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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

Michael Scott, Leon Sweeting, Martin Cerda, All of Us or None, League of Women Voters of California, Dorsey Nunn, and George Galvis,

Plaintiffs,

v.

Debra Bowen, Secretary of State of California;

Defendant.

CASE NO.: RG14712570

Plaintiffs' Reply Memorandum in Support of Motion for Writ of Mandate

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

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In interpreting our constitution and statutes, the words that the voters and Legislature have chosen "are the starting point" and, when they are unambiguous, also the ending point. *Preston v. State Bd. of Equalization*, 25 Cal. 4th 197, 213 (2001); *see Prof'l Engineers in Cal. Gov't v. Kempton*, 40 Cal. 4th 1016, 1037 (2007). The text of Article II § 4 unambiguously states that this provision applies only to people on *parole*, not other forms of supervision such as felony probation. It also recognizes the Legislature's authority to define parole and determine what types of convictions merit a period of state parole supervision. As part of Realignment's comprehensive sentencing reform, the Legislature has decided that parole should be reserved for people convicted of serious felonies, and that people convicted of less-serious crimes will be subject to other forms of supervision. The language of the constitution and the Realignment statutes thus compels the conclusion that these individuals convicted of less-serious crimes are not on parole and therefore retain their right to vote.

The Secretary seems to concede that people on mandatory supervision and PRCS retain the right to vote under this "literal" reading of the statute and constitution. Secretary's Opposition Brief ("Opp.") at 12. She also concedes that Plaintiffs' discussion of the presumption in favor of voting rights is accurate, *id.* at 11, and thus that whenever possible the law must be read in favor of the franchise. But she nevertheless disregards the constitutional and statutory language and the presumption because in her view Realignment was initially proposed to reduce prison overcrowding and save money, its legislative history fails to discuss voting, and mandatory supervision and PRCS share some similarities with parole as it now exists in California. But none of this matters: regardless of whether mandatory supervision and PRCS were created to save money or to reduce recidivism, regardless of whether they are more similar to parole than to probation, they are not parole as it existed in 1974 or as it now exists. Instead, they are new categories of local supervision that the Legislature has created for people convicted of less-serious offenses, distinct from the state parole that those convicted of more serious crimes must still serve. The same plain-language rule that shrinks the voting rolls when the Legislature creates new crimes or lengthens sentences (and thereby puts more people in prison and on parole) works to expand voter eligibility when, as here, the Legislature moves in the opposite direction and reforms the criminal-justice system to limit the scope of parole – and the number of people on parole – regardless of whether the legislative history mentions voting.

Furthermore, the Secretary still fails to explain why mandatory supervision or PRCS is the functional equivalent of parole for the purposes of voting rights or why it would matter if they were. Her arguments that mandatory supervision and PRCS are so similar to parole that people on these new

forms of supervision lose their right to vote cannot be correct because they are so broad that they would apply equally to people on felony probation, all of whom unquestionably have the right to vote in California. In fact, these same similarities would support the argument that mandatory supervision and PRCS are the functional equivalents of felony probation.

Finally, the memorandum is an underground regulation that interprets and implements both the constitution and the Elections Code and is far from the only tenable reading of the law.

1. The Court of Appeal has already rejected the argument that mandatory supervision and PRCS are "parole" as the term is used in pre-Realignment law

Every case that has examined Realignment's new sentencing categories has recognized the distinction between mandatory supervision, PRCS, and parole and has rejected attempts to force Realignment's new sentencing categories into laws that apply to the old categories. For example, everybody convicted of a felony and given a sentence that "includes a period of parole" must pay a parole revocation fine. Penal Code § 1202.45(a). In *People v. Cruz* the court held that because "a defendant sentenced under [Realignment's] section 1170, subdivision (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. *People v. Cruz*, 207 Cal. App. 4th 664, 671-72 & n. 6 (2012). Similarly, in *People v. Isaac* the court recognized that under Realignment "a prison sentence for certain felons ends with county-administered community supervision [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, 2014 WL 772655 (2014) at *1, *3; *see also People v. Fandinola*, 221 Cal. App. 4th 1415, 1423, (2013) ("mandatory supervision is neither probation nor parole"); *People v. Prescott,* 213 Cal.App.4th 1473 (2013)(discussed in Plaintiffs' Opening Br. at 12); *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").

