Case No. A142139

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.

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

Respondents' Brief

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Plaintiffs-Respondents' Certificate of Interested Entities or Persons

I certify as follows:

As noted in the Complaint, Plaintiff All of Us or None is a project of Legal Services for Prisoners with Children, which is a non-profit corporation. *See* Joint Appendix Volume 1, pp. 006-007.

Plaintiffs know of no other interested entity or person that must be listed under Rule of Court 8.208.

Dated: November 6, 2014

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Michael T. Risher

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1. INTRODUCTION AND SUMMARY OF ARGUMENT

In 1974, California voters broadened the franchise so that all adult Californians have the constitutional right to vote unless they are "imprisoned or on parole for conviction of a felony" or are mentally incompetent. Cal. Const. art. II §§ 2, 4. The statutes governing voting also disenfranchise only those people imprisoned or "on parole." *E.g.,* Elec. Code §§ 2101, 2150. The principal question in this appeal is whether these constitutional and statutory provisions disenfranchise individuals convicted of low-level felonies who are not on parole but are instead supervised under two new forms of local criminal-justice supervision created by California's 2011 Criminal Justice Realignment Act: mandatory supervision and postrelease community supervision ("PRCS").

As the superior court correctly held: (1) the plain language of the constitutional and statutory provisions at issue, (2) the rule that laws must be read in favor of expanding the franchise, and (3) the expressly stated purposes of Realignment all demonstrate that otherwise-eligible Californians on these new forms of local supervision have the right to vote. Mandatory supervision and PRCS are not "parole" as the term is used in California law, and the Secretary points to no ambiguity in the term. She nevertheless would disenfranchise Californians on these new categories of criminal-justice supervision because, in her view, mandatory supervision is "parallel to traditional parole" and PRCS is "functionally equivalent to" it. Appellant's Opening Brief at 19, 27.

The Secretary's position is contrary to the text of article II, section 4 of the California Constitution and the Elections Code,

which expressly limits disenfranchisement to individuals who are "on parole." Parole continues to exist for people convicted of serious felonies, and more than 47,000 Californians are currently under state parole supervision. But Realignment eliminated parole for people convicted of less-serious crimes; they are now supervised by county probation officers under two other types of supervision, mandatory supervision and PRCS. These new forms of supervision are governed by new statutory schemes and are classified, along with probation but not parole, as "local supervision." Pen. Code § 1229(e). (All unlabeled statutory references are to the Penal Code.). Construing "parole" to mean parole *and* mandatory supervision *and* PRCS would violate the fundamental rule that courts must enforce the actual words of statutes and constitutional provisions, without adding to them. *See People v. Guzman*, 35 Cal.4th 577, 586-88 (2005).

The Secretary presents no authority for her contention that people who are not on parole should nevertheless be disenfranchised because the new forms of supervision created under Realignment are in some respects similar to it. Even if it were proper to disregard the unambiguous constitutional and statutory language and instead try to determine whether these new forms of supervision are close enough to parole to justify stripping people of their constitutional rights, neither of them is functionally equivalent to parole as it existed in California when the voters amended the Constitution, or to parole as it has existed in California since then. Unlike parole, mandatory supervision and PRCS are local programs that are open only to people who have been convicted of non-serious crimes. Unlike traditional

parole, they are not discretionary early release for good behavior; the court determines when a person should be released onto these new forms of supervision at the time of sentencing. In fact, many of the Secretary's arguments would equally support the conclusion that mandatory supervision and PRCS are the functional equivalent of probation, not parole, and that therefore people subject to them *can* vote. In the 40 years since the voters amended the Constitution to broaden the franchise, nobody has ever suggested that people living in the community on probation or forms of supervision other than parole cannot vote; the Secretary has provided no reason to depart from this well-established rule.

The Secretary's position also violates the longstanding rule that "no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible to any other meaning." *Walters v. Weed*, 45 Cal.3d 1, 14 (1988) (citation omitted). Courts must not interpret any law so as to restrict or abridge voting rights unless the "intent to do so [] appear[s] with great certainty and clearness." *People v. Elkus*, 59 Cal.App. 396, 404 (1922). At the very least, the constitutional and statutory provisions are reasonably susceptible to the meaning that parole means parole and does not include other types of criminal-justice supervision. The Secretary's suggestion that even though mandatory supervision and PRCS are not parole for other purposes, they should be considered parole for the purposes of disenfranchisement turns this rule on its head.

Plaintiffs therefore ask this Court to affirm the superior court's holding that Californians cannot be denied their right to vote simply because they are on mandatory supervision or PRCS.

Plaintiffs also ask this Court to affirm the trial court's ruling that the Secretary's directive to local elections officials disenfranchising people sentenced under Realignment is invalid because it was issued in violation of the Administrative Procedure Act, Gov. Code § 11340 *et seq.* The APA prohibits a state agency from issuing or using any materials that "implement, interpret, or make specific" any law without following the statutory notice-and-comment procedure. Gov. Code §§ 11342.600, 11340.5. The Secretary's only argument on this point is that she claims the Memorandum is exempt from these requirements because it is the only tenable interpretation of the law; but that position is wrong because her interpretation conflicts with the text of the provisions she purports to implement.

Because the Secretary failed to comply with the APA, the Memorandum is "invalid" under Government Code § 11350(a), as are the voter-registration and information materials that incorporate its conclusions. The APA violation also means that the Memorandum's conclusion and reasoning are not entitled to any judicial deference or weight.

2. PARTIES

Plaintiffs-Respondents include two organizations that are dedicated to increasing voter participation (the League of Women Voters of California and All of Us or None); three individuals who would like to vote but are barred from doing so under the Secretary's interpretation of the law because they are on mandatory supervision or PRCS; and two individuals with taxpayers standing under Code of Civil Procedure § 526a. *See*

J.A.1:006-08.[1]

Defendant-Appellant California Secretary of State Debra Bowen is the state's chief elections officer. Gov. Code § 12172.5. Her office issued the Memorandum and voter-registration and information materials that prohibit people on mandatory supervision and PRCS from voting and registering to vote. J.A.1:008, 015-16, 029-62.

3. BACKGROUND AND FACTS

Under article II, section 2 of the California Constitution, every "United States citizen 18 years of age and resident in this State may vote," except those specifically excluded by other constitutional provisions. For many years, the Constitution provided that a conviction of an "infamous crime" resulted in lifetime disenfranchisement. *See League of Women Voters of Cal. v. McPherson*, 145 Cal.App.4th 1469, 1475-79 (2006). But in 1974 the voters amended the Constitution to expand the franchise so that now only people who are *currently* imprisoned or on parole for conviction of a felony are barred from voting. *See id.* at 1478-79. The initial proposal would have broadly disenfranchised anybody "under court order." *Id.* at 1483. But the final provision that the voters adopted is limited to parole:

> The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony.

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[1] References to the joint appendix are in the form J.A.[volume]:[page(s)].

Cal. Const. art. II § 4.[2]

The Legislature has implemented this provision by enacting a number of statutes that prohibit people on "parole"— but not any other form of non-custodial criminal-justice supervision — from voting. For example:

- The California Voter Bill of Rights excludes from voting people "on parole for conviction of a felony." Elec. Code § 2300(a)(1)(B).
- People "on parole for conviction of a felony" cannot register to vote. *Id.* §§ 2101, 2300, 2150(a)(9).
- Elections officials must cancel the registration of people "on parole for the conviction of a felony." *Id.* §§ 2201(c), 2212.
- People attempting to vote may be challenged on the grounds that they are "on parole for the conviction of a felony." *Id.* § 14240(a)(5).

After enacting Realignment, the Legislature has continued to specify that only people on parole, not other types of supervision, are prohibited from voting. *See* Stats. 2014, ch. 619, §2, p. 93, amending Elec. Code § 2106 (using "in prison or on parole" to define voter-registration eligibility); Stats. 2014, ch. 624, §1(a)(1), p. 91 codified as Elec. Code § 2105.7 (requiring voter registration of juveniles in detention facilities who are "of age to register to vote and are not in prison or on parole for the conviction of a felony").

For decades, there was universal agreement that these

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

provisions applied only to people on parole as defined in the Penal Code, not to people on any other types of criminal-justice supervision such as felony probation or diversion. *See McPherson*, 145 Cal.App.4th 1469.

In 2011, the Legislature fundamentally changed California's criminal-justice system by enacting Realignment, which has been called "one of the most ambitious correctional reforms [California] has ever carried out" and "one of the most far-reaching correctional policy reforms in recent U.S. history."[3] As part of its goal of reducing recidivism and facilitating community reintegration, Realignment maintains both parole and probation and creates two new additional categories of supervision: mandatory supervision and PRCS. *See* §§ 17.5, 1170(h), 3450; J.A.2:245 (Legislative Analyst Report: Realignment intended to "rehabilitate offenders and protect public safety"), 284 (Senate Rules Committee Report: PRCS must incorporate "evidence-based practices demonstrated to reduce recidivism"). These new types of community supervision are open only to persons convicted of less-serious offenses who are sentenced or released from custody after Realignment took effect on October 1, 2011. *See* §§ 1170(h)(6), 3451(a).

In December 2011, the Secretary issued Secretary of State Memorandum CC/ROV 11134, which directed local elections officials to bar people on PRCS from voting because they are on

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[3] Mia Bird and Ryken Grattet, *Do Local Realignment Policies Affect Recidivism in California?* Public Policy Institute of California (2014), at 2, 7, *available at* http://www.ppic.org/content/pubs/report/R_814MBR.pdf. All websites were last visited November 2-6, 2014.

the "functional equivalent" of parole, relying on a dictionary definition of the critical term. *See* J.A.1:029, 032-33, 041-42. In a footnote, she also instructed elections officials to disenfranchise the thousands of Californians who are on mandatory supervision—which she called "post-sentencing probation"—on the grounds that this new form of supervision is "more akin" to parole than to probation. J.A.1:043.

