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

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO SHERIFF'S DEPARTMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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Amicus Curiae's Certificate of Interested Entities or Persons

I certify as follows:

The City and County of San Francisco Sheriff's Department is a government entity. The Department knows of no other interested entity or person that must be listed under California Rule of Court 8.208.

Dated: January 7, 2014

Trevor P. Stutz

Trevor P. Stutz

SUSMAN GODFREY, L.L.P.

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I. APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS

The City and County of San Francisco Sheriff's Department (the "Department") requests permission to file the attached brief as amicus curiae in support of respondents Michael Scott, *et al.* The attached amicus brief addresses the purpose of the Realignment Act, the effects of disenfranchisement on reentry, and the purposes of punishment.

Pursuant to California Rule of Court 8.200(c), the Department affirms that no party or counsel for any party in the pending appeal authored this amicus brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the attached brief. No individual or entity other than the Department, its employees, or its attorneys made a contribution of money for the preparation of this brief.

The Department, consisting of more than 850 sworn officers and 125 civilian staff, is responsible for providing a range of law enforcement services. Principally, the Department operates the SF County Jail System, which consists of five jails, including one Intake and Release Facility and four housing facilities. The Department books approximately 35,000 individuals annually and has a current average daily population of approximately 1,300 inmates. The Department's Custody Operations Division strives to maintain a safe and secure jail system and to facilitate an environment in which the various educational and rehabilitation programs can accomplish their mission. The Department maintains

an additional community programs unit that provides for alternatives to incarceration, including electronic monitoring and residential treatment. The community programs unit also provides education, vocation and life skills classes, substance abuse treatment and violence intervention at the Department's community sites. These programs are designed to help ex-offenders meet the requirements of the courts while successfully reentering the community.

A key aspect of the Department's mission is to provide a successful transition for incarcerated individuals back to their families and their communities. The Department views engagement in the democratic process through voting as a fundamental aspect of this reintegration. To further its mission, the Department runs a long-standing voter registration and voting initiative in which it regularly registers eligible individuals who are in its custody.

The Department is familiar with the issues in this case and has reviewed the briefing of the parties before this Court. The Department believes that its brief will assist the Court with the resolution of the important issues presented. Specifically, the Department is concerned with the claim by the Secretary of State that the only purposes behind enacting the criminal justice realignment laws were to save money and reduce the state prison population, when the legislation was clearly intended to promote convicted individuals' reentry into the community. The Department is further focused on the importance of promoting voting as a tool for aiding reentry and on the absence of penological goals served by disenfranchisement.

WHEREFORE, amicus City and County of San Francisco Sheriff's Department seeks leave to file the accompanying amicus brief in support of respondents.

II. INTRODUCTION

"The right to vote freely" is "the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." (*Reynolds v. Sims* (1964) 377 U.S. 533, 555.) The right to vote is "fundamental 'because [it is] preservative of all rights.'" (*Peterson v. City of San Diego* (1983) 34 Cal.3d 225, 229-30 [quoting *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 370].) For these reasons, "in the absence of any clear intent by the Legislature or the voters," California courts apply the principle that "'no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning.'" (*League of Women Voters of California v. McPherson* (2006) 145 Cal.App.4th 1469, 1482 [quoting *Otsuka v. Hite* (1966) 64 Cal.2d 596, 603–604].[1]) This Court should affirm the judgment below. To hold otherwise would directly conflict with the Realignment Act's purpose of reducing recidivism and would unnecessarily deprive tens of thousands of individuals of the right to vote.

III. ARGUMENT

The Legislature enacted AB 109 (the "Realignment Act") in order to reduce recidivism among low-level offenders by removing them from the parole system and placing them under local supervision. Recognizing that California's

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[1] *Otsuka v. Hite* was abrogated on other grounds by *Ramirez v. Brown* (1973) 9 Cal.3d 199, which in turn was reversed on other grounds *sub nom Richardson v. Ramirez* (1974) 418 U.S. 24. (*See McPherson*, 145 Cal.App.4th at 1477-79 & fn. 6 [describing the history of the *Otsuka* and *Ramirez* decisions].)

recidivism rate exceeded the already high national average, the Legislature established new forms of community supervision—mandatory supervision and post-release community supervision ("PCRS")—in order to achieve what the parole system had not. (*See* Cal. Penal Code § 3450(b)(2).)[2] These new forms of supervision are intended to "improve public safety outcomes among adult felons and facilitate their reintegration back into society" through "evidence-based practices." (§§ 17.5(a)(4)-(5), 3450(b)(4)-(5).) As a result, local agencies around the state have implemented new strategies to aid offender reentry.

Ensuring that individuals on mandatory supervision and PRCS have the right to vote will further these explicit legislative goals. As law enforcement leaders have long recognized, providing formerly incarcerated individuals the right to vote facilitates their reentry and reduces the likelihood that they will commit new crimes. In contrast, disenfranchising these new categories of individuals would conflict with the goals of improving public safety and offender reintegration. The Court should not read into the Realignment Act an unexpressed limitation on voting rights that directly undermines the legislative purpose of the Act.