As these cases recognize, in enacting Realignment the Legislature created new categories of supervision, and only the Legislature has the authority to make them subject to existing laws that apply to parole or probation. *See In re Derrick B.*, 39 Cal. 4th 535, 546 (2006) (If the literal language of statute leads to unintended result, "the Legislature may correct its oversight, but it is not our role to do so."); *Isaac*, 2014 WL 772655 at *3 (Legislature responded to *Cruz* by enacting new fines for people sentenced to mandatory supervision or PRCS; new fines go to county, not to state as with parole fines); *Fandinola*, 221 Cal. App. 4th at 1422-23.

2. The Secretary's functional-equivalent and legislative-history arguments cannot overcome the statutory and constitutional language

Despite these holdings, the Secretary argues that voting status does not depend on whether a person is "literally 'on parole.'" Opp. at 12. But why not? The separation of powers doctrine mandates that the courts must follow the "literal meaning" of the words of an enactment except in "extreme cases" where doing so would lead to absurd results. *Guillen v. Schwarzenegger*, 147 Cal. App. 4th 929, 942 (2007). There is nothing absurd about reading the statutory and constitutional language so as to allow people living in the community following their conviction for a non-serious crime to vote. This literal reading still means that the nearly 50,000 people on parole in California cannot vote; it simply permits Californians who have been convicted of less-serious crimes to retain the right to vote (as do people on felony probation and those convicted of misdemeanors).

This is hardly an absurd result; to the contrary, it is completely consistent with the goals of Realignment. Allowing people to vote when they reenter the community reduces recidivism: The most complete study that has been conducted on this topic shows that for people "who had been convicted of a crime but [were] not yet eligible to vote, the likelihood of committing additional criminal offenses was significantly higher than those who had become eligible to vote." Manza Dec. at 3. People who actually voted were even less likely to reoffend. *See id.* Even a "conservative" interpretation of the research indicates that "restoring voting rights for non-incarcerated felons will have a modest but significant impact on reducing recidivism." *Id.* at 4. In contrast, *dis*enfranchising people living in the community following felony convictions "harms their reintegration" into society and serves no identifiable public-policy goal. Manza Dec. at 3- 4; *see id.* at 4 ("there is no risk that the restoring voting rights would harm recidivism rates, and good reason to think it will improve them."). Following the plain language to allow people on mandatory supervision and PRCS to vote therefore fits perfectly with Realignment's express objectives to "reduce recidivism" among "low-level felony offenders" and "facilitate their reintegration back into society." Penal Code § 17.5(a)(1), (5).

2.1 Realignment's legislative history does not support the Secretary's position

The Secretary's brief bypasses the constitutional and statutory language and instead argues that the absence of any discussion of voting rights in Realignment's legislative history means that people on mandatory supervision and PRCS cannot vote. This approach is wrong for several reasons.

First, and most generally, "resort to a statute's legislative history is appropriate only if the statute is reasonably subject to more than one interpretation or is otherwise ambiguous." *Ste. Marie v. Riverside Cnty. Reg'l Park & Open-Space Dist.*, 46 Cal. 4th 282, 290 (2009). As plaintiffs have

previously discussed, there is no ambiguity here, because the Realignment Act's language shows that mandatory supervision and PRCS are new categories of supervision for people who the Legislature decided do not require state parole supervision. *See Derrick B.*, 39 Cal. 4th at 546 (Legislature's choice to use statutory language applicable to adult proceedings made registration statute inapplicable to juvenile proceedings: "This disparate drafting gives rise to divergent application."). The Secretary's only argument that "parole" is ambiguous is a citation to *McPherson*; but that case never even construed the term "parole," much less suggested it could be ambiguous. Compare Opp. at 12 *with League of Women Voters of Ca. v. McPherson*, 145 Cal. App. 4th 1469, 1482 (2006). *McPherson* actually held that the phrase "imprisoned ... for the conviction of a felony" was ambiguous because it did not necessarily include people imprisoned as a condition of felony probation, and that the presumption in favor of voting rights therefore *required* courts to resolve this ambiguity in favor of allowing people to vote. *See id.* at 1482. *McPherson* cannot support the Secretary's attempt to *dis*enfranchise people on mandatory supervision and PRCS.

