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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

MITCHELL SIMS; MICHAEL MORALES;
AMERICAN CIVIL LIBERTIES UNION OF
NORTHERN CALIFORNIA,

Plaintiffs-Petitioners,

v.

SCOTT KERNAN, AS SECRETARY OF THE
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION;
CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

Defendants-Respondents.

CASE NO.:

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF: VIOLATION OF CALIFORNIA
CONSTITUTION**

1
2 Plaintiffs-Petitioners allege as follows:

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4
5 **I. INTRODUCTION**

6
7 1. The death penalty has long been one of society's most hotly-contested issues. This
8 November, the voters of California considered two ballot measures related to the death penalty—one
9 proposed to repeal it, while the other purported to expedite the process between sentence and
10 execution. California citizens espouse diverse and deeply held views about these measures, about the
11 death penalty generally, and about the fundamental policy considerations that underlie capital
12 punishment. These fundamental policy considerations include the amount of pain acceptable for an
13 inmate to suffer during execution; the speed of the execution process; the reliability of the execution
14 process; and the secrecy of the execution process.

15
16 2. The Separation of Powers provision of California's Constitution, Cal. Const., art. III,
17 § 3, requires that the elected Legislature resolve fundamental policy considerations rather than delegate
18 them to non-elected agency officials. But California's death penalty statute, Penal Code § 3604,
19 delegates to a state agency total discretion to decide and resolve the key, fundamental policy questions
20 implicated by the death penalty. By leaving "the resolution of fundamental policy issues" to
21 individuals outside the legislative branch and failing to "provide adequate direction for the
22 implementation of that policy," the statute has effected an "unconstitutional delegation." *Carson*
23 *Mobilehome Park Owners' Assn. v. City of Carson*, 35 Cal.3d 184, 190 (1983).

24
25 3. California law provides that death-sentenced inmates shall be executed by lethal gas or
26 lethal injection, but delegates to the California Department of Corrections and Rehabilitation
27 ("CDCR") unbridled discretion to develop protocols for executing inmates by these means. *See* Cal.
28 Penal Code § 3604. Section 3604 does not establish standards to guide the implementation of lethal
gas or lethal injection executions. Instead, the statute provides only that executions shall be carried out
with "a substance or substances in a lethal quantity sufficient to cause death, by standards established
under the direction of the Department of Corrections." As a result, the statute fails to address the
fundamental policy questions raised by lethal injection and lethal gas executions, or to provide the

1 CDCR with any direction, let alone adequate direction, for the implementation of executions by lethal
2 injection or lethal gas.

3 4. The statute's wholesale delegation of decisionmaking on fundamental policy questions
4 related to the pain, speed, reliability, and secrecy of the execution process directly violates the
5 Separation of Powers provision of the California Constitution. It does so by depriving voters of their
6 constitutional right to have these fundamental issues determined by politically accountable legislators.

7 5. Without legislative guidance, administrative agencies such as CDCR are likely to
8 prioritize considerations such as administrative convenience over priorities that the people's elected
9 representatives might otherwise establish.

10 6. Indeed, CDCR's history with respect to execution protocols illustrates this danger.
11 CDCR has developed execution protocols that courts have declared unlawful *five* times. Courts struck
12 down two of CDCR's prior execution protocols as unconstitutional violations of the Eighth
13 Amendment's prohibition against cruel and unusual punishment. A court struck down part of another
14 as an unconstitutional violation of the public's First Amendment right to view executions. And courts
15 held that two other protocols violated the State's Administrative Procedures Act, which requires
16 agencies to engage in a transparent and reasoned decisionmaking process. Proceeding without the
17 benefit of legislative guidance, CDCR repeatedly has developed execution protocols that highlight its
18 own lack of expertise in developing a lawful and workable execution protocol, as well as its
19 prioritization of administrative convenience over critical policy considerations such as protecting an
20 inmate from pain and engaging in non-secretive, transparent decisionmaking.

21 7. CDCR recently finalized a new protocol for conducting executions by lethal injection.
22 This protocol reflects dozens of policy judgments made by CDCR—without the benefit of any
23 guidance from the people's elected representatives on how to address or resolve the fundamental policy
24 considerations implicated by lethal injection executions. As with prior protocols, the new protocol
25 reflects CDCR's prioritization of administrative convenience over countervailing considerations such
26 as developing a humane, swift, reliable, and transparent execution process. Moreover, internal
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1 inconsistencies in the protocol reflect CDCR's haphazard decisionmaking and failure to make
2 considered judgments on fundamental policy issues.

3
4 8. To be clear, this case does not present the question whether CDCR has resolved these
5 policy choices correctly. Rather, this case concerns whether Penal Code § 3604 permissibly delegates
6 that task to CDCR, and the answer is "no." The Separation of Powers clause of the California
7 Constitution provides that it is for the Legislature, not an agency, to make fundamental policy choices;
8 to provide guidance on how to resolve conflicting fundamental policy considerations; and to provide
9 direction to ensure that the agency does not implement fundamental policy choices in a haphazard
10 fashion. Penal Code § 3604 unconstitutionally delegates to unelected agency officials these solemn
11 legislative duties.

12 **II. JURISDICTION AND VENUE**

13 9. This Court has jurisdiction under Article VI, Section 10, of the California Constitution
14 and California Code of Civil Procedure § 410.10.

15 10. Venue in this Court is proper because (1) Defendants-Respondents reside in Sacramento
16 and are unlawfully spending taxpayer funds in that county; and (2) the California Attorney General
17 maintains an office in Alameda County. *Id.* §§ 393(b), 395(a), 401(1).

18 **III. PARTIES**

19 11. Plaintiff-Petitioner Mitchell Sims is a death-sentenced inmate and potentially faces
20 execution under CDCR's unlawful execution protocol.

21 12. Plaintiff-Petitioner Michael Morales is a death-sentenced inmate and potentially faces
22 execution under CDCR's unlawful execution protocol.

23 13. Plaintiff-Petitioner American Civil Liberties Union of Northern California ("ACLU-
24 NC"), founded in 1934 and based in San Francisco, is dedicated to defending and promoting individual
25 rights and liberties by holding the government accountable for compliance with the state and federal
26 constitutions. It has over 44,000 members. Many of the ACLU-NC's members are assessed and pay
27 California state income taxes and property taxes in Alameda County.

14. Defendant-Respondent and real party in interest CDCR is an agency of the State of California. It is responsible for all prisons in the State of California, for the custody and treatment of death-sentenced inmates, and for conducting the execution of such inmates.

15. Defendant-Respondent and real party in interest Scott Kernan is the Secretary of CDCR. He is named in his official capacity only.

IV. STATEMENT OF FACTS

A. Executions by Lethal Injection and Lethal Gas Raise Fundamental Policy Issues

16. Protocols for executing death-sentenced inmates by lethal injection or lethal gas raise fundamental policy issues concerning the level of pain, speed, reliability, and secrecy of the execution process.

17. Issues such as pain, speed, reliability, and secrecy are “fundamental” because they involve and implicate political value judgments, and are not simply ministerial details to be optimized by an agency.

