IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

MICHAEL SCOTT, LEON SWEETING, MARTIN CERDA, ALL OF US OR NONE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, DORSEY NUNN, and GEORGE GALVIS, Plaintiffs and Respondents, **v.** **DEBRA BOWEN, Secretary of State of California,** Defendant and Appellant.	Case No. A142139

Alameda County Superior Court, Case No. RG14712570
The Honorable Evelio Grillo, Judge

APPELLANT'S OPENING BRIEF

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Case Name: *MICHAEL SCOTT, LEON SWEETING, MARTIN CERDA, ALL OF US OR NONE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, DORSEY NUNN, and GEORGE GALVIS v. DEBRA BOWEN, Secretary of State of California*

Court of Appeal No.: A142139

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

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The undersigned certifies that the above listed persons or entities (corporations, partnerships, firms or any other association, but not including government entities or their agencies), have either (i) an ownership interest of 10 percent or more in the party if an entity; or (ii) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

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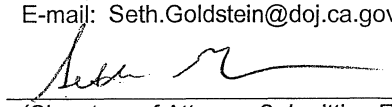

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September 5, 2014

(Date)

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INTRODUCTION

The California Constitution has always prohibited voting by felons. Article II, section 4 requires the Legislature to disqualify persons from voting who are "imprisoned or on parole for the conviction of a felony." In 2011, the Legislature realigned the incarceration of certain felons to provide for imprisonment in a county jail and for "post release community supervision" ("PRCS"), a new category of parole following release. The statutes authorizing PRCS refer to it as parole and the released inmates as "parolees," and PRCS treats them for all practical purposes just as other felons on traditional parole, with the only difference being that they are supervised by the county instead of the state. Accordingly, respondents' claims that felons on parole under PRCS are not subject to the voting disqualification, and that the voting disqualification applies only to felons on parole administered at the state level, hinges on a distinction without a difference. Similarly, individuals under the newly-created mandatory supervision provisions of realignment are likewise still on "parole" and are still disqualified from voting by the Constitution.

Nowhere in the statutes or legislative history is there the slightest indication that, in enacting criminal justice realignment, the Legislature intended to re-enfranchise felons relocated under this new realignment scheme by removing them from the class of felons categorically prohibited from voting by the Constitution. And this makes sense: the realigned prisoners have not been resentenced, they remain felons, and they are serving the same felony sentences they would have prior to realignment. They are just serving those felony sentences at county-run institutions and programs instead of at the state.

Instead, it is clear that the Governor and Legislature enacted realignment in 2011 not to re-enfranchise the affected felons, but to address a crisis in the California prison system. In one swoop, the state planned to

save money and reduce prison population by imprisoning certain lower-level felons in county jails, estimated to cost approximately half of what it would cost to imprison the same felons in state prison. Similarly, by creating PRCS, the state would save money and improve efficiency by having counties supervise lower-level felons following their release from imprisonment, rather than the state. This is a change in parole venue, but the Legislature did not change their fundamental legal status as felons imprisoned or on parole.

Accordingly, the Secretary of State issued a memorandum informing local election officials 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.

The trial court's decision to the contrary essentially concludes that the Legislature accidentally re-enfranchised tens of thousands of individuals when it enacted realignment. However, proper interpretation of article II section 4 of the California Constitution—a provision the trial court declined to interpret—along with the realignment legislation, its legislative intent, and relevant case law confirms that the Secretary is correct.

In fact, before the trial court issued its decision, the Legislature had expressly rejected the construction urged by respondents and now accepted by the trial court. In 2012, petitioners brought a nearly identical lawsuit in this Court. After issuing a notice pursuant to *Palma v. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, and ordering full briefing, this Court summarily denied the petition. On a 6-1 vote, the California Supreme Court denied review. Many of the current respondents then sponsored AB 938, a bill that would have mandated that individuals on PRCS and mandatory supervision be allowed to vote. But this bill died in committee,

apparently due to the concern that AB 938 (and re-enfranchising the affected parolees) 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 rejected it.

