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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

13 **MITCHELL SIMS; MICHAEL**
14 **MORALES; AMERICAN CIVIL**
15 **LIBERTIES UNION OF NORTHERN**
CALIFORNIA,
16 Plaintiffs-Petitioners,
17 v.
18 **SCOTT KERNAN, AS SECRETARY OF**
19 **THE CALIFORNIA DEPARTMENT OF**
20 **CORRECTIONS AND**
21 **REHABILITATION; CALIFORNIA**
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,
22 Defendants-Respondents.

Case No. RG16838951

**MEMORANDUM OF POINTS AND
AUTHORITIES SUPPORTING
RESPONDENTS' DEMURRER TO
VERIFIED PETITION FOR A WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

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INTRODUCTION

California law allows for execution of individuals sentenced to death by lethal gas or lethal injection. Penal Code section 3604, which has been substantively identical since at least 2005, specifically requires the California Department of Corrections and Rehabilitation (“the Department”) to develop the necessary standards to carry out such executions. The Department is thus charged with developing the necessary protocols for executing duly-sentenced individuals. A series of lawsuits have prevented the Department from carrying out an execution since 2006.

Petitioners claim that the delegation of authority to the Department to develop standards for executions under Penal Code section 3604 is unconstitutional in that it violates separation of powers. Specifically, they claim that questions regarding pain, speed, reliability, and secrecy of the lethal injection process are “fundamental policy questions” that the state Constitution requires the Legislature to decide, and cannot delegate to the Department.

The petition fails as a matter for law, for three reasons. First, petitioners have previously challenged the Department’s authority to promulgate standards for execution, and their new claims here are barred by res judicata. Second, even if their claims were not barred they would fail. The Department has a duty under section 3604 to develop a lethal injection protocol, and thus petitioners cannot establish that the Department is failing to perform a ministerial responsibility, as is required for writ relief. Finally, petitioners cannot establish a violation of the California Constitution’s separation of powers clause because as a matter of law they cannot demonstrate an improper delegation of legislative authority. Delegation of authority to the Department to develop lethal injection protocols is well within established parameters. The Legislature’s determination of the fundamental policy decision as required under the California Constitution made appropriate delegation of the creation of detailed standards to the Department, particularly given the Department’s longstanding responsibility for carrying out criminal sentences, its expertise in correctional issues generally, and in the implementation of the death penalty specifically. For these reasons, the Court should dismiss the petition in its entirety, and deny petitioners’ request for relief.

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BACKGROUND

I. ALLEGATIONS OF THE COMPLAINT.

Petitioners are two prison inmates who have been convicted of murder and sentenced to death under state law, and an organization asserting claims based on its members' taxpayer standing. (Pet. ¶¶ 11-13.) They filed a petition for a writ of mandate and a request for declaratory relief, challenging the authority of respondents, the Department and its Secretary, Scott Kernan, to develop protocols to implement the death penalty. (*Id.* ¶ 8.)

Petitioners allege that the Department "recently finalized a new protocol" for conducting executions by lethal injection. (Ver. Pet. for Writ of Mandate and Compl. for Decl. Relief (Pet.) ¶ 7.) They do not challenge the substance of this new protocol; rather, they allege that the Department lacked authority to promulgate the new protocol. Specifically, they allege that the Legislature impermissibly delegated to the Department the authority to make what they deem "fundamental policy choices" regarding executions under state law. (*Id.* ¶ 8) These purported "fundamental" choices include issues regarding pain, speed, reliability, and secrecy of the lethal injection process. (*Id.* ¶ 17.) Petitioners allege that the California Constitution requires the Legislature to make these purported "fundamental policy choices," and to provide guidance and direction to the agency tasked with developing regulations. (*Id.* ¶ 8.) And they conclude that Penal Code section 3604 is unconstitutional because it "delegates to unelected agency officials these solemn legislative duties." (*Id.* ¶ 8.) In short, petitioners claim that section 3604 violates separation of powers (Cal. Const., art. III, § 3) by delegating to the Department the authority to develop execution protocols. (Pet. at p. 26.)