The Secretary's website, voter-registration forms, and other materials all repeat the Memorandum's conclusions and prohibit people "on parole, mandatory supervision, or post release community supervision" from voting. *See* J.A.1:043-44, 051-062. Her voter-registration forms require would-be voters to swear under penalty of perjury that they are not "serving a sentence for a felony pursuant to subdivision (h) of Penal Code section 1170 [*i.e.*, mandatory supervision], or on post release community supervision." J.A.1:057-58. County elections officials obey the Memorandum and refuse to register otherwise-eligible Californians on mandatory supervision and PRCS. *See* J.A.1:008, 016, 065.

3(A) The relevant categories of criminal-justice supervision

Several categories of criminal-justice supervision that can be imposed as a result of a felony conviction are relevant to this case:

3(A)(1) Felony probation (§ 1203 *et seq.*)

Probation is the "conditional and revocable release in the community under the supervision of a probation officer" following the suspension of the imposition or execution of a sentence. § 1203. Probation's goals include "punishment" and "reintegration of the offender into the community." § 1202.7. Probation is not

available to defendants with present or past convictions for particularly serious crimes. *See, e.g.,* §§ 1203.06, 1203.065(a), 1203.066(a), 1203.07(a), 1203.075(a), 1203.08(a), 1203.085, 1203.09.

Persons on felony probation for certain offenses are subject to a number of mandatory conditions. *See, e.g.,* §§ 1203.097, 1203.1ab. In addition, the court has broad discretion to impose other conditions. *See* § 1203.1(a). Most people on felony probation are required to serve a period of imprisonment in county jail before they are released. *See* § 1203.1(a)(2); California Department of Justice, *Crime in California 2013*, at 55 (Table 40).[4]

Because they are not on parole, Californians on felony probation have the right to vote. *McPherson*, 145 Cal.App.4th at 1469. The Secretary does not dispute this.

3(A)(2) Parole as it existed in 1974 when California voters amended the Constitution to expand the franchise

The Legislature first created parole in 1893 and has changed it repeatedly since then. *See In re Fain*, 145 Cal.App.3d 540, 553-57 & notes 10-16 (1983). In 1974, when voters amended the Constitution to expand the franchise, California's indeterminate sentencing law (ISL) gave the prison system, not the courts, the authority to set the length of felony sentences. *See People v. Jefferson*, 21 Cal.4th 86, 94-95 (1999). Parole allowed the Department of Corrections (CDC, now the CDCR) to release state

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[4] Cal. Dept. of Justice, *Crime in California 2013, Available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf.

prisoners early for good behavior. *See id.; see generally* Albert Lipson & Mark Peterson, *California Justice under Determinate Sentencing: A Review and Agenda for Research* (1980) at 1-3, 5 ("RAND").[5] Parole was a part of the prison term, set by the CDC, not a form of supervision that followed it: persons "on parole … continued to serve their terms of imprisonment" in the CDC's "constructive custody" and under its exclusive jurisdiction and supervision. *Jefferson*, 21 Cal.4th at 94-95; *see also In re Peterson*, 14 Cal.2d 82, 85 (1939). If the CDC violated a person's parole, it would send him back to state prison to serve the remainder of his term. *See In re Grey*, 11 Cal.3d 554, 556 (1974); RAND at 45-46. Prisoners who were not deemed suitable for early release served their whole sentence in actual prison custody and were never placed on parole. *See Jefferson*, 21 Cal.4th at 95. Prisoners who did not want to abide by parole conditions could reject parole and instead serve out their terms in prison. *See Peterson*, 14 Cal.2d at 84-85.

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

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

[6] *See* Cal. Dept. of Corrections, *California Prisoners 1974-1975*, at 97 (Table 36), *available at* http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/CalPris/CALPRISd1974_75.pdf. There were an additional 24,741 Californians in state prison. *Id*. at 5 (Table 1). The state's population was 21,173,000. *Crime in California 2013*, *supra* note 4, at 62 (Table 49).

convicted of homicide, rape, robbery, or burglary.[7]

3(A)(3) Parole under the Determinate Sentencing Law (DSL)

The 1977 Determinate Sentencing Law "restructured the entire sentencing and parole system." *In re Bray*, 97 Cal.App.3d 506, 510 (1979). Under the DSL, the court sets a precise prison sentence, and a prisoner who has served this sentence is entitled to be released onto parole, regardless of whether he has changed his ways. *See Jefferson*, 21 Cal.4th at 95; RAND at 3. Parole is no longer a part of the prison term that the CDCR allows some prisoners to serve in constructive, rather than actual, custody; instead, it is a mandatory period of supervision imposed in addition to the prison term. *See Jefferson*, 21 Cal.4th at 95-96; *People v. McMillion*, 2 Cal.App.4th 1363, 1367-68 (1992). Until Realignment took effect, the CDCR continued to exercise exclusive jurisdiction over persons on parole: it set the terms of parole; its agents supervised persons on parole and decided whether to institute revocation proceedings; and CDCR officials presided over revocation hearings. *See Williams v. Superior Court*, 178 Cal.Rptr.3d 685, 694-95 (Cal.App. 2014). Violations led to a physical return to state prison. *Jefferson,* 21 Cal.4th at 95-96. Initially fixed at one year, parole terms were soon increased to three years, then to 10 years, 20 years and even life for some offenses. *See* RAND at 6, 45-46*; see also* §§ 3000(b)(1), (2), (4)(a),

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[7] 52.7% of the 10,787 males on parole had been convicted of these crimes (10.1% homicide, 23.7% robbery, 2.8% rape and 16.1% burglary). *California Prisoners 1974-1975, supra* note 8, at 100. Of the 762 women on parole, 14.6% had been convicted of homicide, 8.3% of robbery, and 7.1% of burglary, and 5.5% of assault. *Id*. at 101.

3000.1; *In re Carabes*, 144 Cal.App.3d 927, 930 & note 1 (1983).

The adoption of the DSL and the "countless increases in criminal sentences enacted by the Legislature or in initiative measures in succeeding years," combined with the failure of the system to prepare prisoners to reintegrate into society after release, caused the state's prison and parole populations to skyrocket. *Coleman v. Schwarzenegger*, 922 F.Supp.2d 882, 908-09 (E.D. Cal. 2009) (three-judge court); *see* RAND at 11-15. A significant part of the problem was that California, unlike any other state, "put[] every inmate leaving the prison system on parole." *Coleman*, 922 F.Supp.2d at 990. By the end of 2010, just before the passage of Realignment, California's adult parole population had soared to 107,667, or 284 per 100,000 Californians, more than five times the 1974 rate,[8] even though the crime rates for both violent and non-violent crimes were much lower in 2011 than in 1974.[9] Moreover, this exponentially larger parole population included many more persons convicted of low-level crimes; by 2010, only 18.1% of parolees had been convicted of homicide, rape, robbery, or burglary.[10]

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[8] CDCR, *Annual Report 2011 - Year at a Glance*, at 12, *available at* http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf. In 2010 the prison population stood at 162,821. *Id.* The state's population was 37,318,481. *Crime in California 2013*, *supra* note 4, at 62 (Table 49).

[9] The violent crime rate in 2011 was 413.3 crimes per 100,000 population; in 1974, it was 602. *Crime in California 2013*, *supra* note 4, at 6 (table 1). For property crimes, the 2011 rate was 2,593.7 per 100,000 Californians, less than half the 1974 rate of 6,137.7. *Id.*

[10] Homicide -1.5%, robbery - 6.3%, rape - 0.4%, and burglary 9.9%. CDCR, *California Prisoners and Parolees 2010*, at 63 (Table 40), *available*

Persons on parole are subject to a number of statutory and special conditions, discussed in Section 3(A)(5), below.

3(A)(4) Realignment's new categories of community supervision

The Legislature enacted the 2011 Criminal Justice Realignment Act to reverse the 25-year trend of putting more and more people convicted of low-level offenses in prison, onto parole, and then "constant[ly] cycling" them back into prison for violations. *See* J.A.2:278 (Governor's Budget Summary). As Governor Brown wrote in his signing message,

> California's correctional system has to change, and this bill is a bold move in the right direction. For too long, the State's prison system has been a revolving door for lower-level offenders and parole violators…. Cycling these offenders through state prisons wastes money, aggravates crowded conditions, thwarts rehabilitation, and impedes local law enforcement supervision.[11]

Thus, Realignment is meant to "improve public safety outcomes among adult felons and facilitate their reintegration back into society" by "realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs" instead of parole. § 17.5(a)(5); *see People v. Scott*, 58 Cal.4th 1425, 1425-26 (2014); *People v. Lynch,* 209 Cal.App.4th 353, 361 (2012) ("The Legislature's stated purpose for the Realignment Act … is to reduce crime and use resources more efficiently …."); *see also*

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at http://www.cdcr.ca.gov/reports_research/offender_information_services_branch/Annual/CalPris/CALPRISd2010.pdf.

[11] A.B. 109 Signing Message, *available at* http://gov.ca.gov/docs/AB_109_Signing_Message.pdf.

Coleman, 922 F.Supp.2d at 991 (finding that "limiting the use of parole for certain offenders would … improve the public safety impact of the parole system").