STATEMENT OF THE CASE

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.[1] 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 certain crimes punishable by imprisonment in a county jail (Pen. Code, § 17) for individuals who were sentenced on or after October 1, 2011. (*Id.*, § 1170, subd. (h)(6).) Criminal justice realignment did not, however, convert any offense from felony to misdemeanor status, or vice versa. Nor did criminal justice realignment affect the length of the felony sentences imposed.

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[1] For example, additional 2011 legislation that affected realignment and realignment funding included SB 87 (the budget bill—Stats. 2011, ch. 33), AB 94 (Stats. 2011, ch. 23), AB 111 (Stats. 2011, ch. 16), AB 116 (Stats. 2011, ch. 136), AB 117 (Stats. 2011, ch. 39), AB 118 (Stats. 2011, ch. 40), SB 92 (Stats. 2011, ch. 36), ABx1-16 (Stats. 2011, ch. 13), ABx1-17 (Stats. 2011, ch. 12), and SBx1-4 (Stats. 2011, ch. 14).

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 the felon's criminal history makes the felon ineligible to serve the sentence in jail. (Pen. Code, § 1170, subd. (h).)[2] This change applies only to criminal statutes that have been expressly amended to provide for serving a sentence for the conviction of a felony in county jail where otherwise allowable. (*Ibid.*) However, under realignment, counties may contract with the California Department of Corrections and Rehabilitation ("CDCR") to house these felony offenders in state prison. (*Id.*, § 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 instead of the state. (*Id.*, § 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. (*Id.*, § 3000.08, subd. (a).) Parolees who were released prior to October 1, 2011 will generally continue to be supervised

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[2] Certain felons are categorically prohibited from serving a felony sentence in county jail. (*Id.*, § 1170, subd. (h)(3).) Such felons include those who have a prior or current serious or violent felony conviction, those required to register as a sex offender, and those convicted of a crime that received an aggravated white collar crime enhancement. (*Ibid.*)

by state parole officers for the duration of their parole period regardless of the underlying criminal offense. (*Id.*, § 3000.09.)

PRCS imposes statutorily-enumerated conditions on an individual's release from prison that closely track traditional parole conditions (Pen. Code, § 3453), and county authorities may impose additional conditions. (*Id.*, § 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. (*Id.*, § 3465.) Moreover, criminal justice realignment also gives parallel treatment to violations and revocations under traditional parole and under PRCS. (Compare Pen. Code, § 3455 [PRCS] with § 3000.08 [parole].)

Finally, realignment also provided for a provision called mandatory supervision. Under this option, 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).)

II. THE SECRETARY OF STATE'S MEMORANDUM

At the request of local elections officials, on December 5, 2011 the Secretary of State issued a detailed 18-page memorandum which analyzed article II, section 4. (See Joint Appendix ("JA"), vol. 2, pp. 193-212.) The memorandum reviewed the history of the realignment legislation, voting rights in California, and the constitutional phrase "imprisoned or on parole for the conviction of a felony." 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 pp. 203-205), a decision that is not challenged in this case. In addition, the memorandum concluded that parole and PRCS are functionally equivalent, comparing numerous Penal Code provisions. (*Id.* at pp. 205-207.) Further, the memorandum concluded that felons on

mandatory supervision are also like parolees in that they are "continuing to serve their felony sentence although no longer in custody." (*Id.* at p. 207.) Most importantly, the Secretary of State concluded that realignment did not change the status quo: it "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. 211.)