Petitioners seek a declaration that section 3604 violates separation of powers and thus that any execution protocols issued under it are invalid; a writ of mandate precluding the Department from "developing, issuing, or implementing" any execution protocol; and an injunction directing respondents to stop developing any execution protocol. (Pet. at p. 27.) They also seek attorneys' fees and costs. (*Ibid.*)

1 **II. PRIOR LITIGATION BY PETITIONERS SIMS AND MORALES.**

2 Petitioners Sims and Morales have previously filed other challenges to the Department's
3 actions in developing or implementing an execution protocol under Penal Code section 3604. In
4 2006, they filed *Morales v. California Department of Corrections and Rehabilitation*, No. CV
5 061436 (Super. Ct., Cty. of Marin), in which they alleged that the Department violated state law
6 in preparing the then-applicable execution protocol, Operational Procedure 770, which was
7 adopted March 6, 2006. (Req. for Jud. Not. Exh. 1 at p. 2; *Morales v. Cal. Dep't of Corrs. &*
8 *Rehab.* (2008) 168 Cal.App.4th 729.) There, petitioners alleged that the Department
9 "promulgated a series of regulations each of which purported to establish standards and
10 regulations governing executions, as required by Penal Code section 3604." (Req. for Jud. Not. at
11 Exh. 1 p. 2 ¶ 2.) They further claimed that the Department did not comply with the
12 Administrative Procedure Act, Government Code §§ 11340, *et seq.* (*Id.* ¶ 4.) Petitioners' 2006
13 action allegedly sought "to ensure that the procedures for execution adopted by Defendants
14 comply with California law, including the APA." (*Id.* at p. 3 ¶ 7.) Petitioners prevailed, and
15 obtained a court decision on the merits, holding that the lethal injection protocol was subject to
16 the APA. (*Morales v. Cal. Dep't of Corrs. & Rehab.*, *supra*, 168 Cal.App.4th at p. 741.) This
17 judgment was affirmed on appeal. (*Ibid.*) The 2006 petition did not challenge the validity or
18 constitutionality of Penal Code section 3604, specifically that the Legislature improperly
19 delegated authority to the Department to do so, and did not allege that the Department lacked
20 authority to establish an execution protocol under Penal Code section 3604. (*See generally* Exh.
21 1 to Req. for Jud. Not.; *Morales v. Cal. Dep't of Corrs. & Rehab.*, *supra*, 168 Cal.App.4th at p.
22 737.)¹

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24
25
26 ¹ In 2010, petitioner Sims again filed suit against the Department after the Department
27 submitted Operational Procedure 770 through the Administrative Procedure Act. (Req. for Jud.
28 Not. Exh. 2; *Sims v. Dep't of Corrs. & Rehab.* (2013) 216 Cal.App.4th 1059, 1066.) The trial
court invalidated the regulations, finding that the Department did not comply with the APA.
(*Sims v. Dep't of Corrs. & Rehab.*, *supra*, 216 Cal.App.4th at p. 1066.)

1 **III. STATUTORY BACKGROUND.**

2 Penal Code section 3604 provides that “The punishment of death shall be inflicted by the
3 administration of a lethal gas or by an intravenous injection of a substance or substances in a
4 lethal quantity sufficient to cause death,” which shall take place “by standards established under
5 the direction of the Department of Corrections.” (Pen. Code, § 3604.)

6 The federal and state constitution also bear on the claims asserted. The Eighth Amendment
7 bars imposition of “cruel and unusual punishments.” Likewise, under the California Constitution,
8 “Cruel or unusual punishment may not be inflicted.” (Cal. Const., art. I, § 17.) The California
9 Constitution also provides that all statutes in effect on February 17, 1972 “requiring, authorizing,
10 imposing, or relating to the death penalty are in full force and effect,” and that “[t]he death
11 penalty provided under those statutes shall not be deemed to be, or to constitute, the infliction of
12 cruel and unusual punishments within the meaning of Article 1, Section 6,” or otherwise “be
13 deemed to contravene any other provision” of the state Constitution.” (*Id.*, art. I, § 27.)

14 **LEGAL STANDARD**

15 A demurrer lies when a complaint does not state facts sufficient to constitute a cause of
16 action. (Code of Civ. Proc., § 430.10, subd. (e).) The demurrer may be taken to the entire
17 complaint or to any of the causes of action stated in the complaint. (*Id.* at § 430.50.) Further, a
18 demurrer may be taken when the objection to plaintiff’s complaint appears on the face of the
19 complaint or from any matter of which the court may take judicial notice. (*Id.* at § 430.30.)