Second, our supreme court has rejected the notion that an absence of legislative history matters when the statutory language is clear. For example, in *Derrick B.* the Court of Appeal had held that juveniles convicted of sexual battery must register under Penal Code § 290 because the registration bill as originally proposed would have required them to do so, and there was "no indication" in the legislative history that an amendment to the bill "prior to enactment was intended to limit its reach to adults." *Derrick B.*, 39 Cal.4th at 545. The supreme court reversed because the "Legislature's specific choice" to use terms that applied only to adult proceedings meant that the law applied only to adults; the lack of legislative history – or other indications of Legislative intent aside from the statutory text – was irrelevant. *Id.* Similarly, the *Cruz* and *Isaac* courts did not fret about the absence of legislative history to support their conclusions that mandatory supervision and PRCS are not parole. The Legislature's choice to use new terms to describe these new forms of supervision is determinative.

The Secretary's claim that the absence of legislative history relating to voting rights means that people on mandatory supervision and PRCS cannot vote is particularly inapt because the Legislature has so often passed laws that have had the effect of *disenfranchising* people with no indication that it intended this result. When the Legislature or the voters set out to change our criminal justice system, they are focused on crime, its consequences, and our state's finances, not on voting rights or other collateral consequences of a criminal conviction. The last three decades have seen hundreds of measures that have created new felonies or lengthened prison or parole terms; rarely if ever have the

legislative history or ballot materials discussed the effect of these laws on voting rights. Nevertheless, these laws have led to the disenfranchisement of tens of thousands of Californians who would have been eligible to vote had they not been "imprisoned or on parole" because of these new laws. The Legislature has thus repeatedly stripped "voting rights [from] tens of thousands of individuals without the slightest indication it intended to address the issue," *see* Gov't Br. at 11, simply because the plain language of the constitution and the Penal Code lead to that result.

This same plain-language principle means that when, as here, the Legislature decides to reform the criminal justice system to narrow the scope of who can be placed on parole, people who can no longer be subject to parole supervision retain – or regain[1] – the right to vote. That Realignment's legislative history doesn't mention voting rights is no more relevant here than it was when the Legislature was increasing sentences. In both cases, the right to vote is controlled by Article II § 4's narrow disenfranchisement provision. 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 put in prison or on parole under new 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 without specific evidence that the Legislature specifically considered voting rights.

The cases that the Secretary cites for the notion that the Legislature does not silently change the law are irrelevant here where the Legislature has spoken though its choice of statutory language. *See Derrick B.*, 39 Cal.4th at 545 (no evidence of legislative intent apart from statutory language is needed to reach even a counterintuitive result).[2] Here, the statutory language creates mandatory supervision and PRCS as distinct alternatives to parole for people convicted of less-serious offenses.

Third, that our state's prison-overcrowding crisis may have been the original motivation for Realignment is no reason to limit the scope of the statutory language. Bills change as they go through the legislative process, and what matters is not the initial proposal but the final enactment. If the governor's original proposal simply to transfer *all* parole supervision to the counties had been enacted,

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[1] Although the Secretary continually claims that this suit is an attempt to *re*-enfranchise people on mandatory supervision and PRCS, it is important to remember that the only reason they are not currently allowed to vote is because of her improper memorandum.