III. THE FIRST LAWSUIT (*ALL OF US OR NONE V. BOWEN*)

Approximately three months after the Secretary of State issued her memorandum, most of the parties who are respondents here, represented by many of the same attorneys, filed a lawsuit in this Court on March 7, 2012, challenging the memorandum. (See JA, vol. 1, p. 17, ¶ 37 [describing lawsuit]; JA, vol. 2, pp. 214-215.) This lawsuit, *All of Us or None v. Bowen*, was assigned case number A134775. On March 15, 2012, Division 3 of this Court issued a notice pursuant to *Palma v. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, that it was considering issuing a peremptory writ in the first instance. (JA, vol. 2, pp. 214-215, 217.) This Court ordered and received full briefing. (*Ibid.*) On May 17, 2012, this 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. (JA, vol. 2, p. 215.) In dissent, Justice Kennard would have granted the petition and transferred the matter back to this Court for issuance of an opinion. (*Ibid.*)

IV. RESPONDENTS' UNSUCCESSFUL LEGISLATIVE EFFORTS

After the unsuccessful attempt to challenge the Secretary's memorandum in the Court of Appeal and California Supreme Court, many of the same groups that are respondents 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. (JA, vol. 2, pp. 219-221, 223-230.)

Ironically, the Legislature appears to have been concerned that AB 938 was unconstitutional under article II, section 4 of the California Constitution, as merely changing the location of where an individual serves his or her felony imprisonment or parole should not result in a change of voting status. (JA, vol. 2, p. 227.) For example, one committee report indicated that 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.*) Accordingly, the committee report noted that 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."

The Legislature appears to have been concerned about the constitutionality of AB 938 because article II, section 4 is self-executing. (See *Flood v. Riggs* (1978) 80 Cal.App.3d 138, 155; see also *Taylor v. Madigan* (1975) 53 Cal.App.3d 943, 951 [constitutional provision "is self-executing if no legislation is necessary to give effect to it, and if there is nothing to be done by the Legislature to put it into operation"].) In other words, the Legislature cannot simply enfranchise by legislation felons who are prohibited from voting by the constitutional prohibition.

The bill was quickly amended in May 2013 to remove any language about the voting status of realigned felons. (JA, vol. 2, pp. 232-234.)[3]

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[3] After the statute was amended, it sat idle in committee for many months. (See JA, vol. 2, p. 236.) The bill has subsequently been amended again to address student success fees at California State University

(continued...)

V. THE SECOND LAWSUIT

Respondents filed this lawsuit in Alameda Superior Court in February 2014 after their unsuccessful efforts in the Legislature. (JA, vol. 1, p. 1.) The petition for writ of mandate alleged that the Secretary's memorandum resulted in a constitutional violation in that it deprived eligible individuals of their right to vote. (JA, vol. 1, p. 19.) Respondents also alleged that the memorandum was an invalid underground regulation in violation of the California Administrative Procedure Act. (*Ibid.*)

After full briefing, the trial court granted the petition for writ of mandate in May 2014. (JA., vol. 3, pp. 378-405.) The court first looked to various criminal cases evaluating realignment provisions and concluded that mandatory supervision and/or PRCS is not parole. (*Id.*, pp. 383-387.) The court declined to interpret article II, section 4 under the theory that "the court should reach Constitutional issues only as a last resort." (*Id.*, p. 388.) Instead, the court looked to Elections Code section 2101, which implements the constitutional provision, and found it provided no assistance as to the meaning of term "parole." (*Id.*, pp. 387-388.) The court then looked at the meaning of the word "parole" both in dictionaries and AB 109 and found that there is "no commonly understood definition" of the term. (*Id.*, pp. 388-391.) The court rejected the idea that mandatory supervision and/or PRCS is functionally equivalent to parole. (*Id.*, pp. 391-393.) The court employed various tools of statutory construction to support its conclusion. (*Id.*, pp. 393-399.) Finally, the court concluded that the Secretary's memorandum was an invalid underground regulation and not entitled to deference. (*Id.*, pp. 400-401.)

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campuses, and has nothing to do with voting rights or realignment. (See http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0901-0950/ab_938_bill_20140827_status.html [as of Aug. 25, 2014].)

