the Penal Code. Felons on PRCS thus cannot vote.

Determining the voting status of a former felony inmate is not simply a matter of determining whether the former inmate is literally "on parole." "Parole" is a general rather than specific term. (See, e.g., *McPherson*, *supra*, 145 Cal.App.4th at p. 1482 [finding the phrase "imprisoned or on parole for the conviction of a felony," to be ambiguous].[3]) Parole is defined as "the conditional release of a prisoner from imprisonment before the full sentence has been served." (Black's Law Dictionary (9th ed. 2009). A leading treatise indicates that "[g]eneralized statements regarding . . . parole. . . must be made cautiously in light of the wide variations among states" and also that "the procedures under which parole is granted and administered . . . vary from state to state." (Cohen, The Law of Probation and Parole (2d ed. 1999), ch. 1, p. 30.)

Respondent is not aware of any case that has examined whether a parolee whose status has changed because the name of a state program has changed should be re-enfranchised by the name change. However, a relevant analogy can be drawn to a line of cases involving whether a parolee

[3] Petitioners argue that this Court should not look behind the meaning of the word "parole," relying on *People v. Prescott* (2013) 213 Cal.App.4th 1473, 1475. (Petitioners' Brief, pp. 12-13.) This reliance is misplaced because the phrase "imprisoned or on parole for the conviction of a felony" is ambiguous. In *Prescott*, the court had to determine whether a statute that presumed a defendant was unable to pay defense costs while "sentenced to state prison" should be applied to an individual sentenced under realignment. Because the Court found the phrase "state prison" unambiguous, it found that realigned felons were not entitled to the presumption. Unlike *Prescott*, here the provision at issue is ambiguous. The result in *Prescott* likely would have been different had the statute instead used the term "imprisoned."

has a protected liberty interest and is entitled to due process before a parole revocation. In 1972, the United States Supreme Court said that parolees were entitled to certain minimal due process procedures. (*Morrissey v. Brewer* (1972), 408 U.S. at p. 482.) However, much like California, since then any number of jurisdictions have enacted new parole schemes that are called something different and utilize new conditions. Courts in these situations have had to analogize these new parole situations with traditional parole to see if a parolee is entitled to due process. Courts do not look merely at the label of whether a system is called "parole" or not. (See *Young v. Harper* (1997) 520 U.S. 143, 149-152 [examining a number of factors and finding "preparole" program to be functionally equivalent to the regular parole program]; *Gonzalez-Fuentes v. Molina* (1st Cir. 2010) 607 F.3d 864, 890 ["electronic supervision program" is "sufficiently similar to traditional parole" to merit protection under due process clause]; *In re McNeal* (Wash. App. 2000) 994 P.2d 890, 897 ["community custody" sufficiently similar to parole to establish liberty interest].)

Accordingly, it is clear that courts look beyond merely the name of a program in determining what rights accrue to an individual. Here, just as the United State Supreme Court found "preparole" to be functionally equivalent to parole (*Young*, *supra*, 520 U.S. 143, 149-152), PRCS is also functionally equivalent to parole such that felons on PRCS may not vote.

A. Comparison of Traditional Parole and PRCS

Parole and PRCS are parallel in their essential concept. "In California, parolee status carries distinct disadvantages when compared to the situation of the law-abiding citizen." (*In re Hudson* (2006) 143 Cal.App.4th 1, 9, internal quotations and citations omitted.) "Even when released from actual confinement, a parolee is still constructively a prisoner subject to correctional authorities." (*Ibid.*) "Parolees have fewer constitutional rights than do ordinary persons. . . [a]lthough a parolee is no longer confined in prison[,] his custody status is one which requires and permits supervision and surveillance under restrictions which may not be imposed on members of the public generally." (*In re Stevens* (2004) 119 Cal.App.4th 1228, 1233, internal quotations and citations omitted.) "The United States Supreme Court has characterized parole as 'an established variation on imprisonment' and a parolee as possessing 'not . . . the absolute

liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions.'" (*People v. Lewis* (1999) 74 Cal.App.4th 662, 670, quoting *Morrissey*, *supra*, 408 U.S. at pp. 477, 480.) However, parole is also about more than just punishment. "The fundamental goal of parole is to help individuals reintegrate into society as constructive individuals . . . to end criminal careers through the rehabilitation of those convicted of crime . . . and to become self-supporting." (*In re Stevens*, *supra*, 119 Cal.App.4th at p. 1233, internal quotations and citations omitted.)