Interpreting the Act to permit those on mandatory supervision and PRCS to vote is also consistent with public opinion and with reforms around the country. Nearly half of all states have enacted legislation over the last fifteen years in order

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[2] All statutory references are to the California Penal Code unless otherwise indicated.

to rein in felony disenfranchisement and expand voting rights.[3] These legislative changes reflect broad public support and have been enacted in both red and blue states. Just as the Realignment Act now differentiates among felonies, many states have eased restrictions by restoring voting rights to those convicted of less serious crimes. Indeed, narrowing the categories of offenses that result in disenfranchisement is consistent with California Supreme Court precedent. (*See Otsuka*, 64 Cal.2d at 605 [interpreting the previous California constitutional provision and finding that "[t]he unreasonableness of a classification disfranchising all former felons, regardless of their crime, is readily demonstrable" because it would apply to less serious crimes that bore no relation to protecting the elective process].)

Finally, there is no countervailing reason to assume that the Legislature intended to disenfranchise individuals subject to new forms of supervision. The purpose of felony disenfranchisement is not further punishment, but rather "to deter election fraud." *Ramirez*, 9 Cal.3d at 206; *Otsuka*, 64 Cal.2d at 602-03. California voters largely rejected this disenfranchisement rationale when they passed Proposition 10, restoring certain voting rights and enacting the current constitutional provision. Moreover, there is no concrete evidence that felony disenfranchisement has any impact on election fraud, and disenfranchisement

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[3] Porter, *Expanding the Vote: State Disenfranchisement Reforms, 1997-2010* (Oct. 2010) The Sentencing Project.

serves no other penological purpose. Instead, it undermines the goal of rehabilitation.

A. The Realignment Act Placed a New Emphasis on Reducing Recidivism and Aiding Reentry.

The trial court correctly found that the Realignment Act was enacted "to improve public safety outcomes among adult felons and facilitate their reintegration back into society." (J.A. 394 [Trial Ct. Order at 17].)[4] The text of the statute states so unequivocally:

> (a) The Legislature finds and declares all of the following: . . .
> (5) Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, **will improve public safety outcomes among adult felons and facilitate their reintegration back into society**.

(§ 17.5(a)(5) [emphasis added]; *see* § 3450(a)(5).) Section 17.5(a)(5) is dispositive evidence of the Legislature's intent to reduce recidivism and facilitate reentry for "low-level felony offenders" on mandatory supervision and PRCS. (*See also* § 17.5(a)(1) [reaffirming the Legislature's "commitment to reducing recidivism among criminal offenders"].)

These new categories of supervision were created precisely because under the old parole regime, California's rate of recidivism was extremely high. (*See* § 3450(b)(2); J.A. 265-66 [Governor's Budget Summary 2011-12 noting the corrections system's "difficulties with rehabilitation efforts" and that reforms to

[4] References to the joint appendix are in the form "J.A. [page(s)]".

the parole system "have only marginally improved the success of parolees"].)[5] In order to improve reentry outcomes, the Act created new forms of supervision distinct from parole that would not be supervised by the Department of Corrections and Rehabilitation, but rather by local probation departments. (§ 1170(h)(5)(B) [defining "mandatory supervision" to include supervision "by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation"]; § 3451(a) [prescribing "community supervision provided by a county agency" for offenders on PRCS]; *see also* J.A. 284 [Senate Rules Committee Report on AB 109 explaining that the Act "Maintains State Parole for Specified Offenders" and distinguishing PRCS to which other offenders will be subject "rather than subject to state parole supervision"].)

Even beyond the plain language of the statute, statements in the legislative record further illustrate that the Governor and the Legislature intended to place a greater emphasis on reintegrating former offenders into their communities. (*See, e.g.*, J.A. 250 [Legislative Analyst Report stating the Act was intended to "improve offender outcomes and reduce their risk of reoffending"]; J.A. 263 [Governor's Budget Summary 2011-12 stating intention to "better address the

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[5] *See also* Lofstrom et al., *Evaluating the Effects of California's Corrections Realignment on Public Safety* (Aug. 2012) Public Policy Institute of California at p. 8, *available at* http://www.ppic.org/content/pubs/report/R_812MLR.pdf ["A major goal of realignment is to reduce California's historically high rate of recidivism."]. (All websites last visited between January 5 and 7, 2014.)

service needs that can stop the revolving door of the corrections system"]; J.A. 284 [Senate Rules Committee Report on AB 109 stating that "post-release supervision shall be consistent with evidence-based practices demonstrated to reduce recidivism"].)[6]

The practices of law enforcement and probation departments around the state offer still further evidence that the Realignment Act established new forms of supervision distinct from parole that place an emphasis on successful reentry that the parole system had failed to achieve. As part of realignment, the law now requires each county's Community Corrections Partnership to create a plan to implement the Realignment Act on the basis of "evidence-based practices." (§ 1230.1.) As a predictable consequence, "California probation departments have made a commitment to, and have invested heavily in evidence based practices" that can reduce recidivism among individuals on mandatory supervision and PRCS.[7] Santa Barbara County, for example, "utilizes an evidence-based risk and needs assessment with both the PRCS and 1170(h) [mandatory supervision]

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[6] *See also* Chief Probation Officers of California, *Public Safety Realignment: What is it?* (Summer 2012) at p. 1, *available at* http://www.cpoc.org/assets/Realignment/public%20safety%20realignment%20brief%201.pdf [explaining that "California enacted historic criminal justice system changes to respond to a variety of factors present in 2011" including "an unacceptably high recidivism rate for criminal offenders"].