1. The Death Penalty in California Is a Controversial Issue of Great Importance to Californians

18. Voters in California closely follow the death penalty and have weighed in on it at the polls repeatedly. That voters and the Legislature continue to revisit the death penalty in California evinces the seriousness and importance of this issue.

19. In 1972, our Supreme Court ruled that the State's death penalty laws were unconstitutional. *See People v. Anderson*, 6 Cal.3d 628 (1972).

20. Later that year, however, the voters reinstated the death penalty when they approved Proposition 17 and invited the Legislature to enact implementing legislation. *See* Cal. Const., art. I, § 27 (“All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum.”) (emphasis added).

21. In 1976, the Supreme Court again invalidated the state's death penalty statutory scheme in *Rockwell v. Superior Court*, 18 Cal.3d 420 (1976).

22. In 1977, the Legislature reinstated the death penalty as a potential penalty for certain first-degree murder convictions. Stats. 1977, ch. 316, §§ 1-26, pp. 1255-1266.

23. In 1978, the voters adopted Proposition 7, which expanded the circumstances under which the death penalty could be imposed. Initiative Measure Proposition 7 (approved Nov. 7, 1978).

24. In 2012, the voters considered Proposition 34, which would have replaced the death penalty with life without the possibility of parole. Initiative Measure Proposition 34 (defeated Nov. 6, 2012). The electorate was deeply divided, with 52% of voters opposing the measure and 48% in favor. See Statement of Vote – November 6, 2012, General Election, at 4, available at <http://elections.cdn.sos.ca.gov/sov/2012-general/06-sov-summary.pdf>.

25. In 2016, the voters once again considered the death penalty and again demonstrated that the people of this State remain closely divided on this extremely controversial topic. Proposition 62, which would have replaced the death penalty with life without the possibility of parole, failed, with 53.9% of voters opposing the measure and 46.1% in favor. Secretary of State Website, Proposition 62, <http://vote.sos.ca.gov/returns/maps/ballot-measures/prop/62/> (accessed Nov. 10, 2016). Proposition 66, which limits and purports to streamline post-conviction relief, narrowly passed with 49.1% of voters opposing the measure and 50.9% in favor. Secretary of State Website, Proposition 66, <http://vote.sos.ca.gov/returns/maps/ballot-measures/prop/66/> (accessed Nov. 10, 2016).

26. The public has demonstrated strong interest not only in the broad question of whether to have a death penalty, but also in basic questions about how inmates should be executed.

27. CDCR has twice issued lethal injection regulations, and provided the public with notice and an opportunity to comment on its proposed lethal injection protocol.

28. In an indication of the public's intense interest in this issue, the state received 29,400 written comments on proposed regulations issued by CDCR in 2009. *See Sims v. Dep't of Corr. & Rehab.*, 216 Cal.App.4th 1059, 1069 (2013). On November 5, 2015, CDCR issued another set of

1 proposed lethal injection regulations. *See* Cal. Reg. Notice Register 2015, No. 45-Z, p.2024,
2 http://oal.ca.gov/November_2015_Notify_Register.htm. Those regulations generated comments from
3 approximately 35,000 members of the public and organizations. *See* CDCR Final Statement of
4 Reasons at 2 (issued Nov. 4, 2016).

5
6 29. Considering the ongoing contention concerning the death penalty in this State, there is
7 no doubt that the fundamental questions involving its implementation are of great importance to
8 California's electorate.

9 **2. Recent Botched Executions Across the Country Illustrate The Fundamental**
10 **Policy Issues that Arise When A State Executes Its Citizens**

11 30. The recent spate of gruesome botched executions across the country sheds light on the
12 fundamental policy issues that arise in a state's implementation of executions by lethal injection.

13 31. *Pain*. Choices in the design of the protocol, related to issues such as intravenous access
14 and drug choice, reflect value-laden policy judgments about the level of pain considered acceptable and
15 the risk of imposing an unacceptable level of pain.

16 32. On September 15, 2009, Ohio attempted to execute Romell Broom but called off the
17 execution after the execution team failed to establish intravenous access through 18 different injection
18 sites over a 95-minute to two-hour period. The number of catheter insertions was actually much higher
19 than the 18 puncture wounds because the team repeatedly withdrew the catheter partway and then
20 reinserted it at different angles into already bruised and swollen sites, in a procedure known as
21 "fishing." *State v. Broom*, 146 Ohio St. 3d 60 (Ohio 2016).

22 33. The design of the drug protocol also affects the risk and level of pain. One-drug
23 protocols typically involve the administration of an anesthetic only. *See* Ariz. Dept. of Corrections
24 Execution Protocols, 40-43 (Dec. 15, 2014) (surveying different lethal injection protocols), available at
25 https://www.supremecourt.gov/opinions/URLs_Cited/OT2014/14-7955/14-7955-3.pdf. A three-drug
26 protocol, once in widespread use, involved the administration of a drug to induce unconsciousness, a
27 second drug to paralyze, and a third drug to induce cardiac arrest. *See, e.g., Baze v. Rees*, 553 U.S. 35,

1 44 (2008). If the first drug in the three-drug protocol does not have its intended effect, because of
2 improper administration or for other reasons, administration of the second two drugs causes severe
3 pain. *See id.* at 49.

4 34. Within constitutionally permissible bounds, there are myriad policy choices to be made
5 about the degree of pain considered “acceptable.” The Eighth Amendment places an outer limit on the
6 risk and degree of pain an execution protocol may constitutionally impose, which is reached upon
7 demonstration of a “substantial risk of serious harm” and “an alternative that is ‘feasible, readily
8 implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’” *Glossip v. Gross*,
9 135 S.Ct. 2726, 2738 (2015). But well before that limit is reached, there exists a “wide range of
10 ‘judgment calls’” about the acceptable risk and degree of pain, which raises fundamental questions of
11 policy. *Baze*, 553 U.S. at 51 (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979).)

12 35. *Speed.* Choices in the design of an execution protocol reflect policy judgments about
13 the duration of an execution considered acceptable. Even after intravenous access is established and the
14 drug is administered, the speed of an execution may vary from quick to excruciatingly long.

15 36. For example, in January 2014, Ohio executed Dennis McGuire using a two-drug
16 protocol consisting of midazolam, which is a benzodiazepine, and the opioid hydromorphone. The
17 execution took 26 minutes, with McGuire gasping and convulsing for 10 minutes before he died. *See*
18 Johnson, *Dennis McGuire’s execution was not ‘humane,’ doctor says*, The Columbus Dispatch, (Aug.
19 12, 2014) [http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-](http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-execution-doctor-says.html)
20 [execution-doctor-says.html](http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-execution-doctor-says.html) (as of Nov. 8, 2016). Afterwards, a medical doctor who studied the records
21 of McGuire’s execution concluded that the drug combination used to kill him would not dependably
22 render a person unconscious before causing respiratory failure. *Id.*; *see* Kent Diveley, M.D., Medical
23 Report, Aug. 4, 2014, available at [http://www.otse.org/wp-content/uploads/2014/08/2014-08-12-Dr.-](http://www.otse.org/wp-content/uploads/2014/08/2014-08-12-Dr.-Report.pdf)
24 [Report.pdf](http://www.otse.org/wp-content/uploads/2014/08/2014-08-12-Dr.-Report.pdf) (as of Nov. 8, 2016).