The court ordered the parties to meet and confer regarding the appropriate scope of the remedy and the text of a proposed judgment and writ. (*Id.*, p. 379.) The parties successfully did so and submitted a stipulation to the court. (*Id.*, pp. 410-412.) The court issued an "order on form of judgment" further explaining why a constitutional analysis was unnecessary. (*Id.*, pp. 421-423.) The court then signed the judgment and writ on May 29, 2014. (*Id.*, pp. 425-427, 429-430.) The Secretary timely appealed on June 13, 2014. (*Id.*, p. 431.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment. (JA, vol. 3, pp. 425-427.) A final judgment is appealable. (Code Civ. Proc., § 904.1, subd. (a)(1).)

STANDARD OF REVIEW

Issues of statutory and constitutional interpretation are reviewed de novo. (*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619, 632.)

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 challenge to a federal three-judge panel's order to release California prisoners. (*Brown v. Plata* (2011) 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 had taken 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 had declared a prison overcrowding emergency, the dispute had 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.*, p. 1928.)

Such an order would have required release of 38,000 to 46,000 prisoners assuming the state did not increase prison capacity. (*Ibid.*)

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

B. State Fiscal Crisis

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

C. Confluence of Overcrowding and Fiscal Crisis and Proposed Solutions

Of course, the state's fiscal problems did not alleviate its responsibility to deal with its prison overcrowding emergency. In late 2006

the Governor issued a proclamation directing CDCR to mitigate overcrowding by transferring inmates to out-of-state correctional facilities. (*Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, 759.) In 2007, the Legislature enacted AB 900, which authorized up to $7.4 billion in bonds for the construction and renovation of prisons and to add additional beds to relieve overcrowding. (*Id.*, p. 757.) However, the three-judge panel found these measures to be unsuccessful in alleviating the massive overcrowding. (*Brown v. Plata, supra*, 131 S.Ct. 1910, 1938.)

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 JA, vol. 2, p. 239.)

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. (*Id.*, p. 245.) Similarly, shifting responsibility for supervising parolees from the state to local governments would result in state savings of $239 million in 2011-12. (*Id.*, p. 250.) 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.*, p. 248.)

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II. FELON DISENFRANCHISEMENT IN CALIFORNIA

Since statehood, the California Constitution has prohibited voting by felons.[4] 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 pp. 144-145.)

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 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

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[4] 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.)

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." (JA, vol. 1, p. 119; 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. (*League of Women Voters*, *supra*, 145 Cal.App.4th at p. 1483.) After the enactment of Proposition 10, 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*, this Court found that individuals who were in county jail as a condition of probation after suspension of imposition or execution of their 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.) This 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.*, p. 1485.) Accordingly, a review of California's history on this issue makes clear that, prior to criminal justice realignment, persons convicted and sentenced for 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.)

A. The Governor's Budget Proposal

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.

(JA, vol. 2, pp. 261-262.) 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 *id.*, p. 278.) The proposal also recognized that the full implementation of realignment would save approximately $1.4 billion. (*Ibid.*) Nothing in the budget proposal mentions creating any new rights for realigned felons.

B. The Legislative Analyst

The Legislative Analyst also focused on the cost-saving and overcrowding reduction aims 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 JA, vol. 2, p. 245.) 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.*, p. 250.) 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.*, p. 248.) 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.*, p. 249.) The Legislative

Analyst made no mention of any intended change in voting rights due to realignment.

C. Legislative Committee Reports

The legislative committee reports are similar. (See *In re J.W.* (2002) 29 Cal.4th 200, 211 ["To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation"].) The Senate and Assembly Budget Committee reports on 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 JA, vol. 2, pp. 282-289.) The Senate Rules Committee analysis of SB 87 (Stats. 2011, ch. 33), the budget bill that appropriated 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." (*Id.* at p. 300.) 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." (*Id.* at p. 306.)

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

D. There Is a Presumption Against a Major Change in Law by Implication

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 do so.