[7] Chief Probation Officers of California, *Mandatory Supervision: The Benefits of Evidence Based Supervision Under Public Safety Realignment* (Winter 2012) at p. 4, *available at* http://www.cpoc.org/assets/Realignment/issuebrief2.pdf; Chief Probation Officers of California, *Assessing Risks and Needs of Realigned Populations: Post-Release Community Supervision and Services* (Fall 2013) *available at* http://www.cpoc.org/assets/Realignment/issuebrief4.pdf.

populations" in order to comply with the Act.[8] Santa Barbara County Chief Probation Officer Beverly Taylor recently described that by "providing services in a new and different way," her department was "on track for making a difference" in successful reentry.[9]

Since the passage of the Realignment Act, the City and County of San Francisco Sheriff's Department has also placed additional focus on reentry. Although the Department has long provided in-custody services that address reentry needs, it has moved forward its reentry focus from just prior to one's release to the time an individual is first booked into the justice system. The Department now individually assesses incoming individuals to determine a range of needs and to provide inmates with the necessary skills for successful reentry. Additional programming includes an increase in communication with family through reduced calling rates and increased visiting opportunities.

In line with the new law, the Department has also developed a new Reentry Pod. The Reentry Pod is a joint project with the San Francisco Adult Probation Department ("APD") and offers wrap-around services to inmates who have a minimum of 90 days remaining in custody. The Reentry Pod provides vocational, educational and life skills classes and connects an inmate with a probation officer

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[8] Sharkey, et al., *Santa Barbara County Annual Realignment Report Oct. 2011 to Dec. 2013* (July 2014) Univ. Cal. Santa Barbara at p. 12.

[9] Misra, *New Santa Barbara County report shows prison realignment law has positive impact* (Dec. 9, 2014) KSBY News, *available at* http://www.ksby.com/news/new-santa-barbara-county-report-shows-prison-realignment-law-has-positive-impact/.

who will be in charge of his supervision upon release. The Department and APD worked with community partners to design a rigorous program that engages offenders in research-based interventions while in custody that continues under community supervision. The populations served by the Reentry Pod and the new programming include individuals who will be released to PRCS and mandatory supervision.

There can be little question that the Realignment Act created something new and distinct from parole—a system of supervision that is focused on aiding offender reentry and reducing recidivism in ways that parole did not.

B. Permitting Individuals on Mandatory Supervision and PRCS to Vote Furthers the Goals of Reducing Recidivism and Aiding Reentry.

By assigning individuals convicted of low-level felonies to mandatory supervision and PRCS, the Legislature sought to improve their chances of successfully reentering society. Preserving these individuals' right to vote furthers this legislative goal. Successful reentry into the community requires that an individual be reengaged with family, community and civic life. Research shows that providing a former offender with the opportunity to exercise the right to vote furthers his civic engagement and strengthens his sense of being a stakeholder in society. Conversely, denying the right to vote increases a sense of alienation from the community and may impede rehabilitation. Law enforcement officials around the country have long understood this dynamic and support voting rights as a tool that aids in desisting from crime.

The existing research supports the view that voting may reduce the likelihood of recidivism. In their empirical study addressing precisely this question, Professors Uggen and Manza concluded that ex-felons who voted were less than half as likely to be rearrested in the subsequent four years.[10] Although direct causal relationships are difficult to assess, they found that "[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime."[11] In sum, they concluded:

> [S]tatistical analysis suggests that a relationship between voting and subsequent crime and arrest is not only plausible, but also supported by empirical evidence. We find consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior. While the single behavioral act of casting a ballot is unlikely to be the sole factor that turns felons' lives around, the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society.[12]

These findings are consistent with other empirical research. In a recent study cited by Attorney General Eric Holder, the Florida Parole Commission found a significant reduction in recidivism for those former felons who had their voting rights restored.[13] From 2001 to 2008 the "three-year recidivism rate based

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[10] Uggen and Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample* (2004) 36 Colum. Hum. Rts. L. Rev 193, 206 [finding that among individuals who had been arrested previously, 27 percent of non-voters were rearrested, compared with 12 percent of voters].

[11] *Id.* at 214-15.

[12] *Id.* at 213.