To accomplish these goals, Realignment "changed the paradigm for the … supervision of persons convicted of certain felony offenses." *People v. Espinoza*, 226 Cal.App.4th 635, 639 (2014). It maintained parole as one system of supervision, but significantly narrowed its scope to include *only* those convicted of serious or violent felonies, third-strikers, high-risk sex offenders, and mentally disordered offenders. § 3000.08(a). People convicted of low-level felonies are instead placed on one of two new types of community supervision, run by county probation departments and the court: mandatory supervision or PRCS. *See Lynch*, 209 Cal.App.4th at 361 ("Defendants sentenced under the Realignment Act are not subject to parole and may serve part of their sentences in less restrictive community release."). These two new forms of local supervision are a critical component of Realignment's goal of reducing recidivism; not only do they avoid the social stigma associated with "parole," they are fundamentally different from it.

3(A)(4)(a)Mandatory supervision (§ 1170(h))

Under Realignment, defendants without current or prior convictions for serious, violent, or sex-related crimes are sentenced to county jail, not to state prison. *See* § 1170(h); *Scott*, 58 Cal.4th at 1418. These county-jail sentences differ from state-prison sentences in a number of ways; most relevant here, people released from them "are not subject to parole." *Id.* at 1419. Instead, the court may "suspend execution of a concluding part of

the term," and release the defendant onto "mandatory supervision" by the county probation department. §§ 1170(h)(5)(B)(i),(ii); *see Scott*, 58 Cal.4th at 1419.

People on mandatory supervision are "supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." § 1170(h)(5)(B)(i). Revocation proceedings follow the same procedures as probation-violation hearings. *Id.* The court retains jurisdiction over the defendant and has the sole authority to terminate supervision early. *Id.*; § 1203.3(a).

Mandatory supervision is only available to persons sentenced after October 1, 2011. § 1170(h)(6); *Scott*, 58 Cal.4th at 1419. As of March 2013, there were 6,252 persons on mandatory supervision in California. *See* J.A.1:123.

3(A)(4)(b) Postrelease community supervision ("PRCS") (§ 3450 et seq.)

Under the Postrelease Community Supervision Act of 2011, people convicted of non-serious, non-violent, non-sex-related offenses but whose prior record makes them ineligible to serve their sentences in local jails are no longer placed on parole when they leave prison; instead, they are placed on PRCS. §§ 3450(a), 3451; *see* § 3000.08(b) (persons released from prison who are not subject to parole "shall be placed on [PRCS] pursuant to Title 2.05 (commencing with Section 3450)"). PRCS is not part of the prison term; instead, it is a period of supervision that people serve "*after* serving a prison term." § 3000.08(a) (emphasis added). And it is mandatory; a person cannot reject PRCS and choose to remain in custody. *See id.*

PRCS is locally run. Each county board of supervisors is required to create a PRCS supervision strategy. § 3451(c). County probation departments supervise people on PRCS. *See* § 3451(a).[12] Petitions to revoke or modify PRCS are filed with the superior court under the same provisions that apply to petitions to revoke probation. *See* §§ 1203.2, 3454, 3455. If the court finds a violation, it may take a number of steps, such as returning the person to supervised release with additional conditions, which may include up to six months of county jail time; or it may revoke and terminate supervision, imposing up to six months in county jail. *See* § 3455. The CDCR has no jurisdiction or authority over people on PRCS. § 3457; *People v. Tubbs*, 178 Cal.Rptr.3d 678, 682-84 (Cal. App. 2014). People on PRCS cannot be sent to prison for violations. § 3458. PRCS can last a maximum of 3 years. § 3451(a).

Persons on PRCS are, like those on probation and parole, subject to a number of statutory conditions. § 3453.

PRCS is only available to persons released from custody after October 1, 2011. § 3451(a). As of March 2013, there were 33,579 Californians on PRCS. J.A.1:012.

3(A)(5) Parole after Realignment (§ 3000 et seq.)

Individuals convicted of serious and violent felonies and those classified as high-risk sex offenders or mentally-disordered

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[12] Every county designated its probation department to supervise people on PRCS. *See* CDCR, *Fact Sheet: 2011 Public Safety Realignment* (2013), at 3, *available at* http://www.cdcr.ca.gov/realignment/docs/Realignment-Fact-Sheet.pdf.

offenders are still "subject to parole supervision by the [CDCR]" under Realignment. § 3000.08(a). Persons on parole for murder or for certain sex offenses are still returned to prison for a violation, although others are sent to jail. §§ 3000.08(a)(4),(f), (h). The CDCR still sets parole conditions and CDCR parole agents supervise people on parole. *See id.*; § 3056(a).

Persons on parole are subject to restrictions that people on PRCS and mandatory supervision are not. *See, e.g.,* § 3003.5(a) (paroled sex offenders may not live together); §§ 3004 & 3010 (electronic monitoring); § 3053.5 (abstention from alcohol); § 3053.8 (exclusion from parks); Health and Safety Code § 11561 (mandatory custodial substance-abuse treatment); *compare* § 3067 (terms and conditions of parole) with § 3453 (terms and conditions of PRCS). Other conditions expressly apply both to persons on parole *and* to those on PRCS. *See e.g.*, § 3003 (persons released on parole *or* PRCS must be returned to last county of residence); § 3060.7 (notice to high-risk-classification persons on parole *or* PRCS); § 3067 (search clause for parole); § 3453(f) (search clause for PRCS).

As of January 22, 2014, there were 47,525 persons on parole in California, approximately 124 per 100,000 Californians, more than four times as were on parole in 1974.[13]

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[13] *See* CDCR, *Weekly Report of Population as of Midnight January 22, 2014, available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad140122.pdf. An additional 133,775 were in state prison. *Id*. The 2013 population of California was 38,204,597. *See Crime in California 2013*, *supra* note 4, at 62 (Table 49).

4. PROCEDURAL HISTORY

Plaintiffs' Petition asserts that otherwise-eligible Californians on mandatory supervision and PRCS have the right to vote, and that the Secretary's Memorandum violates the APA. J.A.1:019-20. Plaintiffs requested a writ of mandate requiring that: (1) the Secretary withdraw the Memorandum because it was issued in violation of the APA and misstates the law, and (2) that the Secretary take other steps to ensure that otherwise-eligible people on mandatory supervision and PRCS can vote. J.A.1:020-21.

The only evidence presented to the trial court was Plaintiffs' Verified Petition—which established standing and undisputed foundational facts relating to the Secretary's Memorandum, voting materials, and authority over voting in California—and an expert declaration from Professor Jeff Manza discussing the relationship between disenfranchisement and recidivism. J.A.1:001-20, 128-35.

After briefing and a hearing, the superior court issued a detailed ruling, holding for the plaintiffs on both of their claims and directing the parties to meet and confer as to the scope of relief. J.A.3:378-405, 421-423. The parties jointly submitted a proposed judgment and writ that will require the Secretary to take a number of steps to ensure that otherwise-eligible Californians on mandatory supervision and PRCS will be allowed to vote. J.A.3:406-408, 421. They also agreed to a stay pending appeal. J.A.3:406-408.

5. STANDARD OF REVIEW

This Court reviews the legal issues in this case *de novo* in light of the undisputed facts set forth in the verified complaint and

Professor Manza's declaration. *See James v. State*, 229 Cal.App.4th 130 (2014); *Capo for Better Representation v. Kelley*, 158 Cal.App.4th 1455, 1461-62 (2008).

6. ARGUMENT

6(A) Otherwise-eligible Californians on mandatory supervision and PRCS have the right to vote because they are not on parole.

Although the Secretary admits that mandatory supervision and PRCS "should not be considered 'parole' for all purposes" and that the Legislature "established [them] as separate categories" from parole, she nevertheless argues that this Court should treat them as if they were the same for the purpose of voting rights. Opening Brief at 30. But this approach would conflict with the statutory language, prior cases interpreting the Realignment statute, and the presumption in favor of voting rights. The Constitution and Elections Code disenfranchise only persons on *parole* for a felony conviction, not those on other forms of criminal-justice supervision.

6(A)(1) Mandatory supervision and PRCS are not parole.

6(A)(1)(a) The statutory text shows that mandatory supervision and PRCS are not parole.

The starting point in interpreting a law is the "actual words" of the enactment. *California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal.4th 627, 633 (1997); *see, e.g, Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal.4th 524, 529-30 (2011); *Scott*, 58 Cal.4th at 1421; *Prof'l Engineers in Cal. Gov. v. Kempton*, 40 Cal.4th 1016, 1037 (2007). It is only when obeying the constitutional or statutory language would "frustrate[ ] the

manifest purposes of the legislation as a whole or [lead] to absurd results" that a court may refuse to do so. *California Sch. Employees Assn. v. Governing Bd.*, 8 Cal.4th 333, 340 (1994); *see Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal.3d 208, 245 (1978). Otherwise, the courts must "presume the Legislature meant what it said" and apply the law as written. *Pineda*, 51 Cal.4th at 530. Terms with specific meanings in the law must be given their legal, not dictionary, definitions. *See Arnett v. Dal Cielo*, 14 Cal.4th 4, 19-20 (1996).

The text of the Realignment statute unambiguously states that persons convicted of less-serious crimes and sentenced or released after October 1, 2011 are subject to mandatory supervision and PRCS instead of parole. Each of these types of supervision is governed by a separate statutory scheme (sections 1170(h), 3450 *et seq.*, and 3000 *et seq.*, respectively). Had the Legislature wanted to create a new type of local parole for people convicted of less serious crimes, it could have done so. In fact, in the years leading up to Realignment, the Legislature created three new types of parole. In 2007, it made juveniles involved in less-serious offenses subject to "local parole supervision," run by counties, instead of state parole as part of juvenile realignment. *In re C.H.*, 53 Cal.4th 94, 105-06 (2011); *see also* Welf. & Inst. Code §§ 1766-1767.6. In 2009, it created what CDCR regulations call "non-revocable parole" for people who are on parole but who cannot be returned to custody for a parole violation. § 3000.03; 15 Cal. Code Regs. § 3505(a). In 2010, the Legislature created "medical parole" to allow the CDCR to release, under CDCR supervision, prisoners who are so ill that they do not pose a risk to

public safety. § 3550(a), (h); *see In re Martinez*, 210 Cal.App.4th 800, 810 (2012). But in enacting Realignment, the Legislature did not create another new type of "parole." Instead, it created two entirely separate forms of local supervision.