25 37. Similarly, on April 29, 2014, Oklahoma executed Clayton D. Lockett using midazolam.
26 Over the course of an hour, the doctor and paramedic stuck Mr. Lockett over 16 times in six locations
27

1 on his body in their efforts to establish intravenous access. Fretland, *Scene at botched Oklahoma*
2 *execution of Clayton Lockett was a 'bloody mess,'* The Guardian (Dec. 13, 2014)
3 [https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-](https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess)
4 [mess](https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess) (as of Nov. 8, 2016). The doctor present at the execution stated that after the lethal injection
5 drugs were administered, Mr. Lockett “raised his head up” and was “kind of jerking it,” “started
6 moaning,” and “was seizing.” *Id.* The prison warden later testified that the scene was “a bloody
7 mess,” and that she “was kind of panicking,” and “[t]hinking oh my God. He’s coming out of this. It’s
8 not working.” *Id.* A victim services advocate with the corrections department stated: “It was like a
9 horror movie...he kept trying to talk.” *Id.* The corrections director called off the execution 33 minutes
10 after the first lethal injection drugs were administered, but Mr. Lockett died 10 minutes after that. *See*
11 *id.* An investigation into the Lockett execution ultimately concluded that the execution team’s failure
12 to establish a viable IV access point “was the single greatest factor that contributed to the difficulty in
13 administering the execution drugs.” *See* Stern, *The Cruel and Unusual Execution of Clayton Lockett*,
14 The Atlantic (Jun. 2015) [http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-](http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/)
15 [lockett/392069/](http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/) (as of Nov. 8, 2016).

16
17 38. In July 2014, Arizona executed Joseph Wood using the same two-drug combination of
18 midazolam and hydromorphone used in Ohio’s execution of Dennis McGuire. Ortega, et al., *Execution*
19 *of Arizona Murderer Takes Nearly 2 Hours*, Ariz. Republic (July 24, 2014)
20 <http://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-executionbotched/13070677/>
21 (as of Nov. 8, 2016). Officials had to use 15 doses of each of the two drugs, rather than the two doses
22 called for by the state’s protocol. The execution took nearly two hours, with Wood snorting and
23 gasping for air. One witness recounted that Wood gasped “about 640 times.” Berman, *The Prolonged*
24 *Arizona Execution Used 15 Doses of Lethal Injection Drugs*, Wash. Post (Aug. 4, 2014)
25 [https://www.washingtonpost.com/news/post-nation/wp/2014/08/04/the-prolonged-arizona-execution-](https://www.washingtonpost.com/news/post-nation/wp/2014/08/04/the-prolonged-arizona-execution-used-15-doses-of-lethal-injection-drugs/)
26 [used-15-doses-of-lethal-injection-drugs/](https://www.washingtonpost.com/news/post-nation/wp/2014/08/04/the-prolonged-arizona-execution-used-15-doses-of-lethal-injection-drugs/) (as of Nov. 8, 2016).

1 39. *Reliability.* Choices in the design of an execution protocol, related to issues such as the
2 source of drugs and whether to include testing and verification procedures, reflect policy judgments
3 about the level of reliability in the execution protocol considered desirable.
4

5 40. Some states have chosen to use compounded drugs, rather than drugs procured from a
6 manufacturer approved by the U.S. Food & Drug Administration (“FDA”). *See, e.g., Fla. Stat.*
7 § 922.105. Compounded drugs are easier to obtain, but pose significant risks of contamination, sub-
8 potency, and adulteration. In addition, there is a heightened danger that a compounded drug is simply
9 not the drug it is represented to be.

10 41. Drug compounding is “a practice in which a licensed pharmacist, a licensed physician,
11 or, in the case of an outsourcing facility, a person under the supervision of a licensed pharmacist,
12 combines, mixes, or alters ingredients of a drug to create a medication tailored to the needs of an
13 individual patient.” *See FDA, Compounding and the FDA: Questions and Answers,*
14 [http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/
15 PharmacyCompounding/ucm339764.htm](http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm) (last visited Nov. 8, 2016). The Food & Drug Administration
16 does not verify the safety or effectiveness of compounded drugs, or inspect the facilities in which they
17 are compounded. Compounding pharmacies are subject to much less regulatory oversight than FDA-
18 approved manufacturers. *See FDA, The Special Risks of Pharmacy Compounding*, FDA Consumer
19 Health Information, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm107836.htm> (last
20 visited Nov. 8, 2016). “[C]ompounded drugs fail to meet specifications at a considerably higher rate
21 than FDA-approved drugs” and “pose the additional risk of microbial contamination.” *Id.* The FDA
22 has further warned that: “Compounded drugs made using poor quality practices may be sub- or super
23 potent, contaminated, or otherwise adulterated. Additional health risks include the possibility that
24 patients will use ineffective compounded drugs instead of FDA-approved drugs that have been shown
25 to be safe and effective.” *See supra*, *FDA, Compounding and the FDA: Questions and Answers.*

26 42. In March 2015, Georgia, which uses a one-drug protocol consisting of the barbiturate
27 pentobarbital, postponed the execution of Kelly Gissendaner because its supply of the drug, which it
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1 obtained from a compounding pharmacy, “appeared cloudy.” *Georgia Delays Woman’s Execution*
2 *Because of ‘Cloudy’ Lethal Injection Drug*, The Guardian (Mar. 2, 2015)
3 [https://www.theguardian.com/world/2015/mar/03/georgia-delays-womans-execution-because-of-](https://www.theguardian.com/world/2015/mar/03/georgia-delays-womans-execution-because-of-cloudy-lethal-injection-drug)
4 [cloudy-lethal-injection-drug](https://www.theguardian.com/world/2015/mar/03/georgia-delays-womans-execution-because-of-cloudy-lethal-injection-drug) (as of Nov. 8, 2016).

5
6 43. A compounding pharmacy that provided lethal injection drugs to Missouri admitted to
7 committing more than a thousand violations of state pharmacy guidelines; FDA inspectors found
8 questionable potency, as well as problematic disinfecting and sterilization practices. McDaniel,
9 *Pharmacy that Mixed Execution Drugs is Being Sold After Admitting Numerous Violations*,
10 BuzzFeedNews (April 21, 2016) [https://www.buzzfeed.com/chrismcdaniel/pharmacy-that-mixed-](https://www.buzzfeed.com/chrismcdaniel/pharmacy-that-mixed-execution-drugs-is-being-sold-after-disc)
11 [execution-drugs-is-being-sold-after-disc](https://www.buzzfeed.com/chrismcdaniel/pharmacy-that-mixed-execution-drugs-is-being-sold-after-disc) (as of Nov. 8, 2016). The pharmacy has been fined and its
12 license placed on probation. *Id.*

13 44. If a state prioritized reliability in the execution process, the implementing agency could
14 choose not to use compounded drugs or to institute controls for testing drugs before they are
15 administered.

16 45. Apart from the issues raised by compounded drugs, there is the issue of drug “mix-ups.”
17 Oklahoma, for example, executed one inmate with the wrong drug and almost executed another inmate
18 with the wrong drug.