[13] *See* Attorney General Eric Holder Delivers Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), *available at* http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-criminal-justice-reform-georgetown [citing the Florida Parole Commission study].

on all released inmates" was 33.1%.[14] In stark contrast, the recidivism rate was only 11.1% for those former felons who had their voting rights restored in 2009 and 2010.[15] That 11.1% recidivism rate has been sustained through the middle of 2014 when data was last gathered.[16] Looking at "the most comprehensive study of recidivism in the United States," other researchers concluded that "individuals who are released in states that permanently disenfranchise are roughly nineteen percent more likely to be rearrested than those released in states that restore the franchise post-release."[17] Even controlling for age, race, gender, unemployment and criminal history, they found that former offenders are 10% more likely to be rearrested in states that permanently disenfranchise them than in states that do not.[18]

Social scientists have repeatedly recognized the same thing: having the right to vote increases civic integration while disenfranchisement impedes rehabilitation. "The right to vote is one of the defining elements of citizenship in a democratic polity and participation in democratic rituals such as elections affirms

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[14] Pate et al., *Status Update: Restoration of Civil Rights' (RCR) Cases Granted 2009 and 2010* (July 1, 2011) Florida Parole Commission at p. 7, *available at* https://www.fcor.state.fl.us/docs/reports/2009-2010ClemencyReport.pdf.

[15] *Id.* at 12.

[16] *Restoration of Civil Rights' Recidivism Report for 2012 & 2013* (July 1, 2014) Florida Commission on Offender Review, *available at* https://www.fcor.state.fl.us/docs/reports/RecidivismReport2012-2013.pdf.

[17] Hamilton-Smith and Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism* (2012) 22 Berkeley La Raza L. J. 407, 424, 426.

[18] *Id.* at 427-28.

membership in the larger community."[19] Ensuring that sense of membership in society is central to successful reentry into a law-abiding community.[20] Research has shown that "active participants in the democratic process are more likely to adopt the shared values of their broader community."[21]

In contrast, individuals who are disenfranchised are clearly denied the most critical form of civic participation and instead are left with a stigmatizing symbol of their outsider status.[22] "Disenfranchisement cannot help to foster the skills and capacities that will rehabilitate offenders and help them become law-abiding citizens. Indeed, on the contrary, it is more likely that 'invisible punishments'

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[19] Uggen and Manza, *Voting and Subsequent Crime and Arrest*, at 195.

[20] Uggen et al., *Less Than the Average Citizen: Stigma, Role Transition and the Civic Reintegration of Convicted Felons*, in After Crime and Punishment (Maruna & Immarigeon eds., 2004) at pp. 261, 287 [concluding that "civic reintegration and establishing an identity as a law-abiding citizen are central to the process of desistance from crime"]; Maruna, Making Good: How Ex-Convicts Reform and Rebuild their Lives 88 (2001) [noting that the desire to "be productive and give something back to society" is central to desisting from crime]; Visher and Travis, *Transitions from prison to community: Understanding individual path-ways* (2003) 29 Annual Rev. of Sociology 89, 97 ["[An] area of identity transformation for returning prisoners is that of responsible citizen, including varieties of civic participation such as voting, volunteer work, 'giving back,' and neighborhood involvement. Many returning prisoners voice the importance of such a role for themselves as they reintegrate into their communities." (citations omitted)].

[21] Hamilton-Smith and Vogel, at 414.

[22] *Id.* at 414; *see also* Uggen et al., *Less Than the Average Citizen* at 274-75 [analyzing dozens of interviews with convicted felons and finding that "almost all said they planned some form of participation as active citizens in the future, with several specifically linking civic participation with their desire to stay away from crime"; recounting individuals who described that the loss of voting and other civil rights make it "impossible" to become a "normal citizen," and that "[v]oting is 'part of being a citizen'" while "franchise restrictions leav[e] felons feeling 'exiled' from their fellow citizens"].

such as disenfranchisement act as barriers to successful rehabilitation."[23] As Justice Marshall put it, "the denial of a right to vote to such persons is hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens." (*Richardson v. Ramirez* (1974) 418 U.S. 24, 78 [Marshall J., dissenting].)[24] "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."[25]

Evidence from California probation departments further underscores that cutting off individuals from their right to vote would be counterproductive to reentry. In a recent report from the Chief Probation Officers of California, they

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[23] Manza and Uggen, Locked Out (2006) at p. 37.

[24] Justice Marshall relied on two contemporary reports. First, the National Advisory Commission on Criminal Justice Standards and Goals, Corrections observed: "Loss of citizenship rights—(including) the right to vote . . .—inhibits reformative efforts. If correction is to reintegrate an offender into free society, the offender must retain all attributes of citizenship. In addition, his respect for law and the legal system may well depend, in some measure, on his ability to participate in that system. Mandatory denials of that participation serve no legitimate public interest." [quoted in *Richardson*, 418 U.S. at 85 fn. 32 [Marshall, J., dissenting]]. Second, the President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections stated: "[T]o be deprived of the right to representation in a democratic society is an important symbol. Moreover, rehabilitation might be furthered by encouraging convicted persons to participate in society by exercising the vote." [quoted in *Richardson*, 418 U.S. at 85 fn. 33 [Marshall, J., dissenting]].

[25] Fellner and Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Oct. 1998) The Sentencing Project & Human Rights Watch (internal quotation omitted).

noted that "[t]he population being released from prison as PRCS offenders, face challenges around education, antisocial attitudes and cognition, employability, mental health, substance abuse, and homelessness."[26] The most consistent need identified by probation departments (for 72% of offenders) relates to "antisocial attitudes."[27] Depriving these individuals of the right to civic participation is the opposite of what these individuals need to overcome alienation and antisocial attitudes.