PRCS is similar in that it combines punishment with rehabilitation. The laws discussing PRCS recognize that the current model has not been successful in reducing recidivism and that a community-based model may be more effective. (Pen. Code, § 3450.) And individuals on PRCS are under the jurisdiction of county officials rather than CDCR. (Pen. Code, § 3457.) However, PRCS is still "punishment" (see Pen. Code, § 3450, subd. (b) [using the phrase "punishment" multiple times]), as is parole. Individuals on PRCS are subject to a number of conditions that are comparable to parole conditions. (Compare Pen. Code, § 3453 [PRCS conditions] with Cal. Code Regs., tit. 15, §§ 2512, 2513 [parole conditions].) Like individuals on parole, individuals on PRCS are subject to search any time day or night with or without a warrant. (Pen. Code, §§ 3453, subd. (f), 3465.) They also cannot possess weapons, and can be sent back into confinement for violations of conditions. (Pen. Code, §§ 3453, subds. (m)-(o), 3455, subd. (b).) Moreover, individuals on PRCS are subject to having their conditional release revoked when they have been convicted of a new misdemeanor or felony. (Pen. Code, § 3455, subd. (a).) Accordingly, an individual on PRCS does not have "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions.'" (See *Lewis*, *supra*, 74 Cal.App.4th at p. 670, quoting *Morrissey*, *supra*, 408 U.S. at pp. 477, 480.)

B. The Terms "Parole" And "PRCS" Are Used Interchangeably Throughout The Penal Code

In addition to the similar conditions imposed on parolees and individuals on PRCS, the interchangeable use of the terms in the Penal Code confirms that felons on PRCS are considered to be on parole.

To begin with, the provisions of the Penal Code that present the legislative findings and declarations about PRCS use the terms "parole" or "parolee" interchangeably with PRCS and someone on PRCS. For example, the Penal Code provides that "[r]ealigning the postrelease supervision of certain felons reentering the community after serving a prison term to local community corrections programs . . . will improve public safety outcomes *among adult felon parolees* and will facilitate their successful reintegration." (Pen. Code, § 3450, subd. (b)(5), emphasis added.) Other provisions are similar, and discuss a "partnership between local safety entities and the county to provide and expand the use of community-based-punishment *for offenders paroled* from state prison." (Pen. Code, § 3450, subd. (b)(6), emphasis added.)

Other provisions of criminal justice realignment make it clear that PRCS is the functional equivalent of parole. To give just a sample:

> A sentence resulting in imprisonment in the state prison pursuant to Section 1168 or 1170 *shall include a period of parole supervision or postrelease community supervision*, unless waived, or as otherwise provided in this article.

(Pen. Code, § 3000, subd. (a)(1), emphasis added.)

> The following information, if available, shall be released by the Department of Corrections and Rehabilitation to local law enforcement agencies regarding *a paroled inmate or inmate placed on postrelease supervision* pursuant to Title 2.05 (commencing with Section 3450) who is released in their jurisdictions . . .

(Pen. Code, 3003, subd. (e), emphasis added.)

> The department shall also inform persons serving a term of parole for a felony offense who are subject to this section of the requirements of this title and of his or her responsibility to report to the county agency responsible for serving that parolee. *Thirty days prior to the release of any person subject to postrelease supervision by a county, the department shall notify the county of all information that would otherwise be required for parolees under subdivision (e) of Section 3003.*

(Pen. Code, § 3451, subd. (c)(2), emphasis added.)