19 46. In January 2015, after the botched Lockett execution, Oklahoma executed Charles
20 Warner under new procedures that involved additional training and a higher dosage of certain drugs.
21 Eckholm, *Oklahoma Executes First Inmate Since Slipshod Injection in April*, N.Y. Times (Jan. 15,
22 2015) <http://www.nytimes.com/2015/01/16/us/oklahoma-execution-charles-warner-lethalinjection.html>
23 (as of Nov. 8, 2015). As the injections began, however, Warner cried out “my body is on fire.” *Id.*
24 Oklahoma later admitted that it used the wrong drug—potassium acetate instead of potassium chloride.
25 *Id.*

26 47. Oklahoma subsequently called off the execution of Richard Glossip, scheduled for
27 September 2015. Interim Report Number 14 at 72, In the Matter of the Multicounty Grand Jury, State

1 of Oklahoma, D.C. Case No. GJ-2014-1 [hereinafter Grand Jury Report] (May 19, 2016), *available at*
2 <http://www.ok.gov/oag/documents/MCGJ%20-%20Interim%20Report%205-19-16.pdf>. A doctor
3 overseeing the execution discovered at the last minute that the state had once again obtained the wrong
4 drug, even though it learned months earlier that it had used the wrong drug in the Warner execution.
5 *Id.* at 63–65. Executions in Oklahoma were placed on hold, pending a grand jury investigation into the
6 drug mix-ups. *Grand Jury Issues Scathing Report on Oklahoma Executions*, CBS NEWS (May 19,
7 2016), <http://www.cbsnews.com/news/grand-jury-issues-scathing-report-on-oklahoma-executions>.
8 Several top officials have resigned after testifying before the grand jury. *Id.* The grand jury report
9 found, among other things, that the “Execution Protocols lacked controls to ensure the proper execution
10 drugs were obtained and administered,” for example, by failing “to require verification of the execution
11 drugs.” Grand Jury Report at 77, 81.

12 48. If a state prioritized reliability in the execution process, the implementing agency could
13 institute controls, such as procedures for verifying drugs before they are administered.

14 49. *Secrecy*. Choices in the design of an execution protocol also reflect policy judgments
15 about the level of transparency considered necessary or the level of secrecy considered acceptable.

16 50. For example, the Oklahoma grand jury report criticized the “surreptitious” manner in
17 which the drugs were acquired and found that the manner of acquisition “contributed greatly to the
18 Department’s receipt of the wrong execution drugs.” *See id.* at 88; *see also* Herskovitz et al.,
19 *Oklahoma bungled drugs used in executions: grand jury report*, Reuters (May 19, 2016)
20 <http://www.reuters.com/article/us-oklahoma-execution-idUSKCN0YA31Y> (as of Nov. 9, 2016).

21 51. *Balancing Competing Fundamental Policy Issues*. Notably, these fundamental policy
22 issues are not always aligned. For example, decisions to minimize pain may increase the duration of
23 the execution process, or decrease its reliability. *Baze v. Rees*, 553 U.S. 35, 57 (2008). The decision
24 about where to strike a balance between countervailing fundamental policy issues is itself an important
25 fundamental policy issue that the legislature should address.
26
27
28

B. Section 3604 Removes Fundamental Policy Decisions Surrounding The Death Penalty From Politically Accountable Lawmakers

52. As the most representative organ of government, the Legislature has a constitutional duty to address fundamental policy questions that, if left unresolved, pose a significant barrier to the ability of other branches to effectively carry out their own constitutional duties.

53. California's electorate has repeatedly demonstrated that it regards the death penalty as a topic of great importance. In addition, executions in other states reveal that the manner in which the implementing agency designs a lethal injection protocol raises and reflects fundamental policy choices.

54. But Penal Code § 3604 delegates to CDCR unbridled discretion to develop protocols for executing inmates by lethal injection and lethal gas, and absolves the Legislature of its constitutional duty to address fundamental policy questions and provide guidance to CDCR in implementing the death penalty.

55. The statute provides only that executions shall be carried out with "a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." Penal Code § 3604. It does not address the pain, speed, reliability, or transparency considered acceptable or desirable in an execution protocol, or provide CDCR with any guidance on how to resolve policy priorities to the extent they conflict.

56. The resolution of these fundamental policy choices cannot properly be delegated to the CDCR because they concern core value judgments that our Constitution requires the Legislature to make. Moreover, the decision about how to balance sometimes competing policy considerations is itself an important value judgment—for example, whether the speed of the execution process should be prioritized over reliability, or reliability over the agency's interest in administrative convenience. These value judgments are important to voters, and the Legislature should not be able to shirk its duty and dodge political accountability by simply hoping that CDCR resolves these controversial and difficult issues.

57. Penal Code § 3604's failure to even address any of these value judgments has left CDCR without sufficient guidance to carry out its own function.

58. In the absence of legislative guidance on what policies to prioritize, CDCR has consistently developed execution protocols that elevate administrative convenience over potentially competing policy considerations, such as reducing the risk the inmate will suffer pain or engaging in non-secretive, transparent decisionmaking. The result has been execution protocols that courts have struck down in whole or in part five times.

59. CDCR's historic inability to promulgate lawful and constitutional protocols shows that the agency requires more guidance than what the Legislature has been providing. The lethal gas and lethal injection death penalty statutes enacted by the Legislature have historically been devoid of guidance and standards as to the implementation of these procedures, and the current statute does no better.

60. *Risk of pain.* An execution protocol that contains safeguards and procedures designed to minimize the risk of pain to an inmate inevitably imposes incremental burdens on an agency and constrains its discretion. The statute designating California's method of execution has consistently failed to provide CDCR with any guidance on how it should strike the balance between competing interests. And in the absence of any guidance, CDCR has unsurprisingly prioritized its administrative interests over the interest in reducing the risk of inmate pain. The result is that courts have *twice* found CDCR's execution protocols to violate the Eighth Amendment's prohibition against cruel and unusual punishment.

61. In 1941, the Legislature first enacted Penal Code § 3604. At the time, this statute designated lethal gas the method of execution and provided no additional guidance to CDCR. Penal Code § 3604 (1941).

62. The Legislature amended Penal Code § 3604 in 1992 (as memorialized in the 1993 version of the code). It added lethal injection as an additional method of execution if elected by the inmate, but retained lethal gas as the default method of execution. Again, it left CDCR with unconstrained authority to develop execution protocols. Penal Code § 3604 (1993).

1
2 63. In 1994, a federal district court ruled that the procedures CDCR developed for execution
3 by lethal gas violated the Eighth Amendment. *See Fierro v. Gomez*, 865 F.Supp. 1387 (N.D. Cal.
4 1994). The district court found, among other things, that there was a substantial likelihood that inmates
5 remained conscious for several minutes, suffering “intense, visceral pain..., anxiety, panic, [and]
6 terror” during this period of consciousness. *Id.* at 1404. The decision was affirmed by the United
7 States Court of Appeals for the Ninth Circuit two years later. *See Fierro v. Gomez*, 77 F.3d 301 (9th
8 Cir. 1996).