Law enforcement leaders across the country share the view that denying the right to vote is antithetical to rehabilitation. In a recent speech, the nation's top law enforcement officer, Attorney General Eric Holder, stated that felony disenfranchisement is "counterproductive. By perpetuating the stigma and isolation imposed on formerly incarcerated individuals, these laws increase the likelihood they will commit future crimes. They undermine the reentry process and defy the principles – of accountability and rehabilitation – that guide our criminal justice policies."[28] Invoking Justice William Brennan, Holder called disenfranchisement "the very antithesis of rehabilitation."[29] Similarly, in an

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[26] Chief Probation Officers of California, *Assessing Risks and Needs of Realigned Populations* at p. 3

[27] *Id.*

[28] Attorney General Eric Holder Delivers Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014).

[29] *Id.*; *see Trop v. Dulles* (1958) 356 U.S. 86, 111 [Brennan, J., concurring] [evaluating the punishment of expatriation and finding it "perfectly obvious that it constitutes the very antithesis of rehabilitation, for instead of guiding the offender

opinion piece in 2013 advocating for the restoration of voting rights in Florida, the former president of the International Association of Chiefs of Police wrote that restoring voting rights is part of "a larger strategy to promote successful re-entry into society and thereby enhance public safety."[30] As another notable example, while serving as Chief of the Seattle Police Department, Gil Kerlikowske, the current Commissioner of U.S. Customs and Border Protection and former Director of the Office of National Drug Control Policy (or "Drug Czar"), argued that voting puts former offenders on the path towards being "law-abiding citizens." He wrote:

> Good law enforcement involves not only preventing and solving crimes but also helping those who have been released from prison return to society as law-abiding citizens. . . . Voting is an important way to connect people to their communities, which in turn helps them avoid going back to crime. One study showed former offenders who vote are 50 percent less likely to commit new crimes than those who don't vote. We want those who leave prison to become productive and law-abiding citizens. Voting puts them on that path.[31]

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back into the useful paths of society it excommunicates him and makes him, literally, an outcast"]. The same is true of disenfranchisement.

[30] McNeil and Schlakman, *My View: Florida Has It Wrong on Restoring Felons' Rights* (Dec. 11, 2013) Tallahassee.com, *available at* http://archive.tallahassee.com/article/20131212/OPINION05/312120026/My-View-Florida-has-wrong-restoring-felons-rights.

[31] Kerlikowske and Lovick, *Restore voting rights to ex-felons* (Feb. 12, 2009) Seattle Post-Intelligencer. *See also, e.g.* Laurent Gillbert, Testimony Opposing LD 573 (March 4, 2013), *available at* http://www.mainelegislature.org/legis/bills/getTestimonyDoc.asp?id=2308 [former police chief and mayor successfully opposing proposed legislation to disenfranchise incarcerated felons in Maine, stating that disenfranchisement "is not consistent with our intention to rehabilitate and reintegrate offenders into our communities"].

The Department has long understood that promoting civic engagement through voting furthers the goals of reentry and reintegration into the community. To that end, the Department has administered voter registration and voting for those in its custody who are eligible to vote, including providing more than 600 individuals with voter services during the 2014 election cycle. As a leader in assisting eligible inmates with the registration and voting process, the Department has served more than 3,000 individuals since 2003 and thousands more before that. The Department's Inmate Voter Program is widely considered to be an important success and has been cited as a model for other jurisdictions. Although the program requires significant effort and coordination, the Department understands that facilitating voting strengthens offenders' social ties and commitment to the common good. Therefore, the Department's mission is to ensure that eligible individuals have an opportunity to exercise their right to vote.

The Realignment Act expresses no intent to subject those under new forms of supervision to disenfranchisement. The Court should read the Act consistently with the Legislature's intention to reduce recidivism and further reentry.

C. Permitting Individuals on Mandatory Supervision and PRCS to Vote Is Consistent with Public Opinion and National Trends.

Dozens of states have scaled back their disenfranchisement laws with bipartisan support.[32] These changes make good sense in light of public sentiment

[32] Indeed even at the national level, Republicans and Democrats have sought to roll back felony disenfranchisement. Republican presidential hopeful Rand Paul recently sponsored the Civil Rights Voting Restoration Act (S. 2550) and co-

that individuals living in their communities should have the right to vote on the issues that affect them and their families. Therefore, interpreting AB 109 to create new categories of individuals who should be denied voting rights is flatly inconsistent with the public will.