20 “A demurrer tests the sufficiency of the complaint as a matter of law.” (*Osornio v.*
21 *Weingarten* (2004) 124 Cal.App.4th 304, 316.) In ruling on a demurrer, a trial court gives the
22 complaint “a reasonable interpretation, and treats the demurrer as admitting all material facts
23 properly pleaded,” but “does not, however, assume the truth of contentions, deductions or
24 conclusions of law.” (*San Mateo Union High School District v. Cnty. of San Mateo* (2013) 213
25 Cal.App.4th 418, 425 [citation omitted].) Trial courts “may properly sustain a general demurrer
26 to a declaratory relief action without leave to amend when . . . the controversy can be determined
27 as a matter of law.” (*City of Fresno v. Cal. Highway Com’n* (1981) 118 Cal.App. 3d 687, 699-
28 700.)

1 This petition is governed by Code of Civil Procedure, section 1085.² A court can issue a
2 writ of mandate to a public agency or state officer “to compel the performance of an act which the
3 law specifically enjoins, as a duty resulting from an office, trust or station.” (Code Civ. Proc.,
4 § 1085.) The petitioner must also show that there is no “plain, speedy, and adequate remedy, in
5 the ordinary course of law.” (*Id.*, § 1086.) “Where an adequate remedy at law exists, the matter
6 of writ relief is within the discretion of the court.” (*Harris Transportation Co. v. Air Resources*
7 *Bd.* (1995) 32 Cal.App.4th 1472, 1481.) The writ will not lie “to control discretion conferred
8 upon a public officer or agency.” (*People ex rel. Younger v. Cnty. of El Dorado* (1971) 5 Cal.3d
9 480, 491.)³

10 ARGUMENT

11 I. PETITIONERS’ SEPARATION OF POWERS CHALLENGE TO PENAL CODE SECTION 12 3604 IS BARRED BY RES JUDICATA.

13 Petitioners Sims and Morales have previously challenged the Department’s actions in
14 developing or implementing an execution protocol under Penal Code section 3604. In 2006, they
15 filed *Morales v. California Department of Corrections and Rehabilitation*, No. CV 061436
16 (Super. Ct., Cty. of Marin). There, they alleged that the Department violated state law in
17 preparing the then-applicable execution protocol, Operational Procedure 770, which was adopted
18 March 6, 2006. (Req. for Jud. Not. Exh. 1 at p. 2; *Morales v. Cal. Dep’t of Corrs. & Rehab.*
19 (2008) 168 Cal.App.4th 729.) Specifically, petitioners alleged that the Department did not
20 comply with the Administrative Procedure Act, Government Code §§ 11340, et seq. (Req. for
21 Jud. Not. Exh. 1.) Petitioners’ 2006 action allegedly sought “to ensure that the procedures for

22 ² Petitioners do not specify whether they seek a so-called traditional writ under section
23 1085, or an administrative writ of mandamus under Code of Civil Procedure, section 1094.5. But
24 an agency’s adoption of rules, regulations, standards, guidelines, or policies is a quasi-legislative
25 act, reviewable by traditional, not administrative, mandamus under section 1085. (*Western States*
Petroleum Assoc. v. Super. Court of L.A. Cnty. (1995) 9 Cal.4th 559, 567; *Pacific Legal*
Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 168-69.)

26 ³ Although petitioners also framed their complaint as one for declaratory and injunctive
27 relief, “an action for declaratory relief is not appropriate to review an administrative decision.”
28 (*State of Cal. v. Superior Court* (1974) 12 Cal. 3d 237, 249; *City of Pasadena v. Cohen* (2014)
228 Cal. App. 4th 1461, 1467 [“Declaratory relief also cannot be joined with a writ of mandate
reviewing an administrative determination.”].)

1 execution adopted by Defendants comply with California law, including the APA.” (*Id.* at p. 3.)
2 Petitioners prevailed, and obtained a court decision on the merits, holding that the lethal injection
3 protocol was subject to the APA. (*Morales v. Cal. Dep’t of Corrs. & Rehab.*, *supra*, 168
4 Cal.App.4th at p. 741.) This judgment was affirmed on appeal. (*Ibid.*) The 2006 petition did not
5 allege that the Department lacked authority to establish the execution protocol under Penal Code
6 section 3604, or that the Legislature improperly delegated authority to the Department to do so.
7 (*See generally* Req. for Jud. Not., Exh. 1.) This failure bars petitioners’ legal claims in this case.