How revocations will be handled after criminal justice realignment is another example of how parole and PRCS are functionally equivalent. Under PRCS and with traditional parole, the supervising agency can impose a "flash incarceration" period in jail of not more than 10 consecutive days for any violation without the right to a court hearing. (Pen. Code, §§ 3453, subd. (q), 3000.08, subd. (e).) Revocations for both parole and PRCS are handled by the courts rather than the Board of Parole Hearings. (*Id.*, §§ 3455 [PRCS]; § 3000.08, subd. (f) [parole]; see

also AB 117 (Stats. 2011, ch. 39) [moving parole revocations under realignment from Board of Parole Hearings to courts].) Upon a finding that a person has violated the conditions of PRCS, a court has the authority to return the person to PRCS with modifications of conditions (including a period of incarceration in county jail), revoke PRCS and order the person to confinement in the county jail, or refer the person to a reentry court or other evidence-based program in the court's discretion. (Pen. Code, § 3455, subd. (a).) Similarly, upon a finding that a person has violated traditional parole conditions, a court will have the authority to return the person to parole with modifications of conditions (including a period of incarceration in county jail), revoke parole and order the person to confinement in the county jail, or refer the person to a reentry court or other evidence-based program. (*Id.*, § 3000.08, subd. (f).) In fact, these statutes read almost identically, another indication that parole and PRCS are functionally equivalent.

Finally, it is also worth noting that, from the very outset, PRCS was considered the functional equivalent of parole. In Governor Brown's budget summary that first proposed realignment, the Governor spoke of "[r]ealigning adult *parole* to the counties." (See Respondent's Appendix, Ex. 8, p. 23, emphasis added.) He also discussed how local supervision of "parolees" is a better policy and that counties could provide "parolees" more services. (*Id.* at pp. 23-24.) Accordingly, from the very beginning of realignment, the terms "parole" and "PRCS" were interchangeable.[4]

C. *McPherson* Is Irrelevant As To The Meaning of the Term "Parole"

Petitioners spend much of their brief discussing *League of Women Voters v. McPherson* (2006) 145 Cal.App.4th 1469, 1475, but this case does not speak to the key question at issue here. *McPherson* held that in cases where a person was convicted of a felony but the trial judge suspended the imposition or execution of sentence and instead ordered the person to serve less

[4] Accordingly, if adopted, petitioners' construction of the realignment provisions would raise serious constitutional concerns. As the Secretary of State noted in her memorandum (Respondent's RJN, Ex. 1, pp. 15-17), and the Legislature noted in legislative committee reports (Respondent's RJN, Ex. 5, p. 5), simply renaming a program should not change an individual's voting status. (See *Flood, supra*, at p. 153 fn. 19 [refusing to read into new parole statutes an intent to enfranchise parolees because it would not be "constitutionally permissible"].) This Court must presume "that the Legislature intended to enact a valid statute" and therefore "adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." (*In re Kay* (1970) 1 Cal.3d 930, 942.)

than one year in county jail as a condition of probation, the person was not imprisoned for the conviction of a felony and was therefore eligible to vote. (*Ibid.*) The Court also held where an offense is a "wobbler" and the court enters judgment imposing something other than imprisonment in state prison, the crime is a misdemeanor for purpose of article II, section 4. (*Id.* at p. 1485.) But the case simply discusses these unique situations, and does not speak to the meaning of the word "parole." The Court did, however, note that the term "imprisoned" "has no fixed meaning," and actually analyzed what probation means in practice, which supports the Secretary's construction here. (*Id.* at pp. 593, 596.)

