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.

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

AMICUS BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-RESPONDENTS MICHAEL SCOTT ET AL.

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies that there are no interested entities or persons required to be listed under rule 8.208 of the California Rules of Court.

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STATEMENT OF INTEREST

The Brennan Center for Justice at New York University School of Law is a not-for-profit, nonpartisan public policy and law institute that seeks to improve the systems of democracy and justice nationwide. Through the activities of its Democracy Program, the Brennan Center seeks to eliminate barriers to full and equal political participation for all American citizens and to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center's Voting Rights and Elections project includes work to restore voting rights to people who have lost them due to a past criminal conviction, and as such engages in litigation, legislative and administrative advocacy, and public education nationwide. The Brennan Center's extensive efforts in the promotion and protection of voting rights, particularly on behalf of disadvantaged and minority communities, include authoring numerous reports; launching legislative initiatives; and participating as counsel or amicus in a number of federal and state cases involving voting and elections issues, such as voting rights restoration for persons with criminal convictions in their past.

The Brennan Center has an interest in confirming that the Realignment Act is implemented consistent with the legislature's desire to rehabilitate those convicted of less serious felonies by re-integrating them into their communities, and in insuring that the Secretary's interpretation does not divest them of the important right of voting as a member of those communities. We urge this court to affirm the Superior Court's decision that the new forms of non-custodial supervision created by the Realignment Act, mandatory supervision ("MS") and postrelease community supervision

("PRCS"), are distinct from parole, and to reject the State's attempt to frustrate this community integration by improperly preventing these citizens from voting.

SUMMARY OF ARGUMENT

The legislature recognized the importance of rehabilitating individuals through community involvement when it passed the Realignment Act. Voting is a critical part of community involvement and reintegration. Voting is an important — and for many, the primary — legal way to have a voice within one's community. It is how we resolve our political differences. Voting thus fosters civic engagement, which in turn increases the odds of successful rehabilitation and improves public safety. Preserving the voting rights of those on mandatory supervision and postrelease community supervision furthers these critical goals.

Moreover, voting encourages voting. The more people vote, the more likely it is that voting will become a habit ingrained in them, their loved ones, and the people surrounding them. Young voters in particular are positively impacted when their parents exercise their right to vote. Disenfranchisement thus not only impacts the individuals who lose their right to vote, it also impacts their families as well as the communities and societies in which they live.

Preserving the right to vote is not just an end to itself; the means by which that right is exercised and administered is critical, and requires clarity. Studies have shown that the more complicated voting rules become, the more likely it becomes that eligible voters are inadvertently disenfranchised. This process is a form of *de facto* disenfranchisement, and it has negative effects on the right to vote. At present, in view of the lower

court's decision, the rule is clear. Reversal of that rule would create a new category of disenfranchised persons and a much more complex system, creating a grave risk that others on similar forms of supervised release — but not impacted by the Secretary's interpretation — would nonetheless be excluded, or would exclude themselves, due to errors and ambiguity in implementation or uncertainty as to its scope.

Finally, reversal of the lower court would disproportionately impact the voting rights of minorities in this state. Minorities are overrepresented throughout the criminal justice system, from arrest to supervision programs. The Secretary's interpretation would thus have a directly disproportionate impact on minority voters within the supervision programs. Furthermore, its ancillary effect on communities, including *de facto* disenfranchisement, would fall heaviest on minorities. Statutes should be interpreted against disenfranchisement and racially disparate impacts, and the Secretary's interpretation would cause both.

Therefore, for the reasons set forth herein, the Brennan Center for Justice, as amicus, respectfully requests affirmance of the decision below.

THE DECISION BELOW

This case was brought to challenge to the Secretary of State's interpretation of AB109 (the "Realignment Act") in light of Article II, Section 4 of the California Constitution and Election Code Section 2101. Article II, Section 4 of the Constitution states that "The legislature…shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony."[1]

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[1] *See also* Elections Code § 2101 ("A person entitled to register to vote shall be a United States citizen, a resident of California, not in prison

(Footnote continues on next page.)

California courts long ago held that individuals subject to forms of supervised release that are not parole can vote. *See*, *e.g.*, *League of Women Voters of California v. McPherson*, 145 Cal. App. 4th 1469, 1484 (2006) (persons subject to probation can vote). In 2011, California adopted the Realignment Act which, among other things, created two new forms of non-custodial supervision for persons convicted of less-serious felonies. These new forms of supervision are mandatory supervision ("MS") and postrelease community supervision ("PRCS").