The Secretary's arguments to the contrary are unconvincing. Her primary argument is that several Penal Code provisions expressly apply both to parole and to PRCS. *See* Opening Brief at 24. But this in fact demonstrates that the Legislature considers parole and PRCS to be two distinct categories, each of which must be separately enumerated. Moreover, the Secretary's approach would also mean that mandatory supervision and PRCS are *probation*, because many statutes apply to "persons convicted of a felony offense under probation supervision, mandatory supervision, or postrelease community supervision," all of which are collectively defined as "local supervision." § 1229(e); *see* §§ 1229(a), (c), (d), 1230(3), 1232. Other statutes apply just to persons on probation and on mandatory supervision. *See* §§ 1203.1b, 1203.3, 1203.9. The many statutes listing parole and PRCS separately do not suggest that these two categories are the same, any more than a statute that refers to juveniles *and* adults would suggest that juveniles *are* adults.

The Secretary also points to two references to parole in the legislative findings relating to PRCS, one of which says that Realignment will improve outcomes among "parolees," the other of which refers to people on PRCS as having been "paroled from state prison." §§ 3450(b)(5), (6); *see* Opening Brief at 23. It appears that these two references, which are found in the legislative findings and nowhere else, are simply an artifact of

earlier proposals. As discussed below in Section 6(A)(4), the original Realignment bill would have simply transferred supervision of all parolees to the counties; it was only later amended to create new categories of supervision for people convicted of less-serious crimes. In any event, two isolated sentences that arguably conflate PRCS with parole, buried in the numerous code sections that unambiguously distinguish between PRCS and parole, do not demonstrate that the two systems are in fact one, much less constitute the "clear intent" required before a court will read a provision as to restrict the right to vote. *McPherson*, 145 Cal.App.4th at 1482; *see People v. Frausto*, 180 Cal.App.4th 890, 897 (2009) ("a statute may not be construed simply by seizing on an isolated word or sentence").

Finally, although the Secretary suggests that *McPherson* held the term "parole" is ambiguous, that case never even construed the term "parole," much less suggested it could be ambiguous. Compare Opening Brief at 19 *with McPherson*, 145 Cal.App.4th at 1482. *McPherson* actually held that the phrase "imprisoned … for the conviction of a felony" as used in the Constitution is ambiguous because it does not necessarily include people imprisoned in county jail as a condition of felony probation, and that the presumption in favor of voting rights therefore *requires* courts to resolve this ambiguity in favor of allowing these people to vote. *See id.* at 1482. *McPherson* cannot support the Secretary's attempt to *dis*enfranchise people on mandatory supervision and PRCS.

In short, the text of the Realignment statutes shows that mandatory supervision, PRCS, and parole are three different

categories of criminal-justice supervision.

6(A)(1)(b)Every court that has addressed the issue has recognized that these new forms of local supervision are not parole.

Every case that has examined Realignment's new sentencing categories has rejected Procrustean attempts to force Realignment's new sentencing categories into laws that reference the preexisting categories. For example, the Second District refused to conflate PRCS with parole in *People v. Espinoza*, 226 Cal.App.4th 635 (2014). After Espinoza was resentenced and released from prison early under the three-strikes reform law, he argued that he should not be subject to PRCS, relying on cases holding that prisoners in similar circumstances could not be placed on parole. *Id.* at 639-40. The Court rejected this argument because Espinoza "was never paroled. He was resentenced under a new sentencing scheme that requires PRCS." *Id.* Because the statutory language is clear and this result not absurd, the court refused to go beyond the statutory language to conflate the two forms of supervision. *Id.*

The Fifth District reached a similar result in *People v. Cruz*, 207 Cal.App.4th 664, 671-72 & note 6 (2012). Everybody convicted of a felony and given a sentence that "includes a period of parole" must pay a parole-revocation fine. § 1202.45(a). In *Cruz,* the court held that because "a defendant sentenced under [§ 1170(h)] – whether to a straight jail term or to a hybrid term [mandatory supervision] – is not subject to a state parole period after his or her sentence is completed," he is not subject to this fine. *Cruz*, 207 Cal.App.4th at 671-72 & note 6.

Similarly, Division 1 of this Court has recognized that under

Realignment's plain language, people convicted of less serious offenses are put on PRCS "in lieu of parole," and thus people sentenced to PRCS are not subject to the parole-revocation fine. *People v. Isaac*, 224 Cal.App.4th 143, 145-48 (2014). Other cases have employed similar textual analyses to reach similar conclusions. *See People v. Fandinola*, 221 Cal.App.4th 1415, 1423 (2013) ("mandatory supervision is neither probation nor parole"); *People v. Lopez*, 218 Cal.App.4th Supp. 6, 10 (2013) (abatement statute that applies to persons committed to CDCR did not apply to person sentenced to Realignment felony county-jail sentence because "the language of the statute is clear"); *People v. Prescott*, 213 Cal.App.4th 1473, 1476-78 & note 2 (2013) (statute that applies to persons sentenced to prison cannot apply to people who receive equivalent sentences but serve them in county jail under realignment); *People v. Lynch*, 209 Cal.App.4th 353, 361 (2012) ("Defendants sentenced under the Realignment Act are not subject to parole and may serve part of their sentences in less restrictive community release.").

As these cases recognize, Realignment created mandatory supervision and PRCS as new categories of supervision; laws that refer to parole simply do not apply to them.

6(A)(2) People on mandatory supervision and PRCS have the right to vote because they are not on parole.

Article II, section 4 of the Constitution and the Elections Code provisions that codify and implement it uniformly call for disenfranchisement of individuals who are on "parole," not those on other forms of criminal-justice supervision. Because these provisions and the Penal Code statutes governing parole all relate

to the same class of persons, identical terms in them should be given identical meanings. *See Neville v. Cnty. of Sonoma*, 206 Cal.App.4th 61, 76 (2012); *cf. Hassan v. Mercy Am. River Hosp.,* 31 Cal.4th 709, 716 (2003) ("words should be given the same meaning throughout a code unless the Legislature has indicated otherwise.") (citations omitted). Thus, "parole," as used in article II, section 4, the Elections Code, and the Penal Code carries the same meaning. "Parole" in the Constitution and Elections Code does not mean parole *and* mandatory supervision *and* PRCS. *See People v. Guzman*, 35 Cal.4th 577, 586-88 (2005) (courts cannot add words to statutes).

Recent legislation confirms this. In the wake of the uniform line of cases discussed above holding that parole does not include PRCS and mandatory supervision, the Legislature has carefully drafted new statutes that specifically reference these new forms of supervision when it wants to include them. For example, after the Court of Appeal held that persons whose sentences include PRCS could not be required to pay fines applicable to parole, the Legislature changed the law to require people sentenced under Realignment to pay new types of fines that go to the county, not to the state. *See* § 1202.45(b); *People v. Ghebretensae*, 222 Cal.App.4th 741, 765-66 (2013).

In contrast, when the Legislature acted even more recently to expand voting by lowering the age of pre-registration, it continued to specify that only people on "parole" are ineligible to register to vote, with no mention of these other forms of supervision. 2014 Cal. Legis. Serv. Ch. 619 (S.B. 113) §§ 2, 3

(amending Elec. Code §§ 2106, 2150(a)(9)). If the Legislature had intended to disenfranchise people on mandatory supervision or PRCS, it would have added these categories when it amended this statute. It instead continued to specify "parole" after the courts—including the court below—had consistently held that this term does not include mandatory supervision and PRCS. This is further proof that the Legislature does not intend to disenfranchise people on the new forms of supervision. *See People v. Favor*, 54 Cal.4th 868, 879 (2012) ("[W]hen the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts.") (citation omitted).[14]

Interpreting "parole" to mean "parole," not "parole and other forms of supervision," is particularly appropriate because parole is a legislative creation, not a natural category with some fixed meaning outside of the law. As discussed above, the Legislature created parole in 1893 and has changed it repeatedly since then, both before and after 1974. When it enacts a statute, the Legislature is presumed to be aware of existing law and to "intend[] to maintain a consistent body of rules and to adopt the meaning of statutory terms already construed." *Scott*, 58 Cal.4th

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[14] The Secretary cannot argue that Legislature adopted her understanding of the term parole when it made these amendments: "An erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change." *Dyna-Med, Inc. v. Fair Employment & Hous. Com.*, 43 Cal.3d 1379, 1396 (1987) (citation omitted). Such an argument would be particularly weak because the superior court had already held the Memorandum to be an invalid underground regulation before the Legislature amended the law. *See Armistead v. State Pers. Bd.*, 22 Cal. 3d 198, 204-05 (1978).

at 1424; *see In re Derrick B.*, 39 Cal.4th 535, 540-41 (2012). In contrast, if it uses a new term, it is presumed the Legislature did so on purpose. *See Briggs et al. v. Eden Council for Hope and Opportunity*, 19 Cal.4th 1106, 1117 (1999). This means that a law referring to a legal term or category in another statute cannot be read to include other statutory categories. For example, a statute authorizing a court to order "any person" to register as a sex-offender if it makes certain findings "at the time of conviction or sentencing" cannot apply to juveniles, because "'conviction' and 'sentencing' are terms of art usually associated with adult proceedings." *Derrick B.*, 39 Cal.4th at 539-540 & note 4, 542. Since the statute uses these terms instead of the corresponding terms that apply to juvenile proceedings—"adjudication" and "commitment"—it applies only to adults. *See id.* at 545.