9 64. In response to this ruling, the Legislature amended the statute in 1996. *See Stats.* 1996,
10 c. 84 (AB 2082), § 1.¹ The amendment designated lethal injection the default method in the event an
11 inmate did not elect a method. Again, the Legislature failed to provide any guidance on fundamental
12 policy issues and instead delegated to the CDCR unbridled authority to resolve (or ignore) these issues.

13 65. CDCR’s resulting protocol was again declared unconstitutional in 2006. *See Morales v.*
14 *Hickman*, 415 F.Supp. 2d 1037 (N.D. Cal. 2006). The lethal injection protocol at the time called for
15 the administration of three drugs—sodium thiopental (purportedly to anesthetize), followed by
16 pancuronium bromide (to paralyze), and potassium chloride (to induce cardiac arrest). The federal
17 district court found that the lethal injection protocol developed by the agency, like the lethal gas
18 protocol it had previously developed, violated the Eighth Amendment’s prohibition against cruel and
19 unusual punishment. In particular, the court found that CDCR’s protocol suffered from the following
20 deficiencies: “Inconsistent and unreliable screening of execution team members”; “A lack of
21 meaningful training, supervision, and oversight of the execution team”; “Inconsistent and unreliable
22 record-keeping”; “Improper mixing, preparation, and administration of sodium thiopental by the
23 execution team”; “Inadequate lighting, overcrowded conditions, and poorly designed facilities in which
24 the execution team must work.” *Id.* at 979-80.

25
26 ¹ The United States Supreme Court subsequently vacated the Ninth Circuit’s decision in light of the
27 intervening amendment to Penal Code § 3604. *See Gomez v. Fierro*, 519 U.S. 918 (1996).

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2 66. Safeguards and protocols to ensure adequate screening, training, and supervision of
3 execution team members, to require reliable record-keeping, and to guarantee proper preparation, all
4 impose additional administrative burdens and reduce agency discretion in conducting an execution.
5 But such safeguards and protocols also provide a defense against the risk that an inmate will suffer
6 pain. The protocol CDCR developed, but that was struck down in *Morales v. Hickman*, prioritized,
7 whether intentionally or not, the interest in reducing administrative burden and increasing agency
8 discretion over the interest in reducing the risk of inmate pain.

9 67. *Secrecy*. On the question of secrecy, too, CDCR has lacked guidance from the
10 Legislature. In the absence of such guidance, CDCR has predictably developed execution protocols
11 that hide as much of the process as possible from the public, and has engaged in secretive, non-
12 transparent decisionmaking. The result, again, has been protocols that have been struck down by
13 multiple courts.

14 68. For example, one of CDCR's prior lethal injection protocols prevented witnesses to an
15 execution from viewing the initial portion of the execution procedures, such as the strapping of the
16 inmate to the gurney and the insertion of intravenous catheters. The United States Court of Appeals
17 found this portion of CDCR's execution protocol to be "an exaggerated, unreasonable response" to
18 concerns about safety of prison staff and held it to violate the First Amendment. *California First*
19 *Amendment Coalition v. Woodford*, 299 F.3d 868, 970 (9th Cir. 2002).

20 69. CDCR also previously attempted to issue its execution protocols unilaterally, without
21 providing the public or affected inmates notice or an opportunity to comment on its protocols. The
22 First District Court of Appeal, however, found CDCR's conduct in doing so to violate the California
23 Administrative Procedures Act. *See Morales v. Calif. Dep't of Corr. & Rehab.*, 168 Cal.App.4th 729
24 (2008). The purpose of that statute "is to ensure that those persons or entities whom a regulation will
25 affect have a voice in its creation." *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 568
26 (1996). The public notice and comment process of the APA "directs the attention of agency
27
28

1 policymakers to the public they serve, thus providing some security against bureaucratic tyranny.” *Id.*
2 at 569.

3
4 70. A protocol subsequently issued by CDCR was found also to violate the APA. *See Sims*
5 *v. Dep’t of Corr. & Rehab.*, 216 Cal.App.4th 1059 (2013). The First District Court of Appeal found
6 that CDCR had failed to substantially comply with the APA, having among other things, “misled” the
7 public about the basis for its decision to adopt a three-drug protocol, failed to include critical
8 documents in the rulemaking file, and failed to grant the public proper access to inspect the rulemaking
9 file. *See id.* at 1074-75.

10 * * *

11 71. In the absence of legislative guidance on fundamental policy questions such as pain,
12 speed, reliability, and transparency, CDCR has consistently prioritized administrative discretion and
13 convenience over these potentially countervailing policy goals. The absence of legislative guidance
14 has resulted in CDCR crafting execution protocols that have been struck down in whole or part on *five*
15 occasions.

16 72. Addressing fundamental policy concerns and making important, political value
17 judgments is a duty that is in no way ministerial, and is far outside of the scope and expertise of CDCR,
18 as shown by the agency’s history.

19 **D. CDCR’s New Lethal Injection Protocol Reflects the Agency’s Prioritization of**
20 **Administrative Convenience over Potentially Competing Policy Goals and**
21 **Haphazard Decisionmaking on Fundamental Policy Issues**

22 73. CDCR has recently announced a new protocol for executing inmates by lethal injection.
23 As with its prior protocols, CDCR has prioritized administrative convenience over fundamental policy
24 considerations. In so doing, the CDCR has made fundamental, value-laden judgments that should have
25 been resolved at the legislative level.

26 74. In addition, CDCR’s new protocol reflects numerous inconsistent, ambiguous, and
27 conflicting choices on fundamental policy issues involving pain, speed, reliability, and transparency.
28 The internal inconsistencies suggest that CDCR itself has not even made a conscious, considered value

1 judgment on these fundamental policy questions. Instead, lacking guidance from the Legislature, it has
2 haphazardly resolved issues such as pain and speed.

3 75. On November 6, 2015, CDCR published proposed regulations setting forth a lethal
4 injection protocol. *See* Cal. Reg. Notice Register 2015, No. 45-Z, p.2024,
5 http://oal.ca.gov/November_2015_Notify_Register.htm (last visited Nov. 14, 2016). The agency's
6 Initial Statement of Reasons ("ISOR") is included along with the proposed regulations. *See* CDCR
7 Notice of Change to Regulations, NCR 15-10 (Nov. 6, 2015), available at
8 http://www.cdcr.ca.gov/regulations/Adult_Operations/docs/NCDR/2015NCR/15-10/NCR%2015-10%20Notice%20of%20Proposed%20Regulations.pdf.
9
10

11 76. On November 4, 2016, CDCR issued a Final Statement of Reasons adopting the
12 regulations it proposed on November 6, 2015, and submitted the regulations for approval to the Office
13 of Administrative Law.

14 77. CDCR has established a one-drug protocol, in which CDCR will administer to the
15 death-sentenced inmate up to 37.5 grams (consisting of up to five doses of 7.5 grams each) of one of
16 the following four drugs: Amobarbital, Pentobarbital, Secobarbital, or Thiopental. *See*
17 § 3349.5(f)(1)(C), 3349.7.