The trial court disagreed with this analysis, finding that because the affected felons are not literally on parole, it would instead be a change by implication to consider the individuals on PRCS and mandatory supervision *not* to be able to vote. (JA, vol. 3, p. 398.) But the court's interpretation was faulty because it is undisputed that the affected felons could not vote before, and the Legislature evinced no intent to change anyone's voting status. And, as the Legislature and Governor used the terms parole and PRCS interchangeably in crafting the realignment statutes, and called individuals on PRCS "parolees" (see Section IV. B.), there is no indication that the Legislature intended to re-enfranchise anyone.

The trial court also relied on various cases to find that "every reasonable presumption and interpretation" must be read in favor of

eligibility to vote. (JA, vol. 3, pp. 396-397.) 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.*)

Moreover, the trial court erred in disregarding the legislative history behind realignment and focusing entirely on the legislative findings in Penal Code section 17.5. (JA, vol. 3, pp. 393-394.) Penal Code section 17.5, subdivision (b) says that the purpose of realignment is not reduction of overcrowding (notwithstanding the evidence in the legislative history to the contrary), but rather is fiscal savings and improved public safety and efficiency. (See also *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 569 ["the deference afforded to legislative findings does 'not foreclose [a court's] independent judgment of the facts bearing on an issue of constitutional law," quoting *Turner Broadcasting System, Inc. v. FCC* (1994) 512 U.S. 622, 666].) Regardless, appellant is not arguing that Penal Code section 17.5 is meaningless, just that it be considered in context with the rest of the legislative history. So understood, 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.[5]

Accordingly, the legislative intent and historical circumstances surrounding realignment make clear that the purpose of realignment was at its heart to improve efficiency and save money, not in any sense to create new rights for 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

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[5] Moreover, in characterizing the committee reports and other documents merely as "suggestions of legislative intent by . . . the executive branch and by legislative staff analysts" (JA, vol. 3, p. 395), the trial court failed to give these documents the weight they deserve. These reports, as well as the reports of the Legislative Analyst, are not merely "suggestions of legislative intent," they are the legislative history of the realignment laws. (See *Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659 ["Statements in legislative committee reports concerning the statutory objects and purposes which are in accord with a reasonable interpretation of the statute are legitimate aids in determining legislative intent"].) Moreover, "[i]t *will be presumed* that the Legislature adopted the proposed legislation with the intent and meaning expressed in committee reports." (*Curtis v. County of Los Angeles* (1985) 172 Cal.App.3d 1243, 1250, emphasis added.)

parole for the conviction of a felony" to be ambiguous].) 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.)

Appellant has found no case that has examined whether a parolee who, 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 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. 471, 482.) However, much like California, since then any number of jurisdictions have enacted new parole schemes that are called something different and utilize new kinds of 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].)[6]

Additionally, in the realignment context, courts examine traditional parole and new realignment programs under the same standards. For example, a recent decision by the Fourth District looked at whether certain mandatory supervision terms given to a criminal defendant were reasonable. (*People v. Martinez* (2014) 226 Cal.App.4th 759.) Because parole and mandatory supervision are "analogous," the court "analyzed the validity of the terms of supervised release under standards . . . parallel to those applied to terms of parole." (*Id.* at p. 763.)

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

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[6] The trial court disagreed with this analysis, citing *People v. Superior Court (Flores)* (2014) 223 Cal.App.4th 1535 for the principle "that a Penal Code section that applies to offenders with a specific type of sentence does not apply to offenders with functionally equivalent sentences." (JA, vol. 3, p. 392.) The Supreme Court has recently granted review of this case, meaning that it is no longer citeable (Cal. Rules of Court, rule 8.115), so appellant will not distinguish this case. The court also cited *People v. Isaac* (2014) 224 Cal.App.4th 143, which is discussed in section VI, below.

correctional authorities." (*Ibid.*) "Parolees have fewer constitutional rights than do ordinary persons. . . . Although 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 pre-realignment parole 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. (*Id.*, § 3457.) However, PRCS is still "punishment" (see *id.*, § 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 *Id.*, § 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. (*Id.*, §§ 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. (*Id.*, § 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 for purposes of voting under the constitution.