In this same vein, the statute governing criminal appeals states that an order granting probation is appealable but does not mention orders granting post-plea diversion under the deferred entry of judgment program. *People v. Mazurette*, 24 Cal.4th 789, 792 (2001). Although the court recognized that these two forms of supervision "have many similarities," it nevertheless held that these similarities are "irrelevant"; because the diversion "simply is not listed in" the statute granting a right to appeal, it is not appealable. *Id.* at 795-96. Similarly, when the Legislature labels a minor crime a misdemeanor, even though it functions as an infraction (in that it is punishable only by a small fine), that label is dispositive, and persons charged with it are entitled to the same rights as to those charged with any other misdemeanor. *See Tracy*

v. Municipal Court, 22 Cal.3d 760, 765-66 (1978).

As these cases illustrate, the "Legislature's specific choice of [statutory] terms" matters. *Derrick B.*, 39 Cal.4th at 545-46. When it chooses a term that is already used in the law, the new statute incorporates that term "in the precise sense" as it has previously been construed. *Id.* at 540-41. When it chooses a new or different term, it means something different, and the courts cannot rewrite the statutes to conflate the old term with the new.

Here, article II, section 4 and the Elections Code exclude from voting only those persons who are imprisoned or on parole for conviction of a felony. Because they do not mention mandatory supervision and PRCS, whether these forms of supervision are similar to or equivalent to parole is "irrelevant." *Mazurette*, 24 Cal.4th at 796. If the Legislature's choice of language that narrows the scope of parole was "inadverten[t]," "the Legislature may correct its oversight, but it is not [the courts'] role to do so," *Derrick B.*, 39 Cal.4th at 546, and certainly not the Secretary of State's.

6(A)(3) The presumption in favor of voting further demonstrates that Californians on mandatory supervision and PRCS have the right to vote.

In interpreting California law, "every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process." *Hedlund v. Davis*, 47 Cal.2d 75, 81 (1956). Thus, California courts have repeatedly emphasized that "no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible to any other meaning." *Walters v. Weed*,

45 Cal.3d 1, 14 (1988) (quoting *Otsuka v. Hite*, 64 Cal.2d 596, 603-04 (1966);[15] *accord McPherson*, 145 Cal.App.4th at 1482; *McMillan v. Siemon*, 36 Cal.App.2d 721, 726 (1940). Courts must not interpret any law so as to restrict or abridge voting rights unless the "intent to do so [] appear[s] with great certainty and clearness." *People v. Elkus*, 59 Cal.App. 396, 404 (1922); *see also Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.").

This presumption means that unless it is clear that the Legislature or voters specifically intended to limit voting rights, courts must uphold the right to vote whenever the text of the law allows it. Thus, in *McPherson*, this Court examined the question of whether people who are "imprison[ed]" in jail as a condition of felony probation under § 1203.1(a)(2) are "imprisoned … for conviction of a felony" and thus disqualified under article II, section 4. After concluding that the law could reasonably be read so as to allow these individuals to vote, this Court applied this presumption to uphold their right to do so:

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

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[15] *Otsuka* was abrogated on other grounds *by Ramirez v. Brown*, 9 Cal.3d 199 (1973), which was itself overturned by *Richardson v. Ramirez*, 418 U.S. 24 (1974).

Here, the text of Realignment can, at the very least, reasonably be read as creating PRCS and mandatory supervision as distinct alternatives to parole; indeed, even the Secretary concedes that mandatory supervision and PRCS "should not be considered parole for all purposes." Opening Brief at 30. The Secretary also concedes that there is no indication that the Legislature intended to prohibit people on mandatory supervision and PRCS from voting (she simply claims that it did not consider voting rights when it enacted Realignment). *See* J.A.1:029-48. Thus, if there were any doubt that otherwise-eligible Californians on mandatory supervision and PRCS have the right to vote, the presumption would eliminate it.

6(A)(4) Realignment's legislative history does not suggest a different result.

The Secretary nevertheless claims that even though mandatory supervision and PRCS are not actually parole, they should be treated as if they were for purposes of voting because Realignment's legislative history does not discuss voting rights. This argument has several flaws:

First, legislative history is relevant only if the statute is "ambiguous or susceptible of more than one reasonable interpretation," *In re C.H.*, 53 Cal.4th 94, 107 (2011), or in rare cases where it shows a "manifest purpose" that would be frustrated by applying the statute as written. *California Sch. Employees Assn.*, 8 Cal.4th at 340. Here, the text of the Realignment statute is clear, and the Secretary does not suggest that anything in the legislative history shows the Legislature

intended to change the longstanding rule that only people on *parole* are disenfranchised, or that it intended to prevent people on local supervision from voting. Instead, she merely asserts that "there is no indication [in the Legislative history] that the Legislature ever considered the issue" of Realignment's effect on voter eligibility. *See* J.A.1:029-48 (Memorandum). This is far from that "manifest purpose" to disenfranchise that would be needed to override the statutory language. Legislative history is useful only when it unambiguously indicates legislative intent. *See Med. Bd. of California v. Superior Court*, 111 Cal.App.4th 163, 182 (2003) ("Because the legislative history is itself ambiguous, it is not useful…."). And the fact that the legislative history of a bill that made so many changes to California's criminal justice system fails to mention voting rights one way or the other does not unambiguously indicate an intent to prohibit people sentenced under Realignment from voting, any more than the absence of legislative history mentioning mandatory supervision means that this new category does not exist.[16] *See Jensen v. BMW of N. Am., Inc.*, 35 Cal.App.4th 112, 124-25 (1995) ("no inference of legislative intent may be drawn from the lack of legislative history.").

The cases that the Secretary cites as support for drawing inference from a lack of legislative history are inapposite because they all used the lack of legislative history to uphold, not override, the statutory language, in response to arguments that the

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[16] Respondents have not seen anything in Realignment's legislative history that mentions mandatory supervision.

Legislature had intended a result not suggested by the text. *See In re Christian S.*, 7 Cal.4th 768, 781 (1994) ("That history, though not unequivocal, leads to the same conclusion" as the textual analysis); *California Redevelopment Assn. v. Matosantos*, 53 Cal.4th 231, 261 (2011) (rejecting claim that initiative that did not expressly strip legislature of preexisting authority had done so by implication); *Ailanto Properties, Inc. v. City of Half Moon Bay*, 142 Cal.App.4th 572, 584, 587-89 (2006) (refusing to depart from statutory text based on isolated statements in legislative history because "other available items of legislative history are utterly silent" on question); *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 466-68 (2001) (rejecting argument that legislative history should defeat "most natural" reading of text).

Realignment's text creates mandatory supervision and PRCS as distinct alternatives to parole for people convicted of less-serious offenses and sentenced or released after the law's effective date. The natural, predictable consequence of this is that people on these new forms of supervision have the right to vote. No lack of legislative history can support the Secretary's argument that when the Legislature passed Realignment it implicitly intended to change the longstanding rule that parole, as used in Article II section 4, means parole, not parole and other types of supervision.

Second, both California and federal courts have recognized that the fact that legislation has consequences that were not articulated in the legislative history or even anticipated by the Legislature cannot override the statutory language. For example, in *Union Bank v. Wolas*, a bankruptcy debtor argued that a statutory amendment should not be read to have changed prior

law because its legislative history did not reveal any intent to do so. *Union Bank v. Wolas*, 502 U.S. 151, 156-57 (1991). The Court rejected this argument, holding that "even if Congress adopted the … amendment to redress [the] particular problems" discussed in the legislative history, the statutory language itself created broader effects, and the "*fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." Id.* (citation omitted, emphasis added).

California courts have similarly recognized that "[l]egislation often has unintended consequences," and that courts "cannot construe [a statute] in a manner wholly unsupported by its text merely to avoid the[se] purported unintended consequences." *In re Gabriel G.*, 134 Cal.App.4th 1428, 1437 (2005). Thus, in *Derrick B.,* the Court of Appeal had grounded its holding on a lack of legislative history suggesting that the Legislature "intended to limit [the sex-offender registration law's] reach to adults." *Derrick B.*, 39 Cal.4th at 545. Our Supreme Court reversed, because the Legislature's use of terms that applied only to adult criminal proceedings itself meant that the law applied only to adults; the lack of legislative history was irrelevant. *Id.*

The Secretary's argument in this regard is particularly weak because the Legislature has so often passed laws that have had the effect of *disenfranchising* people with no indication that it intended this result. Recent decades have seen numerous measures that have created new felonies or lengthened prison or parole terms with no mention in the legislative history or ballot materials of the effect they would have on voting rights. For

example, nothing in the ballot materials or legislative history for California's three-strikes initiative or statute mentioned voting, much less suggested that those measures were intended to disenfranchise anybody.[17] Nor is there any indication that in 1977, when the Legislature changed parole from a system of discretionary early release to a *mandatory* period of supervision served after completion of the prison term, it intended to disenfranchise persons on this new, expanded parole. In fact, the Secretary does not identify *any* examples where the legislative history in a criminal-justice statute mentioned possible effects on voting rights. Nevertheless, these laws have had the consequence of disenfranchising tens of thousands of Californians who would have been eligible to vote had they not been "imprisoned or on parole" because of these new measures. Changes to the criminal justice system necessarily affect who can vote.