On December 5, 2011, the Secretary of State issued an official memorandum concluding that MS and PRCS were respectively "akin to parole" and "functionally equivalent to parole," and therefore persons subject to either would not be allowed to register to vote in California.

In February 2014, several individual and organizational plaintiffs filed this lawsuit challenging the Secretary's interpretation of the term "parole" in the constitution and the enabling statute. The plaintiffs argued that "parole" only meant the supervised release called "parole" and did not encompass MS or PRCS, just as it did not include any of the various other forms of supervision already in effect at the enactment of the Realignment Act.

After taking judicial notice of evidence submitted by the plaintiffs and the Secretary, Judge Evilio Grillo of the Alameda County Superior Court ("the Court") issued an opinion on May 7, 2014 (the "Order") agreeing with the plaintiffs' interpretation. The Court found that (1) the

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(Footnote continued from previous page.)

or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election.").

Court of Appeal has issued decisions distinguishing parole from MS and PRCS outside of the context of voter eligibility; (2) nothing in the legislative history supported the interpretation of "parole" in the constitution and the elections code as encompassing forms of supervision similar to parole; and (3) the canons of statutory construction supported the plaintiffs' interpretation of the word "parole."

On June 5, 2014, the Court issued a writ of mandate compelling the Secretary to withdraw the December 5, 2011 memorandum and notify county election officials that otherwise eligible voters subject to MS and PRCS may register to vote and vote. The Secretary brought the instant appeal, and the writ of mandate is stayed subject to that appeal.

ARGUMENT

I. ALLOWING THOSE ON MANDATORY SUPERVISION AND POSTRELEASE SUPERVISION TO VOTE FURTHERS THE GOALS OF THE REALIGNMENT ACT

As the Court correctly found, the primary objective of the 2011 Realignment Act was to improve public safety outcomes and facilitate the re-integration of people convicted of less serious crimes into the community. (Order at 17; Respondents' Brief ("Brief") at 13-14.) Disenfranchisement of people on postrelease community supervision or mandatory supervision will undermine those legislative objectives.

A. Restoration of Voting Rights Improves Reintegration with Communities

MS and PRCS are important mechanisms to further the reintegration of those with prior convictions into their communities, and support them on their way to rehabilitation. Restoration of voting rights directly and substantially furthers this goal, and provides a way for those on MS and

PRCS to engage with and become full members of their communities after being excluded from those communities during incarceration.

1. Voting Provides a Place and a Voice in the Community

Released prisoners rejoin the community in three general ways — they regain control over their daily lives and employment; they re-establish ties to their family and resume family roles; and they reengage with society as citizens rather than as inmates. Christie Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANNU. REV. SOCIOL. 89, 96-97 (2003). Voting rights implicate the third area by directly facilitating citizenship and the exercise of its rights and responsibilities. Voting is a fundamental part of civic engagement and community involvement. *See*, *e.g.*, Christopher Uggen, Jeff Manza, and Angela Behrens, *'Less than the average citizen': stigma, role transition, and the civic reintegration of convicted felons*, in AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION, at 275 (Shadd Maruna & Russ Immarigeon ed., 2004) (recounting interviews of convicted felons expressing sentiments suggesting that the right to vote was "fundamental to citizenship and a pro-social identity, even if they had never exercised that right in the past"). A Maryland citizen, speaking in 2007 on the day a new law restored his right to vote explained:

> According to the state of Maryland I was not a full citizen. In my eyes, I was not a full citizen. After finishing my sentence for things I had done in the past, I was denied the right to vote. And without it, I was not afforded all the rights and privileges of citizenship. Today all that changes. When I walk into the Board of Elections and hand in my signed voter registration, I will no longer be fragmented from society. I'll be a father, grandfather, uncle, and friend who is able to

> give more of a hand in creating a better place to live, work, and go to school.

Erika Wood, *Restoring the Right to Vote*, BRENNAN CENTER FOR JUSTICE, 8-9 (2009).

There is a clear tension in denying the vote to those otherwise trying to reintegrate into the community. *See*, *e.g.*, Miles Rapoport & Jason Tarricone, *Election Reform's Next Phase: A Broad Democracy Agenda and the Need for a Movement,* 9 GEO. J. ON POVERTY L. & POL'Y 379, 394 (2002) ("The continuing disenfranchisement of ex-felons opposes two core American values: the democratic right to vote and the ability of the individual to leave behind the past and start a new life."); Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States,* THE SENTENCING PROJECT, 14-16 (Oct. 1998) ("Disenfranchisement contradicts the promise of rehabilitation. The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement . . . . [Denying him the vote] is likely to reaffirm feelings of alienation and isolation, both detrimental to the reformation process."); Alec C. Ewald, *"Civil Death:" The Ideological Paradox of Criminal Disenfranchisement Law in the United States,* 2002 WIS. L. REV. 1045, 1114-15 (2002) ("[D]isenfranchising released prisoners says that we do not believe our 'correctional' institutions have successfully prepared them to re-enter society, and barring those on probation and parole from voting runs counter to the rehabilitative assumptions behind these penalties."). The purpose of re-integration is to reintroduce individuals to normal civic roles and communities, which includes building an interest in and ties to the affairs of the community.