8 Res judicata prevents relitigation of the same cause of action in multiple suits between the
9 same parties or those in privity with the parties. (*Mycogen Corp. v. Monsanto Co.* (2002) 28
10 Cal.4th 888, 897.) “Under this doctrine, all claims based on the same cause of action must be
11 decided in a single suit; if not brought initially, they may not be raised at a later date.” (*Ibid.*)
12 The res judicata doctrine “seeks to curtail multiple litigation causing vexation and expense to the
13 parties and wasted effort and expense in *judicial administration*.” (*Ibid.* [citation omitted].)
14 Three conditions must be satisfied for the res judicata bar to apply. First, the claim at issue must
15 be identical to one litigated in the prior proceeding. (*Boeken v. Philip Morris USA, Inc.* (2010) 48
16 Cal.4th 788, 797.) Second, the prior proceeding must have resulted in a final judgment on the
17 merits. (*Ibid.*) Third, the party against whom res judicata is being asserted must have been a
18 party or in privity with a party to the previous proceeding. (*Ibid.*)

19 Here, there is no dispute that petitioners are the same parties as the ones who brought the
20 2006 petition, *Morales v. California Department of Corrections and Rehabilitation*. Although
21 petitioner American Civil Liberties Union (ACLU) was not a party to the previous action, res
22 judicata bars not only parties, but also those in privity with the parties to the previous action, and
23 a “party is adequately represented for purposes of the privity rule ‘if his or her interests are so
24 similar to a party’s interest that the latter was the former’s virtual representative in the earlier
25 action’.” (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass’n* (1998) 60
26 Cal.App.4th 1053, 1070.). A review of the 2006 litigation, in conjunction with a review of the
27 current litigation, makes it evident that the interests of both the ACLU and Sims and Morales are
28 the same—both were challenging the Department’s execution protocols and had an interest in

1 having them declared invalid in some way. Similarly, there is no dispute that the prior
2 proceeding resulted in a final judgment on the merits: petitioners obtained a judgment in their
3 favor, which was affirmed on appeal. (*Morales v. Cal. Dep't of Corrs. & Rehab.*, *supra*, 168
4 Cal.App.4th at p. 741.) Thus, the sole issue is whether the same claim was at issue in both
5 actions.

6 For purposes of the claim preclusion aspect of res judicata, courts apply the “primary rights
7 theory.” (*Boeken v. Philip Morris USA, Inc.*, *supra*, 48 Cal.4th at p. 797.) The key question is
8 the primary right asserted by the petitioners, irrespective of the specific remedy sought or the
9 legal theory advanced in support. (*Id.* at p. 798.) The cause of action is based on the alleged
10 harm suffered—“[e]ven where there are multiple legal theories upon which recovery might be
11 predicated, one injury gives rise to only one claim for relief.” (*Ibid.*) “If the same primary right
12 is involved in two actions, judgment in the first bars consideration not only of all matters actually
13 raised in the first suit but also all matters which *could have been raised.*” (*Eichman v. Fotomat*
14 *Corp.* (1983) 147 Cal. App. 3d 1170, 1175 [emphasis added]; *Staniforth v. Judges' Retirement*
15 *System* (2014) 226 Cal.App.4th 978, 987 n.3 [“The bar/merger aspect of res judicata applies even
16 if [plaintiffs] did not *actually* articulate every legal theory available to them [in the prior
17 action].”])

18 The Court’s decision in *Boeken* is highly instructive. There, the plaintiff filed a common
19 law action for loss of consortium, alleging that defendant tobacco company’s “wrongful conduct
20 ‘permanently deprived’ her of her husband’s companionship and affection.” (*Boeken v. Philip*
21 *Morris USA, Inc.*, *supra*, 48 Cal.4th at p. 798.) The “*primary right* was the right not to be
22 wrongfully deprived of spousal companionship and affection and the *corresponding duty* was the
23 duty not to wrongfully deprive a person of spousal companionship and affection.” (*Ibid.*) This
24 first action barred a later action by the same plaintiff based on a new legal theory of statutory
25 wrongful death. (*Ibid.*)

26 Consistent with the analysis in *Boeken*, the primary right in the 2006 petition and this case
27 is the same; namely the petitioners’ purported right not to be subject to a lethal injection protocol
28 that does not comport with state law. The corresponding duty is the Department’s responsibility