This means that when, as here, the Legislature decides to reform the criminal-justice system to prospectively narrow the scope of who can be placed on parole, people who are as a result not on parole can vote. That the legislative history doesn't mention voting rights is no more relevant here than it was when the Legislature was increasing sentences and expanding the scope

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[17] *See* Off. Cal. Legis. Information: AB 971, *available at* http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=ab_971&sess=9394&house=B&author=assembly_members_jones_and_costa (legislative history for three-strikes legislation); Cal. Ballot Pamphlet: Nov. 8, 1994, *available at* http://librarysource.uchastings.edu/ballot_pdf/1994g.pdf at 32-37 (ballot materials for three-strikes initiative). The initiative duplicated the earlier legislation. *See id.* at 33.

of parole. In both cases, the right to vote is controlled by narrow disenfranchisement provisions in the Constitution and Elections Code. In fact, because courts will not construe a statute so as restrict voting rights absent a clear legislative intent to do so, it would be perverse to *dis*enfranchise people who are added to the parole system under new "get tough on crime" laws that the Legislature passed without any mention of voting rights, but then to refuse to expand the franchise when it passes laws that put fewer people on parole.

Third, the Secretary's focus on the early legislative history of Realignment ignores the fact that the final law made more fundamental changes to the criminal justice system than the Governor had initially proposed. For example, the Governor's initial January 25, 2011, proposal was to "shift responsibility for supervising … all adult parolees from the state to local governments." J.A.2:250; *see id.* at 266 (Governor's budget summary). However, after the bill was amended, the March 14th Senate analysis stated that the new law would instead maintain "state parole supervision for" those convicted of serious offenses but that others would "be subject to postrelease supervision, rather than subject to state parole supervision." J.A.2:284. After a March 17th Senate vote, the Budget Committee report noted that the Senate had voted to "[s]pecify the population to be released onto postrelease supervision (no-violent/serious, no third strike conviction, no high risk sex offenders) and change the "State Parole statutes" to "[s]pecify who remains on parole (violent/serious conviction, third strike conviction, high risk sex offenders)." J.A.2:288. Thus, although the initial proposal would

simply have moved parole supervision from the state to the counties (as had occurred with Juvenile Realignment), the final law instead maintained state parole for serious offenses but eliminated it for people convicted of less-serious crimes.

Mandatory supervision also started out as a new type of an existing category. An initial version of § 1170(h) created "mandatory *probation*"; this was only later changed to mandatory *supervision*. *People v. Ghebretensae*, 222 Cal.App.4th 741, 766 (2013). But the Secretary does not suggest that this means that people on mandatory supervision can vote because they are probationers. And rightly so: it is the final statute, "voted on by two houses of the Legislature, [and]…. finally signed 'into law' by the Governor," that is the law, not earlier proposals. *Wasatch Prop. Mgmt. v. Degrate*, 35 Cal.4th 1111, 1117-18 (2005); *cf. Wilson v. City of Laguna Beach*, 6 Cal.App.4th 543, 555 (1992) ("The rejection of a specific provision contained in an act as originally introduced is "most persuasive" that the act should not be interpreted to include what was left out.") (citation omitted). In the final statute, mandatory supervision and PRCS are neither parole nor probation.

Realignment's legislative history therefore confirms that the Legislature intended to create new categories of local supervision, distinct from parole or probation. Because they are not on parole, people on these new forms of supervision have the right to vote, regardless of whether the Legislature specifically contemplated

voting rights when it enacted Realignment. [18]

6(A)(5) The Constitution does not require the Legislature to disenfranchise people on mandatory supervision and PRCS.

The Secretary's suggestion that the Legislature violated article II, section 4 by eliminating parole for people convicted of less-serious crimes is also wrong, because the Legislature has the authority to change the scope of parole, and neither mandatory supervision nor PRCS is the same as parole.

6(A)(5)(a) Article II, section 4 does not prohibit the Legislature from changing the scope of parole.

"[T]he power to define crimes and fix penalties is vested exclusively in the legislative branch," subject only to the prohibitions against excessive punishments and *ex post facto* laws. *People v. Superior Court (Romero)*, 13 Cal.4th 497, 516 (1996) (citation omitted); *see Espinoza*, 226 Cal.App.4th at 640. The Legislature has long used this authority to create, expand, and contract various types of criminal-justice supervision. Most relevant to this case, the Legislature created parole in 1893 to allow the prison system to release people before the end of their

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[18] If, as the Secretary claims, references in the legislative history to prison overcrowding litigation are relevant to this case, it is equally relevant that the three-judge district court hearing those cases specifically proposed that California eliminate parole for "nonserious, nonviolent offenders," based in part on recommendations from the CDCR. *Coleman*, 922 F.Supp.2d at 990-91. The court found that this would improve public safety, particularly if the state were to increase funding for county "community corrections" programs. *See id.* at 991-93. This is precisely what the Legislature has done: it eliminated parole for people convicted of just these offenses and created mandatory supervision, PRCS, along with probation, as county-run "community corrections" programs. § 1229(a).

terms and then repeatedly expanded it. *See In re Fain*, 145 Cal.App.3d at 553-57 & notes 10-16; *see generally In re Stanley*, 54 Cal.App.3d 1030, 1036-37 (1976). As discussed above, under the ISL, parole was part of the prison terms and was not mandatory – a prisoner who had served his entire term would be released without any parole supervision.

The 1977 DSL then "restructured the entire sentencing and parole system." *In re Bray*, 97 Cal.App.3d at 510. As part of this restructuring, the Legislature expanded the scope of parole by making it a mandatory period of supervision that followed the end of every prison term. Initially, the DSL set the maximum length of parole at one year. *See* RAND at 45-46. But the Legislature quickly expanded it again by increasing parole terms to three years, and then to 5, and then 10 and 20 years for some offenses. *See id.; In re Harper,* 96 Cal.App.3d 138, 139-40 & notes 2-3 (1979), *see also* §§ 3000(b)(1), (2), (6)(A), (6)(B), 3000.1; *In re Carabes*, 144 Cal.App.3d at 930 & note 1; *In re Bray*, 97 Cal.App.3d at 509.

As this history demonstrates, because the Legislature created parole, it may expand or, as here, narrow its scope so that it applies only to persons convicted of certain felonies. *See Way v. Superior Court*, 74 Cal.App.3d 165, 169, 172-73 & note 5 (1977) (upholding retroactive shortening of sentences as part of change from indeterminate to determinate sentencing); *In re Chavez*, 114 Cal.App.4th 989, 1000 (2004). A recent case decision upholding the Legislature's authority to eliminate redevelopment agencies confirms this. The Legislature authorized the formation of redevelopment agencies in 1945. *California Redevelopment Assn.*

v. Matosantos, 53 Cal.4th at 245-46. In the following decades, the voters twice amended the Constitution to grant these agencies specific rights to receive funding. *See id.* at 256-57, 260-62. Then, in 2011, the Legislature decided to limit redevelopment agencies' powers and to eventually dissolve them entirely. *Id.* at 250-51. The redevelopment agencies sued, arguing that the voters, by giving them specific constitutional rights, had implicitly eliminated the Legislature's authority to dissolve them. But our Supreme Court disagreed and held that because the initiatives did not expressly prohibit the Legislature from completely eliminating redevelopment agencies, they did not impair its authority to do so: "[w]hat the Legislature has enacted, it may repeal" or "narrow." *Id.* at 255, 256; *see id.* at 254-64.

Nothing in the text of article II, section 4 limits the Legislature's authority to change the scope of parole. This means that the voters who enacted that provision preserved the Legislature's "broad preexisting authority" to change the scope of parole. *Prof'l Engineers in Cal. Gov. v. Kempton*, 40 Cal.4th 1016, 1048 (2007). The Legislature therefore acted within its authority when it narrowed parole so that parole includes only people convicted of particularly serious crimes. *See California Redevelopment Assn.*, 53 Cal.4th. at 254-56; *see also id.* at 253 ("restrictions and limitations imposed [on the Legislature] by the Constitution … are not to be extended to include matters not covered by the language used.") (citations omitted).

Moreover, both the language ("The Legislature … shall provide …") and the history of article II, section 4 specifically recognize the Legislature's authority to implement the

Constitution's voting provisions. *See Ramirez v. Brown*, 9 Cal.3d 199, 204 (1973), *rev'd on other grounds* sub nom. *Richardson v. Ramirez*, 418 U.S. 24 (1974). Thus, the Legislature has particularly broad authority to interpret and define the scope of parole as the term is used in article II, section 4. *See* McPherson, 145 Cal.App.4th at 1483-84 (deferring to Legislature's interpretation of Article II § 4); *People v. 8,000 Punchboard Card Devices*, 142 Cal.App.3d 618, 619-21 (1983) (constitutional provision stating that "the Legislature by statute may authorize cities and counties to provide for bingo games" authorizes the Legislature to later change the definition of "bingo"); *see generally Mt. San Jacinto Cmty. Coll. Dist. v. Superior Court*, 40 Cal.4th 648, 656 (2007) ("There is a strong presumption in favor of the Legislature's interpretation of a provision of the Constitution.").

Thus, the Legislature did not violate Article II, section 4 when it narrowed parole to encompass only serious offenders, while creating new forms of local supervision for people convicted of less-serious crimes.[19]

6(A)(5)(b) Mandatory Supervision and PRCS are not the functional equivalents of parole as it existed when the voters adopted article II, section 4 or as it exists today.

The fundamental differences between Realignment's new forms of local supervision and parole as it existed in 1974 further

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[19] Recall, too, that the drafters of article II, section 4 rejected a proposal to disenfranchise people "under court order" and instead narrowed the provision to apply only to those "on parole." *McPherson*, 145 Cal.App.4th at 1483. It therefore covers only parole, not other types of supervision. See *Wilson*, 6 Cal.App.4th at 555 (court should not reinsert terms that Legislature has removed).

belie the Secretary's argument that mandatory supervision and PRCS can be considered parole as used in article II, section 4. Courts "must assume that the voters" who enacted article II, section 4 were aware of existing parole statutes and how the courts had interpreted them. *Derrick B.*, 39 Cal.4th at 540. If, as the Secretary suggests, Article II, section 4 gives parole a fixed meaning and scope that the Legislature cannot change, it means what it meant in California law in 1974. *See id.*; *see also Hughes v. Pair,* 46 Cal.4th 1035, 1046 (2009) (same "precise and technical" meaning[]")*; McPherson*, 145 Cal.App.4th at 1482. Thus, even if it were proper to disenfranchise Californians under other types of supervision that are similar to parole, the Secretary would have the burden to show that mandatory supervision and PRCS are the same as parole as it existed in California in 1974.