Encouraging — as opposed to banning — voting by individuals on PRCS and MS will foster civic engagement and allow them to have a voice and an interest in the affairs of the community. It encourages released persons to become informed and involved, thereby maximizing their chances of rehabilitation. Upholding the lower court's decision will further the central purpose of community release.

2. The Effects of Disenfranchisement Extend Throughout Communities

Disenfranchisement affects more than just those whose right to vote has been taken away. It can also affect the voting patterns of families and communities. Voting is by its very nature both communal and social. It is done with other members of the community, often at a communal gathering place like a school or house of worship. Voting is something that occurs after discussion of issues, often with family members. *See* Marc Mauer, Joint Center for Political and Economic Studies, *Disenfranchising Felons Hurts Entire Communities* 5, 6 (May/June 2004). Disenfranchisement depresses turnout throughout families and the entire community. (Wood 2009 at 12; Mauer 2004 at 6.) Disenfranchisement has ripple effects that affect the political life of the entire community, not just the disenfranchised. Research shows that, controlling for other factors, stricter disenfranchisement laws correlate with lower turnout among eligible voters. *See*, *e.g.*, Arman McLeod et al., *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL'Y & L. 66, 78 (2003) ("We found that the mean voter turnout rate in states with the most restrictive criminal disenfranchisement laws is lower than in states with less

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restrictive criminal disenfranchisement laws."); Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOCIAL SCIENCE QUARTERLY 722, 740-41 (September 2009) ("Not only do [felon disenfranchisement] policies directly prohibit a disproportionate share of the black community from participating in one of the more basic political acts, [felon disenfranchisement] also reduces the likelihood of voter participation in the black community.").

These ripple effects occur because voting is a habit that must be acquired. Scholars have shown that the best predictor of voting propensity is past voting behavior. Eric Plutzer, *Becoming a Habitual Voter: Inertia, Resources, and Growth in Young Adulthood*, 96 AM. POL. SCI. REV. 41, 42 (Mar. 2002). Turnout in a community is self-reinforcing, but only if potential new voters become used to voting. First time voters often learn basic information about how and where to vote from family members rather than from official sources like election officials or government publications. (Plutzer 2002 at 42-43.) The propensity of younger people in particular to vote is highly correlated with their parents' behavior and resources. (Plutzer 2002 at 54.) As a result, the disenfranchisement of a parent or other head of a household may discourage voting in an entire family. Wood 2009 at 12; *see also* Plutzer 2002 at 42 ("Parental political involvement can provide both behavior to model and campaign-relevant information that children rarely get form formal schooling"). Additionally, recent research has shown that "close friends" — defined as Facebook friends that are likely to be physically proximate — can mobilize each other to vote by voting. *See* Robert M. Bond et al., *A 61-million person experiment in social influence and political mobilization*, 489 NATURE 295,

297 (2012) (finding that informing "close friends" that you had voted caused increased voting by those friends).

B. Restoration of Voting Rights Improves Public Safety

Integrating released persons into the community, including through restoration of voting rights, decreases recidivism and improves relationships between law enforcement and the community.

Empirical analysis suggests that disenfranchisement is positively correlated with recidivism. In 2002, the United States Department of Justice collected data on the vast majority of people released from prison in 1994, including their arrest and prosecution records in the years after their 1994 release. *See* Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994,* U.S. Dep't of Justice (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf. Statistical analysis of this dataset shows that persons released in states that permanently disenfranchise at least some individuals with felony convictions are "roughly ten percent more likely to reoffend than those released in states that restore the franchise post-release." Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 427 (2012). Similarly, an analysis by the Florida Parole Commission found a statewide recidivism rate of 33.1%, but only 11.1% of those who had their voting rights restored in 2009-10 after a felony conviction had reoffended as of May 31, 2011. *Status Update: Restoration of Civil Rights Cases Granted 2009 and 2010*, Florida Parole Commission (July 1, 2011).