1 not to subject the petitioners to a lethal injection protocol that does not comport with state law.
2 That the 2006 petition alleged the then-applicable protocol was non-compliant with the APA,
3 whereas the instant one alleges that the Department lacks the authority to implement the protocol
4 based on alleged violation of separation of powers due to an improper delegation of Legislative
5 authority, is of no moment. Both cases involve the same primary right and corresponding legal
6 duty, namely the petitioners' right to not be subject to a lethal injection protocol that was in some
7 way improper under state law. Because the separation of powers claim could have been and was
8 not raised in *Morales*, res judicata bars petitioners from raising these claims here.

9 **II. PETITIONERS ARE NOT ENTITLED TO WRIT RELIEF BECAUSE THE DEPARTMENT**
10 **HAS A DUTY TO DEVELOP EXECUTION PROTOCOLS.**

11 Alternatively, the Court should deny the petition because petitioners cannot meet the
12 prerequisites for writ or declaratory relief.

13 Under Code of Civil Procedure, section 1085, this Court can issue a writ of mandate "to
14 compel the performance of an act which the law specifically enjoins, as a duty resulting from an
15 office, trust or station." To obtain writ relief, petitioners must establish "(1) a clear, present and
16 usually ministerial duty on the part of the respondent," and "(2) a clear, present and beneficial
17 right in the petitioner to the performance of that duty." (*City of Dinuba v. Cnty. of Tulare* (2007)
18 41 Cal.4th 859, 868.) A ministerial duty is an act that must be performed in a prescribed manner
19 according to the mandate of legal authority without the exercise of discretion, judgment "or
20 opinion concerning such act's propriety or impropriety." (*Kavanaugh v. West Sonoma Cnty.*
21 *Union High School Dist.* (2003) 29 Cal.4th 911, 916.) "Where a statute or ordinance clearly
22 defines the specific duties or course of conduct that a governing body must take, that course of
23 conduct becomes mandatory and eliminates any element of discretion." (*Rodriguez v. Solis*
24 (1991) 1 Cal.App.4th 495, 504-05.)

25 Here, petitioners cannot demonstrate that the Department has a clear and present ministerial
26 duty that it has failed to perform. Indeed, section 3604 unequivocally imposes a duty on the
27 Department to establish standards to implement the death penalty, the precise action that
28 petitioners are seeking to *prevent* the Department from undertaking. (*Redwood Coast Watersheds*

1 *Alliance v. State Bd. of Forestry and Fire Protection* (1999) 70 Cal.App.4th 962, 970 [noting that
2 administrative board “has a mandatory or ministerial duty to adopt [certain] regulations, while it
3 has a discretionary duty to determine the content of the regulations as long as the content is
4 consistent with the objectives of the [governing statute]”). In situations where, as here, a statute
5 requires an administrative agency to take certain action, traditional mandate may be used to
6 compel the agency’s action, but it may not be used to control *the manner* in which that action is
7 taken. Much less can it be used to compel agency *inaction* where a statute mandates such action.
8 (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 500 “[If] the [statute] requires defendants to
9 promulgate administrative regulations and if plaintiff were seeking to compel them to do so, then
10 a petition for a writ of mandate would be an appropriate form of action.”).)

11 In fact, the Superior Court, Sacramento County, has previously ruled that the Department
12 has a mandatory duty under section 3604. In *Winchell v. Beard*, No. 34-2014-80001968 (Sac.
13 Sup. Ct.), two petitioners sought a writ of mandate directing the Department to promulgate
14 regulations to administer the death penalty. (Req. Jud. Not. Exh. 3.) In overruling the
15 respondents’ demurrer, the court ruled “Penal Code section 3604, subdivision (a) imposes a
16 mandatory duty upon CDCR [California Department of Corrections and Rehabilitation] to
17 establish ‘standards’ to effectuate either of the two methods prescribed to execute condemned
18 prisoners.” (*Id.* at p. 5.)

19 **III. THE SEPARATION OF POWERS CLAIM FAILS AS A MATTER OF LAW.**

20 As a matter of law, petitioners cannot allege a violation of the separation of powers under
21 the California Constitution because the delegation to the Department to implement standards
22 consistent with Penal Code section 3604 was well within the Legislature’s authority.