[2] The only of these cases that is at all relevant is *Flood v. Riggs*, 80 Cal.App.3d 138, 154 n.19 (1978), which held only that people on "parole," as defined by the then-new DLS, could not vote. Plaintiffs here do not argue that people on parole, as it is currently defined in California law, can vote.

see Opp. at 16, then the Secretary would have a stronger case. But the final law maintained state parole for people convicted of serious crimes, moving only those convicted of less-serious crimes onto new, less-onerous and less-stigmatizing forms of county supervision, each governed by its own statutory scheme. That the Legislature made this change from the initial proposal to the final law shows that it did not simply intend to shift parole supervision to the counties using different terminology but instead to create a more fundamental change that distinguishes between supervisees based on the gravity of their offenses. *See People v. Ghebretensae,* 222 Cal. App. 4th 741, 766, (2013); *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); *see also Derrick B.*, 39 Cal. 4th at 545.

2.2 The Secretary's functional-equivalent argument is unsupported by any authority and would apply equally to disenfranchise people on probation

The Secretary's functional-equivalent argument for disregarding the literal meaning is unconvincing both because (1) she provides no authority for this approach and (2) her arguments would apply equally to people on felony probation who indisputably have the right to vote.

First, by its express terms Article II § 4 applies only to people on "parole for conviction of a felony" not to people on parole and other forms of supervision that may be similar to parole. The Secretary has provided no justification or authority for her decision to expand the unambiguous constitutional text to include people who are not on parole. *Cruz* and *Isaac* show that this whole approach is wrong. *See Fandinola*, 221 Cal. App. 4th at 1422 (court "may not add 'or placed on mandatory supervision' to [statutory] provision" that applied to people placed on probation).

Even if there were some reason to include some other forms of criminal-justice supervision as parole, the Secretary's arguments as to why this would include mandatory supervision and PRCS are unpersuasive because they would apply equally to people on any form of supervision, including probation. She first argues that people on other forms of supervised release are entitled to the same *Morrissey* rights as people on parole. Opp. at 12-13 (citing *Morrissey v. Brewer*, 408 U.S. 471 (1972)). But parolees have *Morrissey* rights not because the Due Process Clause specifically mentions parole (it does not), but because everybody – whether on parole, probation, or free from any supervision – has a liberty interest in remaining free. *See People v. Vickers*, 8 Cal. 3d 451, 458 (1972) (holding that *Morrissey* applies to felony probation revocations).

The Secretary's discussion of the similarities between mandatory supervision, PRCS, and parole suffers from this same fallacy. *See* Opp. at 12-14, 19. Certainly, people in all three groups have "fewer

constitutional rights than do ordinary persons," but so do people on probation. Like people on the other forms of supervision, people on felony probation are living in their communities under a mix of statutory and discretionary conditions. *See* Cal. CEB, Cal. Crim. Law Procedure and Practice, §§ 38.34-38.37 (2013); *see generally* Penal Code § 1203.045-1203.1ab. In fact, the conditions of mandatory supervision are those "generally applicable to persons placed on probation." Penal Code § 1170(h)(5)(B)(i). Parole and probation conditions (and, undoubtedly, mandatory supervision and PRCS conditions) are evaluated under the same standard. *In re Stevens*, 119 Cal. App. 4th 1228, 1233-34 (2004). Most people on felony probation have been "imprison[ed]" in jail as a condition of probation before their release. Penal Code § 1203.1(a).[3] Like people on parole, mandatory supervision, or PRCS, people on felony probation can be "sent back into confinement for violations of conditions" of their release or if they commit a new crime. Opp. at 14. And like these other forms of supervision, probation serves both to punish and also to rehabilitate and reintegrate. *Compare id.* with *People v. Carbajal*, 10 Cal. 4th 1114, 1120, 1124 (1995).

Thus, the Secretary's list of similarities between mandatory supervision/PRCS on the one hand and parole on the other does not demonstrate that these new categories of supervision are the equivalent of parole; it simply shows that they are, like both felony probation and parole, types of criminal-justice supervision. In fact, these same arguments would equally support the conclusion that mandatory supervision and PRCS are the functional equivalent of felony probation. Because people on felony probation have the right to vote, it cannot be the case that these similarities are sufficient to disenfranchise people on mandatory supervision and PRCS. Moreover, as plaintiffs have previously discussed, there are significant differences between these new forms of supervision – which, like probation, are locally run and exclude people convicted of very serious crimes – and parole as it existed in 1974 and as it exists today. *See* Opening Br. at 6-10.