Disenfranchisement and rehabilitation thus work at cross purposes. The former is stigmatizing while the latter attempts to promote a sense of

belonging to encourage lawful behavior. *See*, *e.g.*, Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement As an Alternative,* 84 MINN L. REV. 753, 766 (2000) ("In their eyes, disenfranchisement excluded offenders from society and thus increased the likelihood of recidivism."); Howard Itzkowitz and Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AMERICAN CRIMINAL L. REV. 721, 732 (Spring 1973) ("The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement...[Denying him the vote] is likely to reaffirm feelings of alienation and isolation, both detrimental to the reformation process.") The right to vote is therefore an important rehabilitative tool, and unsurprisingly correlated with reduced recidivism.

Furthermore, over the last several years, law enforcement agencies throughout California and the nation have determined that effective law enforcement depends on a strong working relationship between the police and the communities in which they operate.[2] That relationship is

[2] This law enforcement approach is usually called community oriented policing. *See*, *e.g.*, http://www.sandiego.gov/police/about/community.shtml; http://www.lapdonline.org/support_lapd/content_basic_view/731; http://www.sf-police.org/modules/ShowDocument.aspx?documentid=25604. Last September, the Department of Justice provided roughly 20 million dollars in grant funding for community oriented policing to 39 cities and counties in California. *See* Press Release, United States Dep't of Justice, Department of Justice Awards Hiring Grants to Support California Law Enforcement (Sept. 17, 2013) *available at* http://www.cops.usdoj.gov/Default.asp?Item=2693.

strengthened by an accessible ballot box that allows a greater segment of the community to shape law enforcement policies such that they reflect the experiences of the entire polity, including some who have been in the system. Therefore, effective policing is undermined by a policy favoring disenfranchisement, especially for communities with a high concentration of residents who cannot vote. *See*, *e.g.*, William Stuntz, *The Collapse of American Criminal Justice* 310-12 (2012) (Concluding that more "local democracy" is needed so that law enforcement policy will reflect and respond to the needs of the people where law enforcement activity is most common); Wood 2009 at 10.

II. THE SECRETARY'S INTERPRETATION OF "PAROLE" WILL EXACERBATE THE DE FACTO DISENFRANCHISEMENT OF ELIGIBLE VOTERS

Research shows that complicated and confusing rules about voter eligibility interfere with the fundamental right to vote. California's prior rule was far simpler than the rule the Secretary has put forward. Under the prior rule, there were two categories of persons released from prison — those who could not vote because they were on parole, and everyone else. The Secretary now would ask local election officials to make fine distinctions among additional categories of supervision. Moreover, the Secretary's position would invite confusion among people under community supervision by making eligibility distinctions among individuals who report to the same probation office.

Based on past research on the implementation of confusing disenfranchisement policies by election officials in other states, the Secretary's interpretation of the Consitution and Elections Code will not only prevent those on MS or PRCS from voting, it will also exacerbate the

de facto disenfranchisement of other voters through misinformation among voters and mistakes by California election officials.

A. Simple Categories Are Necessary for the Effective Exercise of the Right to Vote

Research in California and other states shows that the more complicated the law of voter eligibility is, the more mistakes election officials will make and the more disinformation there will be among eligible voters as to who can and cannot vote. As a result, fewer eligible voters will successfully register and vote. Therefore, the best way to ensure that all Californians who should be able to vote can, in practice, register to vote is to ensure that California's voter eligibility rules are as simple to understand and administer as possible. That way, local elections officials can accurately assist prospective voters, and the voters themselves will understand whether they are eligible to vote. The Secretary's directive runs counter to this goal by making a relatively simply rule more difficult to understand and administer.[3]

Complicated voting rights restoration rules are poorly understood and implemented by local election officials. For example, in 2005 the

[3] It also runs counter to the Secretary's duty to maximize voter registration. *See* Election Code § 2105 ("It is the intent of the Legislature that voter registration be maintained at the highest possible level. The Secretary of State shall adopt regulations requiring each county to design and implement programs intended to identify qualified electors who are not registered voters, and to register those persons to vote."). Additionally, the second sentence of the current Secretary's official biography states that he "is committed to modernizing the office, increasing voter registration and participation, and strengthening voting rights." *See* http://www.sos.ca.gov/administration/about-alex-padilla/.