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." (*Id.*, § 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:

> It is in the interest of public safety for the state to provide for the effective supervision of and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counseling necessary to assist parolees in the transition between imprisonment and discharge. 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.)
>
> Any inmate who is eligible for release on parole pursuant to this chapter or postrelease community supervision pursuant to Title 2.05 (commencing with Section 3450) of Part 3 shall be given notice that he or she is subject to terms and conditions of his or her release from prison. (Pen. Code, § 3067.)

Handling of revocations after criminal justice realignment is another example of how parole and PRCS are functionally equivalent. Both 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) [PRCS], 3000.08, subds. (d), (e) [parole].) 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 of that first proposed realignment, the Governor spoke of "[r]ealigning *adult parole* to the counties." (JA, p. 266, emphasis added.) The Governor also discussed how local supervision of "parolees" is a better policy and that counties could provide "parolees" more services. (*Id.* at pp. 266-267.) Accordingly, from the very beginning of realignment, the terms "parole" and "PRCS" were interchangeable.

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

Finally, the argument that the name change from "parole" to "PRCS" enfranchises those on PRCS is inconsistent with the longstanding

consideration of federal parolees to be disenfranchised under the California Constitution, even though they are not labeled as "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 JA, vol. 2, p. 206.)

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. § 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. § 3583.) Like the state parole system, a federal 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. § 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. § 4201 et seq.) Supervised release, on the other hand, is decided by a judge. (18 U.S.C. § 3583.)

After the Sentencing Reform Act, federal parolees are not on "parole," but instead are on "supervised release." And of course it would make no sense to consider that a change in federal nomenclature re-enfranchised all federal parolees, and respondents have not suggested such should be the case. The same is true here. Accordingly, as the example of

federal parolees makes clear, simply changing the name of a supervised release program, or even changing the name and making administrative changes to the system, 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. (See *People v. Martinez* (2014) 226 Cal.App. 4th 759 [comparing conditions and status of individuals on mandatory supervision to those of parole].) Mandatory supervision is unlike 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 and is only available as part of a sentence under Penal Code 1170, subdivision (h). Undercutting the 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 time cannot be reduced by court order, and supervision is mandatory and cannot be refused. Finally, unlike the

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, and until the person concludes serving the final portion of his or term, the person is ineligible to vote. (See JA, vol. 1, p. 119) [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 REALIGNMENT CASES THE TRIAL COURT RELIED UPON ARE INAPPOSITE

The trial court concluded that "the court of appeal has determined that mandatory supervision and PRCS are not 'parole,'" (JA, vol. 3, p. 383), relying on a series of post-realignment cases addressing other contexts. (*Id.* at pp. 383-385.) This analysis misses the point, because appellant is not arguing that PRCS and mandatory supervision are necessarily parole for all purposes, but rather that individuals on PRCS and mandatory supervision should be treated the same as individuals on traditional parole for purposes of article II, section 4 of the California Constitution. Moreover, the cases upon which the trial court relied are inapposite.

The first case cited by the court was *People v. Cruz* (2012) 207 Cal.App.4th 664, 668, where the issue was "whether a defendant, who was sentenced before October 1, 2011, but whose conviction is not yet final on appeal, is entitled to be resentenced under [the realignment] provisions." The court in *Cruz* examined the realignment laws and determined that they should be applied prospectively only, and that doing so did not violate equal protection. (*Id.* at p. 680.) During its analysis, the court noted that a realigned inmate is not subject to a parole revocation restitution fine under Penal Code 1202.45.[7] (*Id.* at p. 672, fn. 6.)

In *Fandinola, supra*, 221 Cal.App.4th 1415, the question was whether an individual subject to mandatory supervision could be subject to a probation supervision fee under Penal Code section 1203.1, subdivision (b). That Penal Code section authorizes a fee "[i]n any case in which a defendant is . . . granted probation or given a conditional sentence." (Pen. Code, § 1203.1, subd. (b).) The court reasoned "that defendant was neither granted probation nor given a conditional sentence" and therefore struck the fee. (*Fandinola, supra*, 221 Cal.App.4th at pp. 1421, 1423.) In its analysis, the court noted that "the Legislature understood mandatory supervision is neither probation nor parole." (*Id.* at p. 1423.)