A comprehensive public opinion survey reports that nearly two-thirds of United States residents support voting rights for those living in the community under criminal-justice supervision.[33] "For all categories of felons who are not currently in prison, relatively large majorities . . . favor enfranchisement. . . . [B]etween 60 and 68 percent of the public believes that felony probationers . . . should have their voting rights restored. Moreover, 60 percent support voting rights for parolees (who have been released from prison)."[34] On the basis of his research and polling, Professor Manza stated in his declaration in the trial court

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sponsored with Democrat Cory Booker the REDEEM Act (S. 2567), each of which would restore voting rights in federal elections to individuals with non-violent felony convictions. *See* Everett, *Rand Paul seeks to expand voting rights to some ex-cons* (June 22, 2014) Politico, *available at* http://www.politico.com/story/2014/06/rand-paul-voting-rights-ex-felons-108156.html; O'Keefe, *Cory Booker, Rand Paul team up on sentencing reform bill* (July 8, 2014) Washington Post, *available at* http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/08/cory-booker-rand-paul-team-up-on-sentencing-reform-bill/.

[33] Manza et al., *Public Attitudes Toward Felon Disenfranchisement* in *the United States* (2004) 68 Pub. Opinion Q. 275.

[34] *Id.* at 283. Leading legal organizations also support voting rights for individuals living in the community. The American Bar Association states that "Jurisdictions should not impose the following collateral sanctions: (a) deprivation of the right to vote, except during actual confinement. . . ." ABA Standards for Criminal Justice (3d ed. 2004) at p. 35. Similarly, the Model Sentencing & Corrections Act § 4-1003 provides: "A confined person otherwise eligible may vote by absentee ballot." *See also id.* § 4-112 [also recognizing right of prisoners to vote].

that "it is certain that Californians would favor restoration of voting rights for offenders who [are] living in the community." (J.A. 133 [Manza Decl. at 5].)

In recent years, nearly half of the states in the nation have scaled back their felony disenfranchisement laws in order to expand voter eligibility.[35] These reforms have spanned geographies and political lines and include traditionally conservative as well as liberal states. For example, in 1997 under then-Governor George W. Bush, Texas eliminated a two-year waiting period for the restoration of voting rights and began automatically restoring voting rights at the completion of an offender's sentence. The policy change restored the right to vote to 317,000 individuals.[36]

Much like the Realignment Act, state-level changes have focused on restoring the right to vote for less serious crimes and to particular categories of supervision. Among states that revised their laws on the basis of supervision status, Rhode Island expanded the right to vote to individuals on probation and parole through a 2006 constitutional amendment and Connecticut extended the right to individuals on felony probation in 2001.[37] Alabama, Nevada and Wyoming each expanded voting rights for individuals convicted of non-violent offenses. In 2003, Alabama made it easier for individuals convicted of non-

[35] Porter, *Expanding the Vote: State Disenfranchisement Reforms, 1997-2010* (Oct. 2010) The Sentencing Project at p. 1[summarizing that "since 1997, 23 states have amended felony disenfranchisement policies in an effort to reduce their restrictiveness and expand voter eligibility"].

[36] *Id.* at 26.

[37] *Id.* at 7, 24.

violent offenses to have their voting rights restored immediately upon completion of their sentence.[38] Also in 2003, Nevada passed legislation that "automatically restores the right to vote to any person convicted of a first-time, non-violent offense upon completion of sentence,"[39] and "Wyoming revised its lifetime felony disenfranchisement law by authorizing persons convicted of a first-time non-violent felony to apply to the Wyoming Board of Parole for a certificate that restores voting rights."[40] These policy changes represent an acknowledgment that even in states with sweeping disenfranchisement laws, it makes sense to restore voting rights to lower-level offenders who are under less stringent supervision.

Consistent with the idea that regaining the right to vote furthers successful offender reentry, several states passed laws requiring law enforcement and corrections agencies to inform offenders of their voter eligibility. In 2010, New Jersey "required state criminal justice agencies to provide exiting prisoners with general information regarding New Jersey law and their eligibility to vote. The legislative measure garnered broad bipartisan support that was encouraged by efforts to address recidivism and remove barriers for incarcerated individuals after they are released from prison."[41] Since 2007, Louisiana, New York and North Carolina have all enacted legislation that requires the state corrections department and other agencies to inform

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[38] *Id.* at 6.

[39] *Id.* at 18.

[40] *Id.* at 32.

[41] *Id.* at 19.

individuals when they regain their right vote.[42] In addition, Florida, Kentucky, New Mexico and Virginia have also passed laws requiring the state corrections department to inform individuals how to apply to restore their voting rights.[43]

Interpreting the Realignment Act to create new categories of supervision that result in disenfranchisement is inconsistent with public opinion and national trends.

D. Disenfranchisement Serves No Legitimate Penological Purpose

As the California Supreme Court has held, the rationale behind California's felony disenfranchisement provision is "preventing election fraud." (*Ramirez*, 9 Cal.3d at 216; *id.* at 212.) In *Otsuka*, the court held that "the only tenable purpose" of felony disenfranchisement was to "protect the 'purity of the ballot box' against abuses." (64 Cal.2d at 611.) In *Ramirez*, the court further clarified that protecting the "purity of the ballot box" meant "in short, to deter election fraud." (9 Cal.3d at 205-06; *see McPherson*, 145 Cal.App.4th at 1477 [explaining that the California Supreme Court has "rejected the argument that the purpose of denying offenders the right to vote was to impose an additional punishment on them"].)[44] There is no evidence that the Legislature had any intention to limit voter fraud through realignment.