Sentencing Project collected written surveys of election officials in 33 states and conducted hundreds of additional telephone interviews with election officials in ten states. Alec Ewald, *A 'Crazy Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law*, THE SENTENCING PROJECT (2005). They found that over one third of local election officials incorrectly described or simply did not know a key provision of their state's disenfranchisement law. (Ewald 2005 at 18.) The Brennan Center has found the same thing to be true. Between 2003 and 2008 the Brennan Center, with other research partners, interviewed election officials in twenty-three states to assess their knowledge of and compliance with laws regarding the voting eligibility of persons with criminal convictions. The results show that, throughout the country, election officials do not understand the voter eligibility rules or registration procedures for persons with criminal convictions. *See* Erika Wood and Rachel Bloom, *De Facto Disenfranchisement*, BRENNAN CENTER FOR JUSTICE, at 2 (2008) (finding "Election officials do not understand the basic voter eligibility rules governing people with criminal convictions"). In New York, for example, and notwithstanding a long-standing felon disenfranchisement policy, 38 percent of local boards of election incorrectly believed that people on probation could not vote. (*Id.* at 3.) Others have also found similar results. *See*, *e.g.*, Jessie Allen, *Documentary Disenfranchisement*, 86 TULANE L. REV. 389, 423-24 (2011) (collecting results from the Brennan Center and other investigations by journalists). On the other hand, the simplest rules for voting rights restoration result in the least misinformation on the part of election officials. *See*, *e.g.*, Wood and Bloom at 8 (finding the most reliably knowledgeable elections officials in Oregon and Ohio — states that

disenfranchise only the incarcerated); Ewald 2005 at 18 (finding laws that only disenfranchised the incarcerated most reliably implemented and enforced).

Empirical research finds widespread misinformation about voting eligibility among potential voters as well. For example, one study of adults with criminal histories in New York found that 57.8 percent of respondents thought that people on probation could not vote and fully 27 percent believed that New Yorkers who had ever been on probation could not vote. *See* Ernest Drucker & Ricardo Barreras, *Studies of Voting Behavior and Felony Disenfranchisement Among Individuals in the Criminal Justice System in New York, Connecticut, and Ohio*, THE SENTENCING PROJECT, at 8 (2005). The same researchers found that among a sample of New York and Connecticut residents with criminal histories who never lost their voter eligibility, 44.3 percent believed that they could not vote or did not know if they could vote. (Drucker & Barreras at 9.) For every person actually disenfranchised by a felony conviction, there is likely another person with a criminal history who incorrectly believes she or he cannot vote. (Drucker & Barreras at 10.)

Poor enforcement of and misinformation about elections law causes eligible voters to think, or at least suspect, that they cannot vote and it discourages them from even trying to register. (Drucker & Barreras at 10.) Eligible voters often fear, justifiably, that they may be prosecuted for registering to vote when they are not certain they are eligible.[4]

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[4] *See*, *e.g.*, Ryan J. Foley, *Former Iowa Felon Says She Believed She Could Vote*, Mar. 19, 2014, *available at* http://bigstory.ap.org/article/trial-shows-iowas-tough-stance-ex-felon-voting (woman prosecuted for voter fraud after Iowa changed policy on disenfranchisement for those who

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Complicated laws create lack of information and even misinformation. Among a sample of people with criminal justice histories, over 60 percent of respondents never received any information about voting eligibility rules from anyone, and over 15 percent received information from lay sources — friends, family and acquaintances. (Drucker & Barreras at 9.) In light of all these factors, the only reliable way to maximize the number of eligible voters who can and do vote is to keep the law of voter eligibility as simple as possible.

B. The Secretary's Interpretation of California's Laws Governing the Classification of Released Persons Is Overly Complicated

The Secretary's incorrect interpretation of the law would replace a relatively simple rule — individuals on parole cannot vote and all other supervised persons can —with a rule that three very different forms of supervision — parole, mandatory supervision, and postrelease community supervision — result in disenfranchisement while the myriad other versions do not. California's other versions of non-custodial supervision include: probation (Penal Code § 1203(a)), alternative custody programs for female inmates (Penal Code § 1170.05), post-guilty plea diversion (Penal Code § 1000), pre-guilty plea diversion (Penal Code § 1000.5), "Back on Track"

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complete probation); Reid J. Epstein, *Woman Accused of Voter Fraud in Waukesha County*, MILWAUKEE JOURNAL SENTINEL, Oct. 14, 2005, at B3, *available at* http://www.jsonline.com/story/index.aspx?id=363323 (woman charged with felony voter fraud after voting while on probation); Bill Glauber, *Her First Vote Put Her in Prison*, MILWAUKEE JOURNAL SENTINEL, May 21, 2007, at A1, *available at* http://www.jsonline.com/story/index.aspx?id=608187 (woman spent a year in prison after voting while on probation).