The final case cited by the trial court was *People v. Isaac* (2014) 224 Cal.App.4th 143, which held that an individual placed on PRCS is not subject to a parole revocation fine under Penal Code section 1202.45. That statute then stated: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time

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[7] A defendant currently sentenced under realignment would instead be subject to a mandatory supervision or PRCS revocation restitution fine under Penal Code section 1202.45, subdivision (b).

of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4." (*Id.* at p. 146, fn. 3, quoting former Pen. Code, § 1202.45.) The court also rejected the state's argument that PRCS was a conditional sentence under a second Penal Code provision, section 1202.44. (*Id.* at p. 147.)

The trial court interpreted these cases to mean that neither PRCS nor mandatory supervision are literally parole. But this analysis misses the mark. It is true that PRCS and mandatory supervision should not be considered "parole" for all purposes in the Penal Code; they were, after all, established as separate categories for a reason. But the question here is whether realigned individuals are on "parole" for purposes of article II, section 4. This Court has previously determined the phrase '"imprisoned or on parole for the conviction of a felony,' as it appears in article II, section 4, is ambiguous." (*McPherson*, *supra*, 145 Cal.App.4th at p. 1482.) Accordingly, cases such as *Cruz* and *Isaac*, which were interpreting unambiguous statutory provisions, are not dispositive. And "where a provision in the Constitution is ambiguous, a court ordinarily must adopt that interpretation which carries out the intent and objective of the drafters of the provision and the people by whose vote it was enacted." (*Id.* at p. 1481.) So the question then becomes what the people intended when they enacted article II, section 4.

The clearest indication of that intent will be found in the ballot pamphlet and the arguments for and against the measure. (See *People v. Birkett* (1999) 21 Cal.4th 226, 243 ["When an initiative measure's language is ambiguous, we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet"].) These ballot arguments state that the purpose of constitutional provision is to restore voting rights once an individual has "fully paid the price society has

demanded." (JA, vol. 1, p. 119.) At that time article II, section 4 was enacted, that meant that felons would regain voting rights after a period of conditional release subject to revocation called "parole." Now, after realignment, it can and does include new forms of conditional release subject to revocation—otherwise, the voters would be deprived of what they voted for in 1974.

The trial court disagreed, reasoning that mandatory supervision and PRCS "should have consistent definitions" and that it should mean the same thing in the Penal Code as it does in Elections Code section 2101. (JA, vol. 3, p 387.) Elections Code section 2101 provides in part that "[a] person entitled to register to vote shall be . . . not in prison or on parole for the conviction of a felony." But a hypothetical readily illustrates how this analysis misses the mark. If the Legislature decided tomorrow they wanted more people to vote, and attempted to re-enfranchise tens of thousands of individuals without amending the constitution by simply changing the name of "parole" but keeping the state program exactly the same, it would be unconstitutional. This is because article II, section 4 is self-executing. (*Flood v. Riggs* (1978) 80 Cal.App.3d 138, 155; see also JA, vol. 2, p. 227 [legislative committee report for AB 938 recognizes that simply changing the location of confinement, or the name of a parole program, may not withstand constitutional scrutiny].) "A statute cannot limit a self-executing provision of the Constitution." (*Ex-Cell-O Corp. v. County of Alameda* (1973) 32 Cal.App.3d 135, 140.)[8] Similarly, if the Legislature simply

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[8] For this reason, it is the interpretation urged by respondents and accepted by the trial court that would have the effect of violating the provisions of article II, section 4. The Legislature cannot lawfully re-enfranchise felons who are subject to the constitutional prohibition. (See *Flood v. Riggs*, *supra*, 80 Cal.App.3d at p. 157 [Legislature cannot enact legislation inconsistent with the language of article II, section 4].)

amended Elections Code section 2101 to delete the prohibition on felon voting, it would have no effect, as the Legislature cannot avoid the constitutional provision. The determination of whether an individual can vote under article II, section 4 is a matter of what is required in that provision itself, unchangeable by any action of the Legislature short of a constitutional amendment.