3. The Secretary's discussion of the statutory language fails to show that mandatory supervision and PRCS are parole

Although the Secretary does eventually make two textual arguments in support of her claim that mandatory supervision and PRCS are parole, neither is persuasive. Her primary argument is that numerous provisions of the Penal Code expressly apply both to parole and to PRCS. *See* Opp. at 15.

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[3] 57% of those convicted and sentenced for a felony receive probation and jail. California Admin. Office of the Courts, *Disposition of Criminal Cases According to the Race and Ethnicity of the Defendant* (2013) at 10, available at http://www.courts.ca.gov/documents/lr_PC1170.pdf

But this in fact demonstrates that the Legislature considers parole and PRCS to be two distinct categories: a statute that applies to "fish or fowl" does not mean that the Legislature believes that fish *are* fowl; it means that the Legislature recognized that these are two different categories and that it is necessary to list them both in order to cover individuals in both groups. The many statutes listing these two categories separately demonstrate that they are not the same. *See* Opening Br. at 10.

The Secretary also points to two references to parole in the legislative findings relating to PRCS, one of which says that realigning people on PRCS will improve outcomes among "parolees," the other of which refers to people on PRCS as having been "paroled from state prison." Penal Code §§ 3450(b)(5), (6). But these two sentences, found only in the legislative findings, that arguably conflate the two categories buried in the many code sections that expressly 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").[4]

4. 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* Opp. at 17. There are three problems with this argument. First, the only support that the Secretary can muster for her position is the same Memorandum (and underground regulation) at issue in this case, which contains neither any analysis nor citation to authority to support it. *See id.* (citing Secretary's Memorandum at 12). Second, because Congress, not the California Legislature, controls the terminology used in the federal criminal-justice system, determining whether people on supervised release should be considered as being on parole raises complicated issues relating to the intersection of state and federal law that are not present in this case. And third, Realignment maintains parole for tens of thousands of people convicted of serious crimes but removes a smaller number of people convicted of less-serious crimes from parole supervision; in contrast, the federal Sentencing Reform Act apparently completely ended parole and replaced it with what the

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[4] That this language appears in the findings but nowhere else suggests that it is simply an artifact of earlier proposals: as discussed above, the original Realignment bill would have transferred supervision of all parolees to the counties and was only later amended to create new categories of supervision for people convicted of less-serious crimes. There would be little reason for the Legislature to change the language of its original findings to match the final law.

Secretary describes as a "virtually identical" substitute. *See* Opp. at 17. Thus, even if the Secretary is correct that people on federal supervised release are ineligible to vote in California, that has no effect on the voting rights of Californians on mandatory supervision and PRCS.

5. Legislative inaction and the prior petition are irrelevant

Finally, the fact that the Legislature did not pass a law that included a provision meant to "clarify"[5] that everybody sentenced under Realignment – including people actually serving felony jail sentences under Penal Code § 1170(h) – can vote is irrelevant. *See Grupe Dev. Co. v. Superior Court*, 4 Cal. 4th 911, 922-23 (1993); *see also Olson v. Auto. Club of S. California*, 42 Cal. 4th 1142, 1156 (2008). Similarly, that the appellate courts did not grant discretionary review of a writ petition that also focused on in-custody people says nothing about the merits of this case. *See Funeral Directors Ass'n of Los Angeles v. Board of Funeral Directors*, 22 Cal.2d 104, 110 (1943); *see also Kowis v. Howard*, 3 Cal. 4th 888, 894 (1992).

6. The Secretary's Memorandum is an underground regulation

The Secretary raises only two arguments under the APA, neither of which has merit.