(Penal Code § 1000.8 et seq.), conditional sentences (Penal Code § 1203(a)), and work release (Penal Code § 4024.2). These various categories of supervision have little in common other than the fact that the Secretary acknowledges that their participants are <u>not</u> subject to disenfranchisement.

In fact, MS and PRCS resemble probation and the other forms of supervision described above more than they resemble parole. By statute, the conditions of mandatory supervision are akin to probation, not parole: "During the period of mandatory supervision, the defendant shall be supervised by the county *probation officer* in accordance with the terms, conditions, and procedures generally applicable to persons placed on *probation*." (Penal Code § 1170(h)(5)(B) (emphasis added).) Like those on MS, people on PRCS are supervised by county probation officers (Penal Code § 3451(a)), while those on parole are supervised by the statewide Department of Corrections (Penal Code § 3056). Thus people on MS and PRCS would have a very different experience under supervision compared to people on parole, but a very similar one to those on probation.[5]

Nonetheless, the Secretary proposes to treat MS and PRCS differently from probation for the sole purpose of voting eligibility. This is almost certain to create confusion among voters, the probation officers, and the local officials who implement elections.

First, eligible voters on probation will likely be confused because released persons within a county, all reporting to the same county employees for supervision purposes, would have different voting rights.

[5] *See also* Brief at 14-17 (MS and PRCS are more like probation than parole).

Probationers may well conclude, erroneously, that they cannot vote because other people in their community on MS and PRCS — who are reporting to the same probation office — are not allowed to vote. Second, and as discussed above, local election officials fare poorly in handling the distinction between different kinds of supervision for purposes of voting eligibility. The previous rule provided a relatively bright-line distinction between people in the state-run parole system, who could not vote, and anyone else serving a form of noncustodial supervision, who could. Under the Secretary's view of the law, California election officials and voters would have to distinguish between three different, unrelated versions of noncustodial supervision — two of which are administered locally and one by the state — and all the others. Moreover, in California, state agencies such as the Department of Motor Vehicles and California's Health Benefit Exchange are designated as "voter registration agencies"[6] and are required to provide voter registration information to hundreds of thousands of potential voters as part of their day-to-day activities. (*See generally* Elections Code §§ 2400-08.) The employees at these agencies are neither election officials nor sentencing law experts, and they are thus even less likely to comprehend and accurately convey voter eligibility rules. Based on the experiences of officials in California[7] and other states, the

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[6] A list of all such agencies is available on the Secretary's webpage at http://www.sos.ca.gov/elections/voter-registration/nvra/laws-standards/nvra-voter-reg-agencies.

[7] For example, in the 1970's, one of the Secretary's predecessors in office issued a report on how county election officials determined what constituted an "infamous crime" for the purpose of voter eligibility and found "that a person convicted of almost any given felony would find that

(Footnote continues on next page.)

Secretary's interpretation is almost certain to spread misinformation and create confusion and administrative errors affecting the fundamental right to vote.

III. THE SECRETARY'S INTERPRETATION OF THE REALIGNMENT ACT EXACERBATES RACIAL DISPARITIES THAT PERVADE THE CRIMINAL JUSTICE SYSTEM

The right to vote is "a cornerstone of democratic governance and a fundamental element of citizenship," the restriction of which impedes universal political participation. Christopher Uggen and Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, AMERICAN SOCIOLOGICAL REVIEW Vol. 67, 777, 777-78 (2002). "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Legal Services for Prisoners with Children v. Bowen*, 170 Cal. App. 4th 447, 452 (2009) (citation omitted). Laws with a discriminatory impact are especially suspect. *Id*. "[N]o construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning." *Otsuka v. Hite*, 64 Cal. 2d 596, 604 (1966), quoting *McMillan v. Siemon*, 36 Cal. App. 2d 721 (1940).

Affirming the lower court's decision will prevent disproportionate and detrimental effects on minority populations in California. Study after

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he is eligible to vote in some California counties and ineligible to vote in others." *Richardson v. Ramirez*, 418 U.S. 24, 34 n. 12 (1974).

study has shown that the criminal justice system is plagued by racial disparities, with certain minority populations subject to arrest, conviction, and parole in greater proportions. The Secretary's decision thus directly impacts the voting rights of minorities in a disproportionate way, contrary to the basic equality principles behind the Fifteenth Amendment.

A. Racial Disparities Are Present Throughout California's Criminal Justice System

Minorities, and especially African Americans, are disproportionately represented in every phase of the judicial process, from arrest to post-release status. Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the US Criminal Justice System* 38, National Council on Crime and Delinquency, March 2009. As a result, "[o]ne of the most prominent and consistent findings in [the] literature is that these laws produce a disproportionate effect on black communities." (Bowers & Preuhs at 723.) Although the relative newness of the PRCS/MS systems makes a statistical inquiry difficult, the consistency with which minorities are disproportionately present throughout the system is strong evidence the same is true of PRCS/MS.