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

The trial court found that the Secretary's interpretation of article II, section 4 to be an underground regulation issued in violation of the Administrative Procedures Act (APA). (JA., vol. 3, p. 401.) That decision was incorrect. Even if it was not, the issue is ultimately not dispositive.

"The APA establishes the procedures by which state agencies may adopt regulations." (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.) It defines regulations as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (Gov. Code, § 11342.600.) "A regulation subject to the APA . . . has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.'" (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 334, quoting *Tidewater*, *supra*, 14 Cal.4th at p. 571, internal citations omitted.)

However, 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, and the Legislature evinced no intent to re-enfranchise any parolees. It is worth noting that both the Court of Appeal and California Supreme Court had the opportunity to accept the interpretation put forth by respondents, and both declined to do so. And the Legislature was given the opportunity to adopt the very interpretation of the Constitution that respondents allege here, and likewise declined.[9] Because the Secretary's decision is the only legally tenable interpretation of article II, section 4, it cannot be an underground regulation.

Ultimately, however, respondents' APA claim (and the trial court's decision on it) are essentially meaningless. First, county elections officials are all bound by article II, section 4 to not to let the affected felons vote—it is not the memorandum that is imposing the obligation. Moreover, if this Court were to conclude that realigned felons cannot vote, the Secretary would obviously comply with that decision and inform local elections officials of it. Similarly, if this Court were to decide the opposite, that realigned felons should have their voting rights restored, the Secretary would likewise comply with that decision and inform local officials of that decision. In neither case would the Secretary's action constitute a

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[9] Respondents may 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; see also *McPherson*, *supra*, 145 Cal.App.4th at p. 1483, fn. 12 [finding that vetoed bill that clarified the regulatory election process "provides some 'impression' of the Legislature's intended meaning"].)

rulemaking as the Secretary would merely be informing local officials of what the law is, and there would be no need to engage in formal rulemaking about the meaning of the constitutional provision once this Court (or the California Supreme Court) has spoken. (See *Tidewater*, *supra*, 14 Cal.4th at p. 577 [even if underlying administrative decision violates APA, court still considers whether the interpretation is correct].)

Accordingly, because the Secretary's memorandum was the only legally tenable interpretation of a provision of law, it was not an underground regulation.

CONCLUSION

For all of the above reasons, this court should reverse the decision of the trial court.

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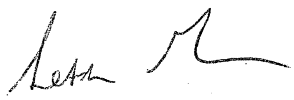


SETH E. GOLDSTEIN
Deputy Attorney General
Attorneys for Appellant
Secretary of State Debra Bowen

CERTIFICATE OF COMPLIANCE

I certify that the attached APPELLANT'S OPENING BRIEF uses a 13 point Times New Roman font and contains 10,163 words.

Dated: September 5, 2014

KAMALA D. HARRIS
Attorney General of California

SETH E. GOLDSTEIN
Deputy Attorney General
Attorneys for Defendant

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Scott, Michael, et al. v. Deborah Bowen (APPEAL)**
No.: **A142139**

I declare:

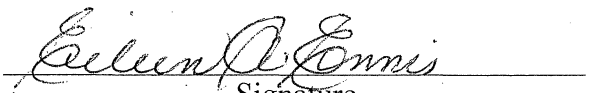
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **GOLDEN STATE OVERNIGHT**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On September 5, 2014, I served the attached **APPELLANT'S BRIEF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

SEE ATTACHED SERVICE LIST.

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 September 5, 2014, at Sacramento, California.

Eileen A. Ennis
Declarant


Signature

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