The Secretary cannot meet this burden. As discussed above in Section 3(A)(2), 1974 parole allowed the CDC to release a prisoner early to serve part of his term in constructive, rather than actual, state custody, under its exclusive jurisdiction and control. Violations could result in a return to prison to serve the remainder of the term in actual custody. When the prison term ended, so did parole. Some prisoners were released without being put on parole at all. Thus, when the voters decided to amend the Constitution to expand the franchise to include everybody who was not "imprisoned or on parole for conviction of a felony," only those individuals who were actually serving a state prison term, either in actual state custody or in constructive custody under state parole supervision, remained ineligible to vote. Most of them were serving terms for serious crimes.

As discussed above in Section 3(A)(4)(a), mandatory supervision is fundamentally different from this traditional parole. Only those convicted of non-serious offenses are eligible for mandatory supervision. People on mandatory supervision have not been released early for good behavior to serve part of their state prison term in constructive custody; they have not been sentenced to state prison at all, and even their county jail term is suspended while they are on community supervision. The court sets the release date and the term and conditions of mandatory supervision at the time of sentencing; it then retains jurisdiction to punish violations. County probation officers, not state parole agents, supervise them. Judges, not the CDCR, hear violations, using the same procedures that govern probation-violation hearings. Prison is not an option for violations.

Nor is PRCS the same as "parole," much less parole as it existed when the voters adopted article II, section 4. *See* Section 3(A)(4)(b), above. Only people convicted of non-serious crimes are eligible for PRCS. The court, not the CDCR, determines when a prisoner will be released to PRCS when it pronounces sentence. People on PRCS are not released early to serve part of their prison term in constructive custody; to the contrary, they have completed that term and are serving a separate part of their sentence. The conditions of PRCS are set by a special statute or by the county, not by the CDCR. County probation officers supervise them and decide whether to initiate revocation proceedings; judicial officers determine whether to revoke PRCS using the same procedures they would use to adjudicate a probation violation. The maximum punishment for a violation is six months in county jail, rather

than completion of the remaining sentence that a 1974 parole violation would entail.

Mandatory supervision and PRCS also differ from parole as it exists today. Most importantly, parole is now reserved for people convicted of serious offenses. People on parole remain under the supervision of state parole agents, not the county probation officers that supervise people convicted of less serious crimes. People on parole are governed by a different statutory scheme, with more severe terms and conditions, than are those on mandatory supervision and PRCS.

The Secretary also claims that PRCS is parole because violations can result in arrest, a court hearing, and jail time. Opening Brief at 24-25. But this merely demonstrates that both parole and PRCS are forms of criminal-justice supervision – probationers are subject to the same treatment. *See* § 1203.1(j). This same flaw inheres in the Secretary's argument that because people on local supervision have due process rights guaranteed to parolees under *Morrissey v. Brewer*, 408 U.S. 471 (1972), they must be on parole. *See* Opening Brief at 20-21. These individuals have *Morrissey* rights not because they are on "parole," but because everybody has a liberty interest in remaining free from custody. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). Thus, *Morrissey* also applies to people on probation. *Id*; *People v. Vickers,* 8 Cal.3d 451 (1972). In fact, as part of Realignment, the Legislature amended § 1203.2 to create a uniform process for revoking *all* of these forms of supervision, including probation. *Williams*, 178 Cal.Rptr.3d at 694-95. Similarly, that courts analyze mandatory supervision conditions under the same

standards as parole conditions is irrelevant, because, "[t]he validity and reasonableness of parole conditions is analyzed under the same standard as that developed for probation conditions." *People v. Martinez*, 226 Cal.App.4th 759, 764 (2014) (citations omitted).[20]

The Secretary's argument that people on mandatory supervision and PRCS are on parole as defined in a dictionary is also unpersuasive. *See* Opening Brief at 20. Because "parole" is a legal term, what matters is how the California Legislature and courts, not dictionaries, define it. *See Arnett v. Dal Cielo*, 14 Cal.4th 4, 19-20 (1996) ("[W]hen [a] word has both a specific legal meaning and a more general sense in informal legal usage or in lay speech … lawmakers are presumed to have used the word in its specifically legal sense."). Even the Secretary admits that different jurisdictions define parole differently, so that a dictionary definition cannot explain what parole means in California. *See id*. Moreover, as the superior court noted, "dictionaries conflate the term 'parole' with 'probation.'" J.A.3:389-90.[21] In fact, the Secretary's definition of parole would sweep in most people on felony probation in California, because they are on

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[20] The Secretary's suggestion that only people who have "fully paid the price" of their crimes have the right to vote suffers from this same flaw: people on felony probation have not completed their sentences, but they indisputably have the right to vote. Opening Brief at 30-31.

[21] Definitions of parole from when the voters adopted Article II § 4 mostly define it as it existed in California in 1974, as the "release of a prisoner before his term has expired," often specifying "from prison" and "under the supervision of a parole board." J.A.1:082 (collecting definitions).

conditional release following a period of imprisonment in county jail as a condition of that probation. *See* Section 3(A)(1), above. Dictionary definitions of the terms "conviction" and "sentence" would not exclude juvenile proceedings, but California law does. *See Derrick B.*, 39 Cal.4th at 540. And, most relevant to this case, using dictionary definitions of "convicted" and "imprison" would mean that people imprisoned in jail as a condition of felony probation would be barred from voting; but this Court has held that as used in Article II, section 4 these terms have a narrow, technical meaning that excludes these individuals. *See McPherson*, 145 Cal.App.4th at 1480 (rejecting dictionary definition of "imprisoned"), 1482 ("convicted"). It would also mean that Californians on non-revocable parole *can* vote, even though they are on parole, because their release is not conditional. [22] The Secretary's dictionary definition of "parole" cannot help resolve this case.

6(A)(6) Disenfranchising Californians under local supervision undermines Realignment's goal of reintegrating people convicted of low-level felonies back into society.

The Legislature created mandatory supervision and PRCS as less-stigmatizing, "community-based" "improved supervision strategies" to help "facilitate [low-level offenders'] reintegration back into society" and thus reduce recidivism, a goal that the state's parole system was failing to accomplish. §§ 17.5(a)(1), (5). Allowing people in these new forms of community supervision to

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[22] Notably, the Secretary has never suggested that people on non-revocable parole have the right to vote.

vote furthers these goals.

First, voting "is one of the most important functions of good citizenship." *Otsuka*, 64 Cal.2d at 603-04 (citation omitted). Thus, allowing people to vote after they are released from custody directly furthers Realignment's goal of reintegrating them back into society. Conversely, as Professor Manza explains, "disenfranchising convicted felons living in their communities from participating in elections harms their reintegration." J.A.1:131.

Second, "restoring voting rights for non-incarcerated felons [has] a modest but significant impact on reducing recidivism." J.A.1:132. This impact is greater when formerly incarcerated people are encouraged to exercise this right. *See id.*[23] In contrast, "disenfranchisement may actually increase criminal activity."[24] Thus, allowing and encouraging people on mandatory supervision and PRCS to vote also furthers Realignment's goal of reducing recidivism.

No counterbalancing interests justify expanding disenfranchisement to include people not on parole. The rationale behind felony disenfranchisement is not to punish individuals convicted of a felony but rather "to deter election fraud." *Ramirez*, 9 Cal.3d at 206; *Otsuka*, 64 Cal.2d at 602-03. When the voters

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

[24] Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley La Raza L.J. 407, 414, 429 (2012).

expanded the franchise in 1974, they recognized, as have the courts, that this historical need for felony disenfranchisement no longer exists. *See* J.A.1:119 (arguments in favor of initiative); *see also Ramirez*, 9 Cal.3d at 211-17; *Collier v. Menzel*, 176 Cal.App.3d 24, 34-35 (1985). Scholarly work confirms that there is "no empirical evidence that suggests ex-felons … are at a higher risk of committing election-related offenses" and that felon disenfranchisement is ineffective at reducing fraud.[25] Nor would disenfranchising people under community supervision serve any other legitimate governmental interests. *See* J.A.1:132-33.[26]

Article II, section 4 continues to disenfranchise the nearly 50,000 Californians who are on parole because they have been convicted of serious felonies and remain under state CDCR supervision; this is many more people than were disenfranchised when the voters enacted article II, section 4. Expanding its scope to include Californians who are on other forms of supervision and will never have contact with the state parole system would frustrate the goals of Realignment.

6(A)(7) The prior writ petition and legislative inaction are irrelevant.

That other appellate courts did not grant discretionary review of a writ petition that raised some of the issues present here has

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[25] Hamilton-Smith & Vogel, *The Violence of Voicelessness*, *supra* note 24, at 413, citing Jeff Manza & Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* 25 (Dedi Felman ed., 2006).

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

no bearing on this case, because summary denial of a writ petition is not a decision on the merits. *See Funeral Directors Ass'n of Los Angeles v. Board of Funeral Directors*, 22 Cal.2d 104, 110 (1943); *Kowis v. Howard*, 3 Cal.4th 888, 894-95 (1992). Similarly, "a denial of a petition for review is not an expression of opinion of the Supreme Court on the merits." *Camper v. Workers' Comp. Appeals Bd.*, 3 Cal.4th 679, 689 & note 8 (1992). Moreover, that prior petition focused on the voting rights of people serving felony county-jail sentences—an issue not involved in the present case—and did not raise the question of the validity of the Secretary's memorandum under the APA.[27] It is doubly irrelevant.