The California Constitution's felon disenfranchisement clause prevents the incarcerated and the paroled from voting. Racial minorities are disproportionately represented among both populations. The Secretary would have this Court extend this disproportionate impact to other post-release programs. Affirming the lower court's decision would prevent the racial disparity from becoming even more pervasive.

1. African Americans Are More Commonly Arrested than Whites

Racial disparities begin at the very beginning of an individual's encounter with the criminal justice system: the arrest. In California in 2013, 16.6 percent of arrests were of African Americans. Crime in California, 2013 33, California Department of Justice, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf. However, the U.S. Census estimates that only 6.6% of California's population is black. U.S. Census, *available at* http://quickfacts.census.gov/qfd/states/06000.html.

2. African Americans Are More Commonly Incarcerated than Whites

Statistics demonstrate that minorities are more likely to be incarcerated than whites. Among inmates incarcerated under federal jurisdiction, African Americans are 4.5 times more represented than whites. (Hartney & Vuong at 20.) At the state level, African Americans are 6.0 times more likely to be incarcerated than whites. (*Id*. at 20.) And California fares worse than the average state. In 2010, in California's prisons, African Americans were 8.2 times more represented than whites.[8] Ryken Grattet & Joseph Hayes, *California's Changing Prison Population*, Public Policy Institute of California, June 2013 *available at* http://www.ppic.org/content/pubs/jtf/JTF_PrisonsJTF.pdf.

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[8] African Americans are not the only over-represented minority. Hispanics are 1.7 times more likely to be incarcerated than whites. (Grattet & Hayes.)

The numbers are not inflated by past disparities now corrected. In 2003, new nationwide-admissions to prison were 5.7 times more likely to be African American than white.[9] (Hartney & Vuong at 16.) California was no better than the national averages. In California, new admissions to prison were 6.1 times more likely to be African American than white. (*Id*. at 17.)

3. Racial Disparities in Sentencing Extend Outside the Prison Walls

Although statewide demographic statistics on the recently-created forms of release are unavailable, minorities are overrepresented among probationers. Nationwide, African Americans are 3.7 times more likely to be on probation than whites. (*Id*. at 15.)

Nationally, as of 2006, African Americans were present in the population of paroled individuals at 5.2 times the rate of whites.[10] (*Id*. at 24.) Here again, the disparities were worse in California, where African Americans were present among the parolee population at 5.5 times the rate of whites. (*Id*.)

Overall, nationwide, African Americans are 4.0 times more likely to be under some form of corrections supervision than whites, while Hispanics are 1.4 times more likely to be under corrections supervision than whites. *Id*. at 27. Continuing its pattern of having a higher than average racial

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[9] New admissions were also 1.9 times more likely to be Hispanic than white. (Hartney & Vuong at 16.)

[10] Hispanics are present at 2.0 times the rate of whites. (Hartney &Vuong at 24.)

disparity, California is 6.2 times more likely to place an African American under correctional supervision.[11] *Id*.

4. Racial Disparities Exist in PRCS and MS

Demographic data on the PRCS program from San Francisco County, as well as statewide arrest data, indicate that the racial disparities present throughout the California criminal justice system also extend to the MS/PRCS program. San Francisco County released a study of the program's first twelve months which found that 57 percent of individuals in PRCS in San Francisco County are black, Public Safety Realignment in San Francisco: The First 12 Months 58, Community Corrections Partnership Executive Committee, Dec. 19, 2012, *available at* http://www.sfsheriff.com/files/SF_PSR.pdf, even though only 6 percent of the population of San Francisco County is black. *See* U.S. Census San Francisco Quick Facts, *available at* http://quickfacts.census.gov/qfd/states/06/06075.html. In other words, blacks are 9.5 times overrepresented in PRCS. This finding is consistent with the expectation of what the demographics of the programs would be considering the parts of the criminal justice system for which statistics do exist.

Because African Americans are more likely than whites to be arrested, imprisoned, and subject to a form of corrections supervision, they are more likely to be present in the PRCS and MS programs as well. Although California does not keep specific enough arrest data to determine

[11] California is also 1.7 times more likely to place a Hispanic under correctional supervision. (Hartney & Vuong at 27.)

the demographics of those arrested for crimes eligible for PRCS and MS, it does publish enough information to make rough approximations. *See* Crime in California, 2013 34.