18 78. *Pain Inflicted.* CDCR's protocol reflects numerous policy choices about the amount of
19 pain an inmate is likely to experience during an execution. It also reflects decisions about how to
20 resolve competing policy priorities, including intentional or inadvertent decisions to prioritize
21 preserving agency discretion over reducing inmate pain.

22 79. CDCR chose to adopt a one-drug protocol, which represents a departure from its prior
23 three-drug protocol. ISOR at 1 (Nov. 6, 2015), available at
24 http://www.cdcr.ca.gov/regulations/Adult_Operations/docs/NCDR/2015NCR/15-10/NCR%2015-10%20Notice%20of%20Proposed%20Regulations.pdf. Its prior three-drug protocol involved the
25 administration of one drug to induce unconsciousness, a second to induce paralysis, and a third to
26 induce cardiac arrest. *Id.*
27
28

80. In adopting its current one-drug protocol, CDCR has offered the following rationale: “While CDCR considered several single and multi-chemical combination methods of execution, it elected to use a single-chemical method because it reduces the risk of pain and possible complications.” *Id.*

81. Despite its stated goal of reducing the risk of pain, at least with respect to the choice of a one-drug over a three-drug protocol, CDCR chose not to include any safeguards or limitations on the establishment of intravenous access. CDCR's protocol, for example, does not impose any limits on how many times the execution team can insert the catheter into the inmate, or any limits on the practice of "fishing" (repeatedly pushing the catheter in and out of the same site at slightly different angles in an attempt to find a vein). Nor does the protocol address how long the state may spend trying to establish intravenous access.

82. A procedure that fails to set forth limitations on the establishment of intravenous access does at least two things: First, it increases the risk that the inmate will be subjected to a painful procedure. Ohio’s effort to execute Rommell Broom in 2009 illustrates the potential consequences of an execution protocol that lacks safeguards on the establishment of intravenous access. But it also preserves unfettered agency discretion in conducting the execution. And CDCR made clear that preserving agency discretion was the purpose of numerous portions of its protocol. *See, e.g.*, ISOR at 25 (“This provision is necessary to ensure that the San Quentin Warden has the discretion required to make a Lethal Injection Chemical selection.”); *id.* at 26 (provision necessary to ensure “[t]he San Quentin Warden has the discretion to determine the preparedness of a specific Lethal Injection Team member.”).

83. CDCR's decision not to include any protocols governing the establishment of intravenous access is inconsistent with its stated rationale for choosing a one-drug protocol—reducing the risk of pain. It thus reflects a failure to implement consistently the agency's stated goal of reducing the risk of pain, as well as an intentional or inadvertent judgment that granting the execution team discretion in conducting the execution is a higher priority than reducing the risk of pain to the inmate.

1 84. *Speed of the execution.* CDCR's protocol also has implications for the speed of the
2 execution. Certain aspects of the protocol reflect inconsistent choices about the appropriate speed of an
3 execution, while other aspects reflect either a failure to recognize the importance of addressing the
4 appropriate length of an execution or a conscious decision to design an extremely protracted execution.
5

6 85. For example, the protocol grants the Warden of San Quentin, where most death-
7 sentenced inmates are housed and executions occur, discretion to select a drug from among the four
8 listed in the protocol. *See* § 3349.5(f)(1)(A). However, the four drugs do not affect a person's nervous
9 system at the same speed. Only one of the four drugs, thiopental, is classified as "ultra-short-acting."
10 Manuchair Ebadi, *Desk Reference of Clinical Pharma.* 67 (2d ed. 2007). The other three drugs
11 identified in CDCR's protocol are short-to intermediate-acting. *Id.* Thus, CDCR's decision to include
12 drugs in the protocol that take effect with different speeds reflects inconsistent choices about how long
13 an execution should last.

14 86. Moreover, CDCR designed a protocol in which an execution could last as long as 14
15 hours and 45 minutes. The length of the execution process itself belies any notion that CDCR
16 recognized the importance of addressing the duration of an execution.

17 87. The regulations provide for the administration of up to five doses of the lethal injection
18 drug before the execution is called off, if death does not result as anticipated. *See* §§3349.7(c)(9),
19 3349.7(c)(1), 3349.7(d)(5), 3349.7(d)(6). Each dose consists of five 60 cc syringes of the drug,
20 followed by a sixth 60 cc syringe containing a saline flush. *See* §3349.6(3)(A).

21 88. The chart below sets forth the steps in the procedure, along with a conservative estimate
22 of the amount of time each step would take:

23

Procedure	Minimum Length of Time	Likely Length of Time
Administer Tray A and begin 10-minute countdown (§ 3349.7(c)(3))	10 minutes (for the 10-minute countdown) ^A	150 minutes (for administration of dose) ^B

24

25

26 A. Conservatively assumes administration of dose would not take longer than 10-minute countdown
27 provided for in regulation.

Administer Tray B and begin 10-minute countdown (§ 3349.7(c)(9))	10 minutes (for the 10-minute countdown) ^A	150 minutes (for administration of dose) ^B
Insert catheter into alternate back-up site (§ 3349.7(d))	5 minutes (estimate) ^C	5 minutes (estimate) ^C
Administer Tray C and begin 10-minute countdown (§ 3349.7(d)(4)&(5))	10 minutes (for the 10-minute countdown) ^A	150 minutes (for administration of dose) ^B
Preparation of 5 syringes for fourth dose & verification of proper preparation (§ 3349.7(d)(5))	5 minutes (estimate) ^D	at least 15 minutes ^E
Administer 1st syringe and “wait for ten minutes” (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes ^F	40 minutes (30 minutes to administer syringe plus 10 minutes waiting time) ^B
Administer 2nd syringe and “wait ten minutes” (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer syringe plus 10 minutes waiting time) ^B
Administer 3rd syringe and wait ten minutes (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer syringe plus 10 minutes waiting time) ^B

B. Internal CDCR documents indicate that the infusion time for pentobarbital is 30 minutes for each syringe. Each tray consists of 5 syringes of the chemical plus a saline flush. Even if the saline syringe took no time to administer, each dose of pentobarbital would require 150 minutes to administer. Similarly, amobarbital would also take 150 minutes for each 7.5 gram dose. According to prescribing information from the manufacturer, the rate for IV injection should not exceed 50 mg per minute. See Valeant Prescribing Information for Amytal Sodium, available at http://www.valeant.com/Portals/25/Pdf/PI/Amytal_Sodium_PI.pdf. This would mean 20 minutes per 1000 mg (=1 gram), or 150 minutes per 7.5 grams. The regulations provide for a ten-minute countdown to begin at the start of each of the first three doses and before the next dose is administered. See Proposed § 3349.7(c)(3), (9). But administration will take more than 10 minutes.

C. The five-minute estimate to establish intravenous access at the back-up alternate location is very conservative. The execution team of Romell Broom failed to establish intravenous access over a 95 minute to two-hour period. *State v. Broom*, 146 Ohio St. 3d 60, 61-63 (Ohio 2016).

D. Conservatively estimates 1 minute to prepare and verify each syringe.

E. As described in one of the public comments submitted to CDCR about its regulations, Professor Craig Stevens, a professor of pharmacology, explained that preparation of the chemicals is a complex procedure. Preparation of amobarbital, for example, would require preparation of 15 vials for each 7.5 gram dose because the drug is only available in 0.5 gram vials. Conservatively assuming each vial would require only 1 minute to mix, each dose would require at least 15 minutes to prepare.