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[42] *Id.* at 15 [Louisiana], 21 [New York], 22 [North Carolina].

[43] *Id.* at 9 [Florida], 13 [Kentucky], 20 [New Mexico], 28 [Virginia].

[44] *See also* Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States* (2002) 2002 Wis. L. Rev. 1045, 1137 [noting that "the California Supreme Court has interpreted 'purity of the ballot box' reasoning to be largely about preventing fraud"].

Moreover, the voters largely rejected this rationale when they passed Proposition 10 (1974) and amended the California constitutional provision governing felony disenfranchisement. (*See* Cal. Const. art. II, § 2.) By passing Proposition 10, California expanded the right to vote and recognized that—at least as to individuals no longer in state prison or on parole—the "historical need to restrict [the] right to vote is gone." (J.A. 119 [1974 Ballot Argument in Favor of Proposition 10]; *see McPherson*, 145 Cal.App.4th at 1481 [stating that "[n]ew provisions of the Constitution must be considered with reference to the situation intended to be remedied or provided for"].) The ballot explained that the historical "exclusion of ex-felons from voting was based on a need to prevent election fraud and protect the integrity of the election process. The need to use this voter exclusion no longer exists." (*Id.*; *see McPherson*, 145 Cal.App.4th at 1483 [reviewing the arguments in favor and opposed to Proposition 10].)

Further, there is no evidence that felony disenfranchisement has any effect on preventing election fraud. While the idea behind felony disenfranchisement "is that ex-felons, having demonstrated criminality in the past, are more likely to commit election-related offenses" there is "no empirical evidence that suggests ex-felons, either as a group or as individuals, are at a higher risk of committing election related offenses. Furthermore, the efficacy of disenfranchising ex-felons is dubious as a prophylactic measure because one does not need to be eligible to

vote in order to commit election-related offenses."[45] The great majority of felonies "simply have no correlation with the electoral process and do not logically indicate a greater propensity on the part of the [offender] to commit election crime."[46] Without any evidence, there can be no presumption that ex-felons are any more likely to commit election fraud than others. (*See Collier v. Menzel* (1985) 176 Cal.App.3d 24, 34 [rejecting any presumption that homeless individuals are more prone to election fraud].)

Nor can states deny the right to vote to individuals convicted of felonies on the basis of how they might vote. Although the idea of the "purity of the ballot

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[45] Hamilton-Smith and Vogel, at 413; *see also* Fellner and Mauer at 15 ["Protection against voter fraud is clearly an insufficient rationale for statutes that are triggered by crimes having nothing to do with elections, where laws criminalizing voter fraud exist, and where there is no evidence that ex-felons are more likely to commit voter fraud than anyone else"] [citing *Richardson v. Ramirez,* 418 at 79-80 [Marshall, J. dissenting], *Note: Disenfranchisement of Ex-Felons: A Reassessment* (1973) 25 Stan. L. Rev 845, and *Note: The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'the Purity of the Ballot Box'"* (1989) 102 Harv. L Rev. 1300].

[46] *Comment: Don't Do The Crime If You Ever Intend To Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment* (2002) 33 Seton Hall L. Rev. 167, 191; *see* Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration* (2002) 12 Fed. Sentencing Rep. 248, 250 [noting that "more than 99 percent of felons have not been convicted of electoral offenses"]. "Moreover, even if the fear that offenders are more likely to commit election fraud had some grounding in truth, blanket disenfranchisement would be an excessive solution to the problem. Such a solution is comparable to enacting a law to prevent any ex-convict from entering a bank for fear that he or she would rob it. The Legislature has less restrictive and less burdensome means at its disposal to forestall vote fraud." *Muntaqim v. Coombe*, Amicus Br. of Certain Criminologists, 2005 WL 4680726, at *11 (2d Cir. 2005) [citing *Dunn v. Blumstein* (1972) 405 U.S. 330, 353 ["[The state] has at its disposal a variety of criminal laws that are more than adequate to detect and deter whatever fraud may be feared."]].

box" has sometimes been interpreted as ensuring the moral fitness of the electorate, this rationale has been flatly rejected by the courts as unconstitutional. (*See Dunn v. Blumstein* (1972) 405 U.S. 330, 355 [state may not limit the vote to those with "a common interest"]; *Cipriano v. City of Houmac* (1969) 395 U.S. 701, 705 ["differences of opinion cannot justify" excluding a group from voting]; *Carrington v. Rash* (1965) 380 U.S. 89, 94 ["'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."]; *see also Romer v. Evans* (1996) 517 U.S. 620, 634 [expressly rejecting the Mormon disenfranchisement case, *Davis v. Beason*, which had concluded that advocates of polygamy could be disenfranchised because of their support for an illegal practice]; 52 U.S.C. § 10501 [providing that citizens cannot be denied the right to vote in any election because of *inter alia* a failure to "possess good moral character"].)[47]

Felony disenfranchisement serves no legitimate penological purpose.[48] "A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation." (*Ewing v. California* (2003) 538 U.S. 11, 25.)