23 The California Supreme Court has noted that legislative bodies have neither the resources
24 nor the expertise to deal adequately with every question potentially within their jurisdiction.
25 (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 383.) Thus, the separation of powers doctrine reflects
26 due deference for the Legislature’s decision to delegate to an administrative agency the authority
27 to implement and administer regulations. This deference is also based on the practicalities of
28 government, and the fact that no legislative body can reasonably address every contingency

1 within a particular area of legislation. (*Ibid.*) The California Supreme Court observed that,
2 “[o]nly in the event of a total abdication of [the legislative] power, through failure either to render
3 basic policy decisions or assure that they are implemented as made, will this court intrude on
4 legislative enactment because it is an ‘unlawful delegation.’” (*Id.* at 384.)

5 “The Legislature may, after declaring a policy and fixing a primary standard, confer upon
6 executive or administrative officers the ‘power to fill up the details’ by prescribing administrative
7 rules and regulations to promote the purposes of the legislation and to carry it into effect.”
8 (*Kugler v. Yocum, supra*, 69 Cal.2d at p. 376 [citation omitted].) “The Legislature must make the
9 fundamental policy determinations, but after declaring the legislative goals and establishing a
10 yardstick guiding the administrator, it may authorize the administrator to adopt rules and
11 regulations to promote the purposes of the legislation and to carry it into effect.” (*People v.*
12 *Wright* (1982) 30 Cal.3d 705, 713.) While the Legislature’s purpose is “determination and
13 formulation of the legislative policy . . . attainment of the ends, including how and by what means
14 they are to be achieved, may constitutionally be left in the hands of others.” (*Kugler v. Yocum,*
15 *supra*, 69 Cal. 2d at p. 376 [citation omitted].) That is precisely what section 3604 does.

16 The Legislature made the fundamental policy decision to establish the death penalty in
17 1941, which was reaffirmed by the people of California in 1972. In 1941 the Legislature adopted
18 a statutory framework of primary standards governing the execution of the death penalty
19 (including section 3604) providing that the death penalty would be accomplished by lethal gas.
20 The Legislature later amended section 3604, providing for administration of the death penalty
21 through lethal injection by standards established by the Department. Consistent with the clear
22 policy determinations and primary standards delineated by section 3604, specifically that “(a) The
23 punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous
24 injection of a substance or substances in a lethal quantity sufficient to cause death, by standards
25 established under the direction of the Department of Corrections[],” the Legislature appropriately
26 delegated to the Department the “...task of prescribing administrative rules and regulations to
27 promote the purposes of the legislation and carry it into effect.” (Pen. Code § 3604; *People v.*
28 *Wright* (1982) 30 Cal.3d 705, 713.)

1 Petitioners contend that the Legislature overstepped its boundaries by delegating what they
2 deem to be the “fundamental policy questions” to the Department, specifically singling out
3 questions regarding pain, speed, reliability, and secrecy of the execution process. (Pet. at 2 ¶ 4.)
4 Relying on *Carson Mobilehome Park Owners' Association v. City of Carson* (1983) 35 Cal.3d
5 184, they contend section 3604 does not provide adequate direction to the Department for
6 developing execution protocols. (Pet. at 1 ¶ 3.) *Carson* did not involve a statute by the state
7 Legislature, and actually held that a city ordinance directing that rent increases be “just, fair, and
8 reasonable,” did not improperly delegate legislative power. (*Carson Mobilehome Park Owners'*
9 *Association v. City of Carson, supra*, 35 Cal.3d at pp. 190-91.) Ultimately, there is no authority
10 that decisions regarding the specific issues petitioners single out must be made by the Legislature.
11 (*Cf. Sturgeon v. Cnty. of Los Angeles* (2008) 167 Cal.App.4th 630 [holding that, in light of
12 constitutional provision that the Legislature must set judicial compensation, this duty could not be
13 delegated].) As noted above, the Legislature properly set forth a policy and standards, and then
14 conferred on an administrative agency “the power to fill up the details” through administrative
15 regulations. (*Kugler v. Yocum, supra*, 69 Cal.2d at p. 376.) The Legislature has already
16 performed its essential legislative function in making the “determination and formulation of the
17 legislative policy.” (*Kugler v. Yocum, supra*, 69 Cal.2d at p. 306 [quoting *First Industrial Loan*
18 *Co. v. Daugherty* (1945) 26 Cal.2d 545, 549]; Penal Code section 3600 et. seq.) “The doctrine
19 prohibiting delegations of legislative power does not invalidate reasonable grants of power to an
20 administrative agency, when suitable safeguards are established to guide the power’s use and to
21 protect against misuse.” (*People v. Wright, supra*, 30 Cal.3d at p. 712.) In assessing whether a
22 legislative grant of authority provides adequate standards, the “standards for administrative
23 application of a statute need not be expressly set forth; they may be implied by the statutory
24 purpose.” (*Id.* at p. 713.) Penal Code section 3604 is part of a greater statutory scheme that
25 provides specific direction and limits discretion.