F. For the first three doses, the proposed regulations require the “ten minute countdown [to begin] at the start of the infusion of syringe #1.” See Proposed § 3349.7(c)(3). For the fourth and fifth doses, the proposed regulations require a ten minute waiting period after the administration of each syringe and before the administration of the next syringe. See Proposed § 3349.7(d)(5) (“The Warden shall direct the Infusion Sub-Team to administer a syringe containing 1.5 grams of the Lethal Injection Chemical in the alternate backup intravenous line, and wait for ten minutes. If the inmate’s death has not been declared by the end of that ten-minute period, the San Quentin Warden shall direct the Infusion Sub-Team to administer another syringe containing 1.5 grams of Lethal Injection Chemical in the alternate backup intravenous line and wait ten minutes.”).

Administer 4th syringe and wait ten minutes (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer syringe plus 10 minutes waiting time) ^B
Administer 5th syringe and wait ten minutes (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer syringe plus 10 minutes waiting time) ^B
Preparation of 5 syringes for fifth dose & verification of proper preparation (§ 3349.7(d)(5))	5 minutes (estimate) ^D	at least 15 minutes ^E
Administer 1st syringe and “wait for ten minutes” (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes ^F	40 minutes (30 minutes to administer each syringe with 1.5 gram of drug plus 10 minutes waiting time) ^B
Administer 2nd syringe and “wait ten minutes” (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer each syringe with 1.5 gram of drug plus 10 minutes waiting time) ^B
Administer 3rd syringe and wait ten minutes (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer each syringe with 1.5 gram of drug plus 10 minutes waiting time) ^B
Administer 4th syringe and wait ten minutes (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer each syringe with 1.5 gram of drug plus 10 minutes waiting time) ^B
Administer 5th syringe and wait ten minutes (§ 3349.7(d)(5))	Time to administer syringe plus 10 minutes	40 minutes (30 minutes to administer each syringe with 1.5 gram of drug plus 10 minutes waiting time) ^B
Execution stopped if death has not been declared		
TOTAL TIME	At least 145 minutes	At least 885 minutes

89. *Reliability of drugs.* CDCR’s protocol reflects a number of significant policy choices that implicate the reliability of the drugs used in an execution. These choices reduce reliability but increase agency discretion and convenience. CDCR’s protocol thus reflects either a failure to recognize the importance of addressing reliability, or a conscious decision to prioritize agency discretion and convenience over drug reliability.

90. First, CDCR has designated four drugs, from which the San Quentin Warden may select one for use in an execution. *See* § 3349.5(f)(1)(A). “CDCR determined that it is necessary to provide alternative chemical options to contend with potential issues complicated by the shifting availability of the chemicals” and drafted the provision to preserve the San Quentin Warden’s “discretion” in making a selection from among the four drugs. ISOR at 2, 25.

91. But two of the four drugs in the protocol—Amobarbital and Secobarbital—have never before been used in an execution. Bob Egelko, *Critics Question California's Single-Drug Execution Plan*, SFGATE (Jan. 21, 2016), <http://www.sfgate.com/news/article/Critics-question-California-s-single-drug-6775207.php>. In selecting these drugs, CDCR pointed to no evidence that these drugs had ever been used in another execution, let alone reliably so.

92. The choice to include Amobarbital and Secobarbital therefore reflects a decision to prioritize administrative convenience in procuring the drugs over reliability.

93. Second, CDCR's protocol does not include any requirement that drugs be tested to ensure their reliability, or specify protocols to ensure that drugs are procured from lawful, reliable sources.

94. CDCR contemplates procuring the drugs from a compounding pharmacy. *See* ISOR at 10 (“If for any reason CDCR is unable to utilize CDCR or other state resources to compound the Lethal Injection Chemical, CDCR is permitted to contract with a private non-state compound pharmacy.”).

95. As discussed above, however, compounded drugs pose significant risks of contamination, sub-potency, and adulteration, as well as the heightened danger that a compounded drug is simply not the drug it is represented to be.

96. CDCR's protocol contains no requirement that the drugs it procures be tested for purity, potency, quality, or sterility.

97. The inclusion of testing requirements increases the administrative burden, while the absence of any testing requirements increases administrative convenience. CDCR's protocol thus reflects a decision to prioritize administrative convenience over reliability of the drugs used in an execution.

98. In addition, the regulations contain no protocols for acquiring execution drugs, vetting the reliability of the sources from which they are procured, or ensuring that they are lawfully procured.

99. To be sure, the proposed regulations require the warden to “ensure that the Lethal Injection Chemical is obtained from a licensed pharmaceutical facility or distributor.”

1 § 3394.5(f)(1)(D). The ISOR states that such a provision “is necessary to ensure that procurement of
2 the Lethal Injection Chemical shall comply with all state and federal laws regarding controlled
3 substances.” ISOR at 25. While the provision may be necessary, it is hardly sufficient.

4 100. The mere fact that a facility may be licensed for one purpose does not ensure that the
5 drug it sells to CDCR may be used in an execution consistent with all state and federal laws. For
6 example, an entity may be licensed by the California State Board of Pharmacy, *see* Bus. & Prof. Code §
7 4000 *et seq.*, but it would still violate federal drug laws if that entity imported a Schedule III controlled
8 substance, unless the entity is registered (or exempt from registration), and has filed an import
9 declaration with the DEA. *See* 21 C.F.R. § 1312.11(b); *see also* 21 C.F.R. § 207.40(b) (“No drug may
10 be imported or offered for import into the United States unless it is listed as required in subpart C of
11 this part and manufactured, prepared, propagated, compounded, or processed at a registered foreign
12 drug establishment”). Further, “a separate permit or declaration must be obtained for each consignment
13 of controlled substances to be imported.” 21 C.F.R. §1312.11(c). Unlawful importation, distribution,
14 or dispensation of the drug is a criminal offense. *See* 21 U.S.C. §§ 841, 952.

15 101. Moreover, acquisition from a licensed facility does not ensure reliability. For example,
16 a compounding pharmacy that provided lethal injection drugs to Missouri was licensed at the time it
17 sold execution drugs, but subsequent investigations by state and federal authorities revealed over a
18 thousand violations of state pharmacy guidelines and questionable potency, as well as problematic
19 disinfecting and sterilization practices. *See* McDaniel, *supra*. The pharmacy has been fined and its
20 license placed on probation. *Id.*

21 102. The inclusion of more detailed procedures to vet drug sources and ensure they are
22 lawfully procured would increase the administrative burden on CDCR, while the skeletal requirement
23 to procure drugs from a “licensed pharmaceutical facility or distributor” (§ 3394.5(f)(1)(D)) provides
24 for relative administrative convenience. In this regard, too, CDCR’s protocol reflects a decision to
25 prioritize administrative convenience over reliability of the drugs used in an execution.
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2 103. *Transparency of process.* CDCR’s protocol reflects a number of significant policy
3 choices that cloak the process in secrecy. These choices reduce transparency but increase agency
4 discretion and convenience. CDCR’s protocol thus reflects either a failure to recognize the importance
5 of addressing transparency, or a conscious decision to prioritize secrecy.