Similarly, that the Legislature has not passed new laws clarifying that people sentenced under Realignment can vote is no more relevant than is the fact that it has not passed any laws suggesting that people sentenced under Realignment *cannot* vote. *See Grupe Dev. Co. v. Superior Court*, 4 Cal.4th 911, 922-23 (1993) ("The light shed by such unadopted proposals is too dim to pierce statutory obscurities.") (citation omitted). Relying on the unpassed bill cited by the Secretary would be particularly inappropriate because it focused on people in custody serving felony jail sentences, not people under community supervision, and included provisions that a committee report asserted could cause administrative problems by requiring court clerks to provide social-security information to county elections officials, as

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[27] Although the Secretary's argument relies on the prior petition, she has not provided any of the pleadings that would show what issues and arguments it raised.

well as a provision that would have specifically prohibited persons on federal supervised release from voting. J.A.2:223, 227-28. In part because it is impossible to know why the Legislature decided not to pass a measure, "[u]npassed bills, as evidences of legislative intent, have little value." *Grupe Dev. Co.,* 4 Cal.4th at 923 (citation omitted). Neither the unpassed legislation, nor any of the legislative materials relating to it, has any bearing on this case.[28]

6(A)(8) The Secretary's discussion of federal supervised release is unsupported and irrelevant.

The Secretary's final justification for her position is her claim that people on federal supervised release cannot vote. *See* Opening Brief at 26. There are three problems with this argument:

First, the federal Sentencing Reform Act completely ended parole and replaced it with what the Secretary describes as a "virtually identical" substitute. *See id.* Realignment is not that type of "renaming"; it maintains parole for tens of thousands of people convicted of serious crimes but removes those convicted of less-serious crimes from parole supervision. Thus, even were the Secretary correct that people on federal supervised release are ineligible to vote in California, that would have no effect on the voting rights of Californians on mandatory supervision and PRCS.

Second, the Legislature cannot control what changes Congress makes to the federal criminal justice system; nor can Congress be presumed to take into account the effect that those changes will

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[28] In particular, there is no reason to think that the Legislature gave any weight to the suggestion in a committee report that the bill "may" have raised constitutional concerns. *Contra* Opening Brief at 7.

have on all 50 states' diverse voting systems. *See California Sch. Employees Assn. v. Governing Bd.*, 8 Cal.4th at 340. Determining how to treat people on federal supervised release under California law raises complicated issues relating to the intersection of state and federal law that are not present in this case, where our state legislature has spoken clearly and is presumed to understand the effect that the statutory language it chose will have on voting rights under California law.

Third, the only support the Secretary can muster for her position is the same Memorandum at issue in this case, which contains neither any analysis nor citation to authority to support it and which, as discussed below in Section 6(B), is an invalid underground regulation. *See* Opening Brief at 26. Not even the Secretary's voting materials suggest that people on federal supervised release are barred from registering or voting. *See* J.A.1:051-52, 058. As an underground regulation, the Memorandum is void, and its analysis and conclusions therefore "should be given no deference" by this Court. *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 581-82 (2000).

6(A)(9) The Memorandum and its conclusions are not entitled to any deference.

Even if the Memorandum were not an underground regulation, this Court would not defer to the Secretary's analysis of the legal question of whether people on local supervision have the right to vote under the state constitution and implementing statutes. *See W. States Petroleum Assn. v. Bd. of Equalization,* 57 Cal.4th 401, 415 (2013) ("when an implementing regulation is challenged on the ground that it is in conflict with the statute …

the issue of statutory construction is a question of law on which a court exercises independent judgment.") (citations omitted); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal.4th 1, 11-15 (1998); *Malick v. Athenour*, 37 Cal.App.4th 1120, 1128 (1995) ("The trial court was not required to defer to the election department's interpretation of the law ….").

6(B) The Memorandum is an unlawful underground regulation.

California's Administrative Procedure Act ensures that "persons or entities whom a regulation will affect have a voice in its creation." *Morning Star Co. v. State Bd. of Equalization,* 38 Cal.4th 324, 333 (2006) (citation omitted). It therefore requires state agencies to engage in a formal notice-and-comment procedure before they "issue [or] utilize … any guideline, criterion, bulletin, manual, [or] instruction" that falls within its broad definition of a regulation, except as specifically excused by statute. Gov. Code § 11340.5. An agency guideline or bulletin that falls within this definition but has not gone through the notice-and-comment process is an invalid "underground regulation." *Clovis Unified School Dist. v. Chiang*, 188 Cal.App.4th 794, 799-800 (2010); *see Morning Star*, 38 Cal.4th at 331, 333-36.

Under Government Code § 11342.600 a "regulation" includes

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

"[A]bsent an express exception, the APA applies to all generally applicable administrative interpretations of a statute." *Morning*

Star, 38 Cal.4th at 335. Thus, the APA's notice-and-comment requirement applies to an agency's "informational" materials that interpret the law. *See Union of Am. Physicians & Dentists v. Kizer*, 223 Cal.App.3d 490, 502 (1990) (invalidating "informational" manual); *accord Cal. Grocers Assn. v. Dept. of Alcoholic Beverage Control*, 219 Cal.App.4th 1065 (2013) (invalidating department's "advisory" memorandum).

The Secretary of State's office is authorized to "adopt regulations to assure the uniform application and administration of state election laws." Gov. Code § 12172.5(d). When it does so, it must follow the APA. *County of San Diego v. Bowen*, 166 Cal.App.4th 501, 516 note 21 (2008). Because the Memorandum is a "guideline," "manual," "bulletin," or "instruction" that purports "to implement, interpret, or make specific" California election law, it falls within the APA's definition of a regulation that must go through the formal adoption process. *Id.* at 516-18; *see Morning Star Co.*, 38 Cal.4th at 335; *Cal. Grocers Assn.*, 219 Cal.App.4th at 1073-74; *Kizer*, 223 Cal.App.3d at 502.

The Secretary does not dispute that the Memorandum falls within the definition of a regulation or that it was issued without notice and comment. Instead, she argues only that it is exempt from the APA's requirements under Government Code § 11340.9(f), which exempts any "regulation that embodies the only legally tenable interpretation of a provision of law" from the APA's procedural requirements. But this exception "applies only in situations where the law can reasonably be read only one way," so that the agency's interpretation is "patently compelled by, or repetitive of, the statute's plain language." *Morning Star*, 38

Cal.4th at 336-37. It does not cover materials that "depart from, or embellish upon, express statutory authorization and language." *Id.* at 336. Thus, whether the agency's interpretation of the law is ultimately correct does not matter; the question is whether it "follows directly and inescapably from the pertinent provisions of law." *Id.* at 340; *see Cal. Grocers Assn.,* 219 Cal.App.4th at 1069, 1073-74 (exception cannot apply where regulation is "more than a simple paraphrase" of the statute); *County of San Diego*, 166 Cal.App.4th at 519 note 25 (exception cannot apply because "[t]here is nothing in the cited code sections that requires the Secretary to promulgate the precise rules" she had issued).

For the reasons discussed at length above, interpreting "parole" to include mandatory supervision and PRCS as well as parole is not a rote repetition of the statutory language; in fact, as the superior court held, it is not even a correct interpretation of the law. The Memorandum therefore cannot fall within the narrow exception.

By issuing the Memorandum and related voter-registration and education materials without complying with the APA, the Secretary has disenfranchised tens of thousands of Californians without giving them—or anyone else outside of her office—any opportunity to object to her decision to abridge this fundamental right. This is precisely the type of unilateral, closed-door rulemaking that the APA is designed to prevent. Respondents are therefore entitled to a declaration that the Memorandum and the materials that incorporate its conclusions are "invalid for a substantial failure to comply with" the APA. Gov. Code § 11350(a); *Bollay v. Cal. Office of Admin. Law*, 193 Cal.App.4th 103, 112-13

(2011); s*ee Morning Star*, 38 Cal.4th at 340-42; *Cal. Grocers Assn.,* 219 Cal.App.4th at 1068 (conclusion that advisory violates APA "requires" the court to "void" it); *Clovis*, 188 Cal.App.4th at 805.

7. CONCLUSION

For the reasons discussed above, otherwise-eligible Californians on mandatory supervision and PRCS have the right to vote. Furthermore, the Secretary's Memorandum is invalid under the APA. This Court should therefore affirm.

Respectfully submitted,

Dated: November 6, 2014 _____

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CERTIFICATE OF COMPLIANCE

I certify that the text in the attached Brief contains 13,800 words, as calculated by Microsoft Word, including footnotes but not the caption, the table of contents, the table of authorities, signature blocks, or this certification. *See* Rule of Court 8.204(c)(1), (3).

Dated: November 6, 2014

By: _____
Michael T. Risher

PROOF OF SERVICE

I, Carey Lamprecht, declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City of San Francisco, County of San Francisco, California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of the AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, and my business address is 39 Drumm Street, California 94111.

On November 6, 2014, I served the following document:

Respondents' Brief

In the following case:
Michael Scott, et al. v. Debra Bowen, Case No. A142139

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__X__ By U.S. Mail enclosing a true copy in a sealed envelope in a designated area for outgoing mail, addressed with the aforementioned addressee. I am readily familiar with the business practices of the ACLU of Northern California for collection and processing of correspondence for mailing with the United States Postal Service, and correspondence so collected and processed is deposited with the United States Postal Service on the same date in the ordinary course of business.

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Executed on November 6, 2014 at San Francisco, California.

____/s/ Carey Lamprecht_____
Carey Lamprecht, Declarant