She first claims that the memorandum is not an underground regulation because it interprets the constitution, rather than a statute. Opp. at 19. But the APA's definition of a regulation includes any agency interpretation or interpretation of "the law," not limited to statutes. Gov't Code § 11342.600.[6] Thus, regulations can – and do – implement and interpret the state constitution. *See Lynch v. State Bd. of Equalization*, 164 Cal. App. 3d 94, 109-110 & n.11, 114-15 (1985) (upholding 18 Cal. Code Regs. § "468 [as] an appropriate interpretation of article XIIIA" of the California Constitution).[7] In fact, the Court of Appeal has struck-down an agency policy that interpreted "constitutional, statutory, and decisional law" as an invalid underground regulation. *Bollay v. Office of Admin. Law*, 193 Cal. App. 4th 103, 111-113 (2011). And this makes sense, because Californians whose *constitutional* rights may be impacted by an agency's rule or policy have at least as great an interest of having a "a voice in its creation" as to those whose *statutory* rights are at risk, and this is precisely the interest that the APA's

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[5] *See* Defendant's RJN Ex. 5 p.2.

[6] In addition, the Office of Administrative Law allows agencies to promulgate regulations if they "implement, interpret or make specific a … California constitutional provision." 1 Cal.Code.Regs. § 14(b)(1). *See* Gov't Code § 11349(e) ("reference" means the law the agency implements or interprets), 11349.1 (OAL review of regulations for reference and other statutory requirements).

[7] *See also* 18 Cal. Code Regs. §§ 460, 461, 469, 473. If the Secretary were correct that regulations cannot interpret the constitution then these provisions would all be void.

notice-and-comment requirements are intended to protect. *See Morning Star Co. v. State Bd. of Equalization*, 38 Cal. 4th 324, 333 (2006).

In any event, the Secretary's Memorandum *does* implement and interpret Elections Code sections 2016, 2150, 2201, 2212, and 2300 and concludes that "[c]onstrued literally, these provisions would not apply to [disenfranchise] a person serving a sentence in county jail for the conviction of a felony." Secretary's Memorandum at 10. It also interprets "the term 'in prison' in the Elections Code" to justify disenfranchising this population. *Id.* at 16. Finally, it interprets several "pre-existing Elections Code provisions" as applying to people on mandatory supervision and PRCS. *Id.* Even if the Secretary were right that regulations can only interpret statutes, her Memorandum is void because it interprets the Elections Code and the constitution. *See Bollay*, 193 Cal. App. 4th at 111-113.[8]

The Secretary's other APA argument – that the Memorandum is exempt from the APA because it is the only tenable interpretation of the law – fails because this exception applies only when "the agency's actions or decisions in applying the law are essentially rote, ministerial, or otherwise patently compelled by, or repetitive of, the statute's plain language." *Morning Star*, 38 Cal. 4th at 336-37. Because the Secretary admits that her interpretation of the law conflicts with the literal meaning of the statutory and constitutional language, *see* Memorandum at 10, it is not the only tenable interpretation of the law. Because the Memorandum was issued without giving the public notice and the opportunity to comment, it is a void underground regulation. *See Bollay*, 193 Cal. App. 4th at 112-13.

7. Conclusion

The statutory and constitutional language, the goals of Realignment, public-policy considerations, and the presumption in favor of voting rights all support the right of people on mandatory supervision and PRCS to vote. There is simply no reason to deny plaintiffs and other Californians living in their communities this fundamental right and responsibility of citizenship.

This Court should issue a writ of mandate to allow people on mandatory supervision and PRCS to vote and to invalidate the Secretary's Memorandum, as detailed in Plaintiffs' opening brief.

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[8] That "the Secretary does not implement, interpret, or make specific the realignment laws," Opp. at 20, is relevant only in that it is an additional reason not to defer to her interpretation of the effect of realignment on voting rights. Even the case that the Secretary cites as supporting judicial deference applies only to the interpretation of a "statute by the officials charged with its administration." *Highland Ranch v. Agric. Labor Relations Bd.*, 29 Cal. 3d 848, 859 (1981).

Respectfully submitted,

Dated: March 21, 2014

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