D. The Lawful Disenfranchisement of Federal Parolees Contradicts Petitioners' Argument That the Word "Parole" Is Determinative

Finally, Petitioners' argument that the name change from "parole" to "PRCS" enfranchises those on PRCS is inconsistent with the treatment of federal parolees. Courts have determined "that the constitutional language of temporary disenfranchisement applies uniformly to all paroled felons in California whether convicted under the laws of California, any sister state or federal jurisdiction." (*Flood*, *supra*, 80 Cal.App.3d at p. 156.) And federal parolees do not have the right to vote in this state even though their release is also not officially labeled "parole." (See Respondent's RJN, Ex. 1, p. 12.)

The federal parole system has undergone a renaming change similar to that of California's parole system. The federal parole system was repealed by the Sentencing Reform Act of 1984, which took effect in 1987. (18 U.S.C.A. §§ 3551 et seq.; P.L. No. 98-473, § 211.) In lieu of the parole system, the Sentencing Reform Act created a form of post-imprisonment supervision called supervised release. (18 U.S.C.A. § 3583.) Like the state parole system, when a federal court imposes a sentence to a term of imprisonment, the court may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment. (18 U.S.C.A. § 3583(a).) Though the post-conviction supervision changed names from "parole" to "supervised release," the systems are virtually identical. (*U.S. v. Paskow* (9th Cir. 1993) 11 F.3d 873, 881.) The primary change in the system was that parole had been decided by the United States Parole Commission (which still decides cases for those criminal

defendants sentenced prior to 1987). (18 U.S.C.A. §§ 4201 et seq.) Supervised release, on the other hand, is decided by a judge. (18 U.S.C.A. § 3583.)

After the Sentencing Reform Act, federal parolees are not on "parole," they are on "supervised release." But it would make little sense to find that a change in federal nomenclature effected a change in voting status, and Petitioners do not suggest such should be the case.[5] The same is true here. Accordingly, as the example of federal parolees makes clear, simply changing the name of a supervised release program does not thereby re-enfranchise individuals who were otherwise not entitled to vote in California.

V. FELONS ON MANDATORY SUPERVISION ARE NOT RE-ENFRANCHISED

Criminal justice realignment provides for another new option for the courts in felony sentencing, which likewise does not create new voting rights. Under Penal Code section 1170, subdivision (h)(5)(B), a court can suspend execution of a *concluding portion of the term* selected and instead order the person to serve the concluding portion of the term on a type of release known as mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)(B).) This concluding period of release, which could last more than a year, continues until the end of the full sentence term.

Like PRCS, mandatory supervision is parallel to traditional parole, not pre-sentencing probation, which is conditioned on serving a year or less in county jail, an option that judges had both before and after realignment went into effect. (See Pen. Code, § 1203.) Mandatory supervision is unique to realignment, is only available as part of a sentence under Penal Code 1170, subdivision (h), and is not present elsewhere in the Penal Code. Undercutting Petitioners' argument that probation rules should be the model applicable to mandatory supervision, a court actually must *deny* traditional probation before sentencing an individual to a split sentence and mandatory supervision under Penal Code, section 1170, subdivision (h)(5)(B). (*People v. Fandinola* (2013) 221 Cal.App.4th 1415, 1422.) Also, unlike probation, mandatory supervision

[5] Petitioners argue that a literal reading of "parole" should be adopted unless it leads to "absurd results." (Petitioners' Brief, p. 14.) But petitioners' construction does indeed lead to this. As shown in in the federal model, simply changing the name of a program should not affect voting rights. What if the Legislature decided to keep "parole" the exact same, but change the name of the program because of a social stigma?

time cannot be reduced by court order and supervision is mandatory and cannot be refused. Finally, unlike probationers in *McPherson*, a felon under mandatory supervision has been convicted and sentenced. (*McPherson*, *supra*, 145 Cal.App.4th at p. 1482 [finding relevant that probationers have not had a sentence imposed].) Accordingly, "the Legislature has decided a county jail commitment followed by mandatory supervision imposed under section 1170, subdivision (h), is akin to a state prison commitment; it is not a grant of probation or a conditional sentence." (*Fandinola*, *supra*, 221 Cal.App.4th at p. 1422.)