Only people without current or prior convictions for serious, violent, or sex-related criminal offenses are eligible for PRCS or MS. Cal. Penal Code §§ 1170(h)(5)(B)(i)-(ii), 3000.08(b), 3451(a). Of the MS/PRCS-eligible offenses for which demographic felony arrest records are kept, 15.4 percent at arrests were of African Americans, *see* Crime in California, 2013 34, despite their making up only 6.6 percent of the population. *See* U.S. Census California Quick Facts, *available at* http://quickfacts.census.gov/qfd/states/06000.html.[12] Blacks were arrested for offenses eligible for PRCS or MS at twice the rate of whites. These disparities in the arrest rates for MS/PRCS offenses validate San Francisco County's experience that minorities are overrepresented in the PRCS and MS programs after being convicted of non-serious felonies.

B. Felon Disenfranchisement Laws Disproportionately Impact Racial Minorities

As a result of the disparate representation of minorities within the criminal justice system, felon disenfranchisement laws disproportionately reduce the electoral power of minorities. Robert R. Preuhs, *State Felon Disenfranchisement Policy*, 82 SOCIAL SCIENCE QUARTERLY 4, 738 (Dec. 2001).

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[12] These offenses are drug offenses, weapons, escape, motor vehicle theft, and forgery. In 2013, 177,354 such individuals were arrested. *See* Crime in California, 2013 34.

The history of felon disenfranchisement in America illustrates that this disproportionate impact is not an accident. Many state felon disenfranchisement laws were modified for the specific purpose of disenfranchising minorities, and specifically African Americans, in response to the Civil War Amendments. (*Id*. at 736.) States turned to felon disenfranchisement because it was narrower in scope than the literacy tests and poll taxes previously used to reduce minority electoral power. Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 626 (Nov. 2004). Felon disenfranchisement provided a form of insurance if these more blatantly unconstitutional provisions were struck down. (*Id*.) Evidence of the racist history of felon disenfranchisement is so strong that, even considering other possible explanations, "race remains the primary factor in determining the severity" of felon disenfranchisement. (Preuhs at 744.)

Over the years, felon disenfranchisement has been devastatingly effective at reducing the electoral power of minorities. At the start of this century, 36 percent of people disenfranchised on account of a felony conviction were black, despite the fact that only 12 percent of the population was black. Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 1, New York: Human Rights Watch 1998. In other words, 13 percent of adult African Americans were disenfranchised compared to only 2 percent of the whole adult population. (*Id*. at 9.) In California specifically, 8.7 percent of black men were disenfranchised compared to only 1 percent of the adult population. (*Id*.)

Upon its inception, California's Constitution only excluded from suffrage any person convicted of an infamous crime, and also provided that

laws shall be passed to exclude anyone subsequently convicted of bribery, perjury, forgery, or other high crimes. California Constitution of 1849, Art. II, Sec. 5; Art. XI, Sec. 18. The California Supreme Court later clarified that "an infamous crime" was limited to "crimes involving moral corruption and dishonesty, thereby branding their perpetrator a threat to the integrity of the elective process." *Otsuka*, 64 Cal. 2d at 599. However, this limitation was short-lived, and the U.S. Supreme Court eventually upheld California's exclusion from suffrage of anyone convicted of a felony. *Richardson*, 418 U.S. 24. In 2010, the state disenfranchised 4.12 percent of blacks compared to 1 percent of the adult population. Jeff Manza, Christopher Uggen, & Sarah Shannon, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, THE SENTENCING PROJECT, July 2012.

Although the original purpose of California's disenfranchisement laws may have been to protect the integrity of the election process, its evolution has broader implications that disparately burden minorities. The disparate impact is lessened by allowing voting by people who are under local supervision pursuant to the Realignment Act and are attempting to reintegrate with their families and communities as the Act intended. The disparate impact evident throughout the criminal justice system illustrates the high likelihood of a similar disproportionate impact on persons on PRCS and MS. The lower court's determination mitigates the disparate impact and should be upheld.

CONCLUSION

Affirming the lower court would support the will of the legislature by increasing the ability of released prisoners to reintegrate into their

communities. It would have a positive impact on communities by encouraging voting. Forbidding released prisoners on MS or PRCS from voting would complicate voting eligibility rules and lead to de facto disenfranchisement as election officials and voters struggle to understand the distinctions drawn by the Secretary. Finally, affirmance would mitigate the disparate impact of felony disenfranchisement. For these reasons, California law should be interpreted to favor voter eligibility.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Amicus Curiae Brief was produced using at least 13 point font and contains 6,224 words.

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