6 104. For instance, the protocol offers no mechanism for informing the inmate, let alone the
7 public, of the source of the drug—information that may be critical for the inmate and the public to
8 evaluate the drug’s reliability.

9 105. Nor does the protocol permit the witnesses to the execution to view the preparation of
10 the lethal injection drugs prior to an execution. *Compare* §3349.6(h) (execution drugs prepared three
11 hours before execution), *with* § 3349.6(i)(1) (curtain on viewing window opened and witnesses
12 escorted into witness rooms two hours before execution). According to CDCR’s own records, its lethal
13 injection facility suffers from “overall cleanliness” problems. *See* CDCR Lethal Injection Facility
14 Sanitation Inspection Checklist at 1 (June 8, 2015). Given high-profile botched executions in other
15 states, the importance of sterile drugs to a reliable execution process, and the documented uncleanliness
16 of CDCR’s lethal injection facility, the preparation of the chemicals are an important stage in an
17 execution that would assist the public in understanding the overall process.

18 106. CDCR’s protocol reflects the policy judgment to skew in favor of secrecy over
19 transparency.

20 * * *

21 107. Due to the Legislature’s failure to resolve or provide any guidance on fundamental
22 policy issues, CDCR has made important choices about the risk of pain to an inmate, the overall
23 duration of the execution process, the reliability of the drugs procured, and the amount of transparency
24 in the process.

25 108. Some of these choices reflect CDCR’s decision about how to resolve potentially
26 competing policy priorities: agency discretion or convenience on the one hand, and a humane, swift,
27

1 reliable, and transparent process on the other. CDCR has consistently prioritized the former over the
2 latter.

3 109. Other choices appear somewhat haphazard and internally inconsistent, and may reflect
4 CDCR's failure to recognize the need to address certain fundamental policy issues.

5 110. In other words, Penal Code § 3604 removes difficult, fundamental policy decisions from
6 the political-legislative process and has resulted in some of those issues not being consciously
7 evaluated at all.

8
9 **E. CDCR Lacks Administrative Expertise in the Subject Matter**

10 111. CDCR's latest protocol also reflects that it lacks basic expertise in the subject matter.

11 112. For example, CDCR states that in considering what drugs to include in the protocol, it
12 considered a litany of drugs. ISOR at 3-6. While this gives the appearance of the agency having
13 conducted exhaustive research, the listed drugs actually underscore CDCR's profound lack of medical
14 knowledge. CDCR states that it considered 19 opioids for potential inclusion in the protocol, but 7 of
15 the 19 (37%) are, in fact, *not opioids at all*; 3 are for veterinary use only; and 1 does not even appear in
16 the FDA Register, which is the listing of all drugs in commercial distribution in the United States.

17 113. To take another example, the regulations require the execution team to identify sites on
18 the inmate's body where the intravenous catheter will be inserted. §3349.5(f)(6). The regulations state
19 that one of the designated locations may be "a percutaneous portal vein access." *Id.* This is not a
20 recognized medical term.

1 **FIRST CAUSE OF ACTION**
2 **(VIOLATION OF CALIFORNIA CONSTITUTION, ARTICLE III, § 3)**
3 **(SEPARATION OF POWERS)**

4 114. Plaintiffs-Petitioners incorporate by reference all of the above allegations as though
5 fully set forth herein.

6 115. The Separation of Powers Clause in California's Constitution, Article III, § 3, provides:
7 "The powers of state government are legislative, executive, and judicial. Persons charged with the
8 exercise of one power may not exercise either of the others except as permitted by this Constitution."

9 116. This constitutional provision prohibits delegation to non-elected executive branch
10 officials the core duty of the Legislature, as the most representative organ of government, to settle
11 controverted, fundamental issues of policy.

12 117. The death penalty presents a number of society's most controversial issues.

13 118. Penal Code § 3604 delegates wholesale authority to non-elected decisionmakers at
14 CDCR to fashion the state's protocols for conducting executions by lethal injection and lethal gas. In
15 doing so, the statute grants CDCR with complete discretion to decide fundamental issues of policy that
16 surround the controversial topic of implementation of the death penalty. These issues include questions
17 related to pain, speed, and the reliability of the execution process, as well as the appropriate level of
18 secrecy surrounding the process.

19 119. The statute's failure to address these fundamental policy issues has resulted in a
20 complete lack of ascertainable standards to contain and guide CDCR's exercise of delegated power to
21 fashion execution protocols.

22 120. As a result, the wholesale delegation to CDCR of a core legislative function violates the
23 Separation of Powers Clause in California's Constitution.

24 **SECOND CAUSE OF ACTION**
25 **TAXPAYER ACTION UNDER CODE CIV. PROC. § 526A TO PREVENT**
26 **ILLEGAL EXPENDITURE OF FUNDS**

27 121. Plaintiffs-Petitioners incorporate by reference all of the above allegations as though
28 fully set forth herein.

122. Defendants-Respondents are illegally expending public funds by performing their duties in violation of the statutory provisions described above.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs-Petitioners respectfully request that the Court:

1. Issue a declaration that Penal Code § 3604 violates the Separation of Powers Clause of the state Constitution and that any execution protocols issued thereunder are invalid.

2. Issue a writ of prohibitory mandate prohibiting Defendants-Respondents from developing, issuing, or implementing any execution protocol until enactment of a statute that addresses fundamental policy questions and provides adequate direction to CDCR regarding execution protocols.

3. Issue an injunction directing Defendants-Respondents to cease and desist from developing, issuing, or implememting any execution protocol until enactment of a statute that addresses fundamental policy questions and provides adequate direction to CDCR regarding execution protocols.

4. Order Defendants-Respondents to pay Plaintiffs-Petitioners' attorneys' fees and costs pursuant to Code Civ. Proc. § 1021.5 and other applicable statutes.

5. Grant Plaintiffs-Petitioners such further relief as the Court deems just and proper.

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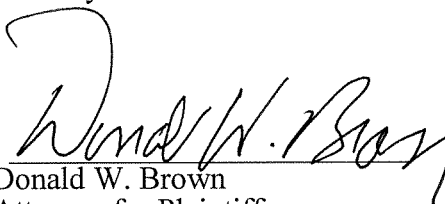
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1 DATED: November 15, 2016

Respectfully submitted,

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5 By: 
6 Linda Lye
7 Attorney for Plaintiffs

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9 By: 
10 Donald W. Brown
11 Attorney for Plaintiffs
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1
2 **VERIFICATION**

3 I, Abdi Soltani, declare and state that I am the Executive Director of Plaintiff the American
4 Civil Liberties Union of Northern California, Inc. ("ACLU"), and am authorized to make this
5 verification on behalf of ACLU. I have read this Verified Petition for Writ of Mandate and Complaint
6 for Declaratory and Injunctive Relief and affirm the facts contained therein are either true as of my own
7 knowledge or true on the basis of my information and belief.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is
9 true and correct.

10
11 DATED: 11/10/16



12
13 Abdi Soltani