A person released on mandatory supervision pursuant to this new felony sentencing option is, like a parolee, continuing to serve his or her felony sentence although no longer in custody. Until the period of mandatory supervision ends, the person is ineligible to vote. (See Petitioners' RJN, Ex. H [purpose of constitutional provision is to restore voting rights once individual has "fully paid the price society has demanded"].) Had the Legislature intended otherwise, it would not have set up the entirely separate system of mandatory supervision with no discussion of new rights accruing to those individuals.

VI. THE SECRETARY'S MEMORANDUM WAS NOT AN "UNDERGROUND REGULATION"

Petitioners next argue that the Secretary's interpretation of article II, section 4 is an underground regulation issued in violation of the Administrative Procedures Act (APA). (Brief, pp. 18-19.) This is an inventive argument, but is clearly wrong. This is because a regulation interprets a statute, not the Constitution. (See *Caldo Oil Co. v. State Water Resources Control Bd.* (1996) 44 Cal.App.4th 1821, 1827 ["A regulation interprets or makes specific an agency's administration of a *statutory duty*," emphasis added].) As our Supreme Court has held, "the APA applies to all generally applicable administrative interpretations *of a statute*." (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 335, emphasis added; see also *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 16, 960 P.2d 1031, 1039 [court must "determine whether the agency exercised its quasi-legislative authority within the bounds of the *statutory mandate*," internal punctuation omitted, emphasis added.) Accordingly, the Secretary's interpretation of the constitution cannot be a regulation.

Petitioners may instead try to argue that the Secretary's interpretation of the realignment laws is what constitutes the regulation. This too, however, is wrong. A regulation "must 'implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure.'" (*Morning Star*, *supra*, 38 Cal.4th at p. 334, internal punctuation and citation omitted.) But the realignment laws are the procedures of law enforcement agencies, while the Secretary enforces provisions of the Elections Code and is not a law enforcement official. Accordingly, the Secretary does not implement, interpret, or make specific the realignment laws found in the Penal Code, nor does the Secretary enforce or administer them.

Finally, even if all of the above were not true, something "that embodies the only legally tenable interpretation of a provision of law" is not a regulation. (Gov. Code, 11340.9, subd. (f); see also *Morning Star*, *supra*, 38 Cal.4th at p. 336.) Such is the case here. Simply changing the title of parole does not affect a change in voting status. It is worth noting that both the Court of Appeal and California Supreme Court had the opportunity to accept the interpretation put forth by petitioners, and both declined to do so. And the Legislature was given the opportunity to adopt the very interpretation of the Constitution that petitioners allege here, and likewise declined.[6] The Secretary's decision is the only legally tenable interpretation of article II, section 4.

CONCLUSION

For all the reasons discussed above, this Court should deny the petition.

Dated: March 12, 2014

Respectfully Submitted,

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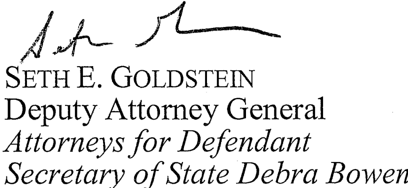

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[6] Petitioners will undoubtedly assert that the failure of the Legislature to pass AB 938 should not be evidence of legislative intent. However, "in some circumstances such legislative inaction may represent a reliable indicant of the intended scope of existing legislation." (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 480 fn. 13.)

DECLARATION OF SERVICE BY E-MAIL

Case Name: **Scott, Michael, et al. v. Deborah Bowen**
No.: **RG14712570**

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; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On March 12, 2014, I served the attached **OPPOSITION TO PETITION FOR WRIT OF MANDATE** by transmitting a true copy via electronic mail as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 12, 2014, at Sacramento, California.

Eileen A. Ennis
Declarant

Signature

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