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[47] The United States Supreme Court "has consistently rejected restrictions on the franchise as a reasonable means of promoting intelligent or responsible voting." Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement* (2004) 56 Stan. L. Rev. 1147, 1153; *id.* at 1150-53 [explaining that disenfranchisement must be viewed as punishment rather than as regulation].

[48] *See, e.g.*, *Farrakhan v. Gregoire*, Amicus Br. on Behalf of Leading Criminologists, 2006 WL 4030104 (9th Cir. 2006) ["Felon disenfranchisement cannot be justified as a legitimate punitive measure."].

Disenfranchisement undermines rehabilitation (*see supra* sec. III.B), and cannot be justified as incapacitation, deterrence or retribution. Disenfranchisement does not incapacitate offenders—i.e. isolate dangerous individuals for the protection of society.[49] Nor does it deter individuals who are not already deterred from crime by the threat of incarceration.[50] The only logical penological purpose of disenfranchisement is simply a desire to further punish (i.e. retribution)—a rationale that California long ago rejected. *See McPherson*, 145 Cal.App.4th at 1477. Moreover, denying the right to vote "violates the retributive, 'just deserts' rationale for criminal punishment, which rests on the tenet that punishment must be proportionate to the blameworthiness of the criminal and the severity of harm caused."[51]

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[49] Even taking a broad view of incapacitation as protecting society from election fraud or how individuals might vote, this rationale cannot be used to justify disenfranchisement. *See Id.* [concluding that "[n]either of these arguments, upon examination, offers a permissible reason to deprive offenders of the right to vote"]; *Muntaqim v. Coombe*, Amicus Br. of Certain Criminologists, 2005 WL 4680726, at *9 [same].

[50] *See* Mauer, *Felony Disenfranchisement: A Policy Whose Time Has Passed* (2004) 31 Human Rights 1, 1; *Muntaqim v. Coombe*, Amicus Br. of Certain Criminologists, 2005 WL 4680726, at *14-16 [noting that "[e]mpirical data also support the conclusion that felon disenfranchisement fails to act as a deterrent of any kind" and that "collateral consequences of conviction, such as disenfranchisement, are also likely to be poor deterrents"].

[51] *Muntaqim v. Coombe*, Amicus Br. of Certain Criminologists, 2005 WL 4680726, at *3; *see* 1 LaFave, Wayne R. & Scott, Austin W., Jr., *Substantive Criminal Law* § 1.5 (2d ed. 2003) [explaining that retribution involves the imposition of punishment "because it is fitting and just"]; *Atkins v. Virginia* (2002) 536 U.S. 304, 311 ["'[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"] [quoting *Weems v. United States* (1910) 217 U.S. 349, 367]; *see also Muntaqim v. Coombe*, Amicus Br. of

In short, there is no legitimate rationale for expanding the scope of disenfranchisement to the tens of thousands of individuals on mandatory supervision and PRCS.

IV. CONCLUSION

Consistent with the purposes and practices of realignment, this Court should affirm the judgment below and hold that otherwise-eligible Californians on mandatory supervision and PRCS have the right to vote.

Dated: January 7, 2015

Respectfully submitted,

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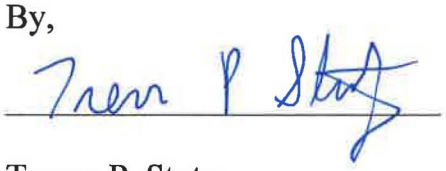
Carter, Coleman-Davis, Lassar, Marks, Schechtman, Nat'l Black Police Assoc., Nat'l Latino Officers Assoc. of Amer., et al., 2005 WL 4680725, at *11 (2d Cir. 2005) ["[T]here is nothing 'tough on crime' about felon disenfranchisement. Strong law enforcement can only mean pursuing policies which one believes will reduce crime. But a[b]sent from the historical and legal literature about disenfranchising people convicted of felonies is the claim that imposing this sanction reduces crime. Unlike other widely-accepted forms of criminal punishment, the deprivation of voting rights is not supported by any accepted theory or purpose of punishment. Nor has felon disfranchisement been shown to make communities or correctional facilities safer."].

Certificate of Compliance

Pursuant to California Rule of Court 8.204(c)(1), I certify that the attached Amicus Brief in Support of Respondents is proportionally spaced in Times New Roman, has a typeface of 13 points, was created in Word format and contains 6,851 words as calculated by Microsoft Word (including footnotes but not the caption, table of contents, table of authorities, signature blocks or this certification).

Dated: January 7, 2015

By,



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Proof of Service

I, Laura Quenzel, declare under penalty of perjury under the laws of the State of California and the laws of the United States that the following is true and correct:

I am employed in the City of Los Angeles, County of Los Angeles, 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 SUSMAN GODFREY, L.L.P., and my business address is 1901 Avenue of the Stars, Suite 950, Los Angeles, CA 90069.

On January 7, 2015, I served the following document:

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO SHERIFF'S DEPARTMENT AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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

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Executed on January 7, 2015 at Los Angeles, California.

Laura Quenzel, Declarant

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