26 Petitioners simply cannot show that section 3604 “totally abdicates” the Legislature’s
27 power, (*Kugler v. Yocum, supra*, 69 Cal.2d at p. 384), and thus their claim fails.
28

1 **IV. PETITIONERS ARE NOT ENTITLED TO RELIEF UNDER THEIR PUTATIVE CAUSE OF**
2 **ACTION UNDER TAXPAYER STANDING.**

3 Petitioners purport to bring a second cause of action, under Code of Civil Procedure section
4 526. (Pet. at pp. 26-27.) This claim also fails.

5 Initially, taxpayer standing does not create a cause of action, but merely provides a vehicle
6 for a party to assert standing to challenge government action. Section 526a confers standing to
7 assert a claim where it would otherwise be lacking. (*Taxpayers for Accountable School Bond*
8 *Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1032 [“[T]he primary
9 purpose of [section 526a] ... is to enable a large body of the citizenry to challenge governmental
10 action which would otherwise go unchallenged in the courts because of the standing
11 requirement”]; accord *Van Atta v. Scott* (1980) 27 Cal.4th 424, 447 [finding standing under
12 section 526a to bring action for violation of the due process clauses of the federal and California
13 constitutions].)

14 In any event, this putative claim also fails because petitioners cannot show that the
15 Department failed to comply with a mandatory duty. “Taxpayer suits are authorized only if the
16 government body has a duty to act and has refused to do so.” (*Daily Journal Corp. v. Cty. of Los*
17 *Angeles* (2009) 172 Cal.App.4th 1550, 1557.) Here, petitioners’ claim is instead that the
18 Department should *not* develop execution protocols despite the clear mandate under section 3604
19 that it do so. Petitioners also contend that respondents “are illegally expending public funds by
20 performing their duties in violation of the statutory provisions described above.” (Pet. at 27 ¶
21 122.) Although no statutory provisions are actually cited, this appears to refer to petitioners’
22 argument that the Department lacks authority to implement protocols. As explained above, this
23 argument fails.

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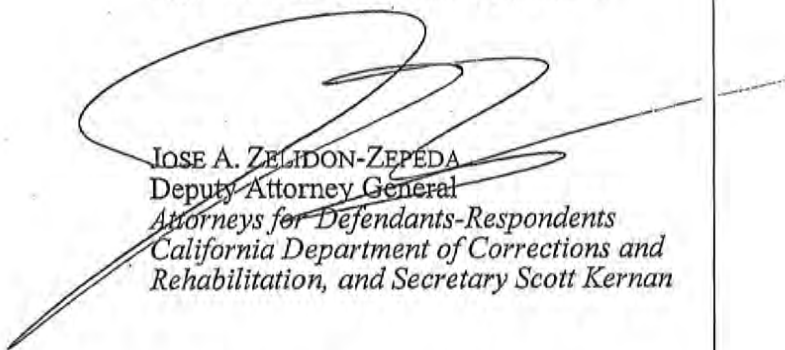
CONCLUSION

For these reasons, the Court should sustain the demurrer to all causes of action in the petitioners' Verified Petition for a Writ of Mandate and Complaint for Declaratory and Injunctive Relief, without leave to amend.

Dated: December 16, 2016

Respectfully Submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Sims, Mitchell, et al. v. Scott Kernan, et al.*

No.: **RG1688951**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 16, 2016, I served the attached

**MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING RESPONDENTS'
DEMURRER TO VERIFIED PETITION FOR A WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

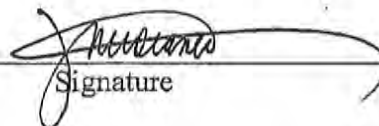
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 16, 2016, at San Francisco, California.

M. T. Otnes
Declarant


Signature