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SUPERIOR COURT OF THE STATE 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. RG16838951

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

Date: February 3, 2017
Time: 9:31 a.m.
Dept: 30
Judge: Honorable Brad Seligman
Trial Date: n/a
Action Filed: November 15, 2016

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**CASES**

## TABLE OF AUTHORITIES
**(continued)**

**Page**



**STATUTES**



**CONSTITUTIONAL PROVISIONS**

## INTRODUCTION

The opposition to the demurrer fails to demonstrate that petitioners have or can allege a viable claim for violation of the separation of powers clause of the California Constitution. As a matter of law, petitioners have failed to show that the Legislature improperly delegated fundamental policy questions to the Department of Corrections and Rehabilitation over the establishment of execution protocols. Petitioners quietly pivot away from their unlawful delegation claim and instead focus on problems with executions in other states. But such issues have their own remedy—the Eighth Amendment—and provide no support for a claim that the Legislature cannot constitutionally delegate to the Department specific questions about the manner in which lethal injection is carried out.

Petitioners also fail to overcome the bar of res judicata because the 2006 lawsuit filed by petitioners Sims and Morales seeking an execution protocol that "complies with California law" litigated the same primary right alleged in this case, and their claim in this case could have been alleged in the 2006 action. And, because petitioner American Civil Liberties Union is in privity with Sims and Morales in the 2006 case, it is also bound by res judicata. For these reasons, the Court should sustain the demurrer, without leave to amend.[1]

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[1] Although petitioners bring a second claim under taxpayer standing under Code of Civil Procedure, section 526a, (Compl. ¶¶ 121-122), this provision only confers standing to assert a claim where it would otherwise be lacking, and does not create a substantive cause of action. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1032.) In any event, petitioners do not dispute that their taxpayer claim piggybacks on their argument that section 3604 improperly delegated authority to the Department. (Opp. at 2, 15.) As explained in the demurrer and this reply, that argument fails. In other words, because the Legislature did not violate the separation of powers clause, petitioners cannot show that respondents are improperly spending funds in developing execution standards under section 3604.

## ARGUMENT

### I. PETITIONERS' SEPARATION OF POWERS CLAIM FAILS.

#### A. Petitioners Have Not and Cannot Show that the Legislature Improperly Abdicated Its Lawmaking Authority.

Petitioners allege that in enacting Penal Code section 3604, the Legislature improperly delegated its lawmaking power to the Department. This assertion is incorrect. "Only in the event of a total abdication of [the legislative] power, through failure either to render basic policy decisions or to assure that they are implemented as made, will this court intrude on legislative enactment because it is an 'unlawful delegation.'" (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 384.) The Legislature's constitutionally un-delegable duty is the "determination and formulation of the legislative policy," but "attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others." (*Id.* at p. 376, citation omitted; see *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419 [holding that Legislature properly made fundamental policy determination to grant state agricultural workers the right to self-organization and collective bargaining, and agency's regulation "which in essence merely implements one aspect of the statutory program—the holding of secret elections—. . . does not amount to a 'fundamental policy determination'"].)

Petitioners do not show that the Legislature "totally abdicate[d]" its lawmaking power. (See Opp. to Demurrer.) Instead of squarely addressing this legal question, they discuss problems with executions in *other* states to support their conclusion that issues relating to pain, speed, reliability and transparency are "fundamental policy choices" that the *California* Legislature must decide but purportedly delegated to the Department. (*Id.* at 3-5.) They accuse the Legislature of dodging what they call "political hot potato" issues surrounding the death penalty. (*Id.* at 1.)

California case law defines the parameters of fundamental policy decisions that cannot be delegated under the California Constitution. Fundamental policy decisions are broad policy determinations, such as a decision to deter and punish unlicensed driving. (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 805 [rejecting trial court characterization of whether mitigating

circumstances warrant an early release of an impounded vehicle as a fundamental policy decision]; *Jordan v. Cal. Dep't Motor Vehicles* (2002) 100 Cal.App.4th 431, 455 [rejecting separation of powers claim because "the Legislature made the fundamental policy decision to refund the smog impact fee and to settle the outstanding dispute over attorney fees"]; See *Sturgeon v. Cnty. of Los Angeles* (2008) 167 Cal.App.4th 630 [holding that, in light of constitutional provision that the Legislature must set judicial compensation, this duty could not be delegated].)

Petitioners overlook this case law, insisting that "pain, speed, reliability, and transparency are fundamental policy issues." (Opp. at 5.) Although these matters are of course significant, they are not the "*truly* fundamental issues" that the Constitution requires the Legislature to decide.[2] (*Kugler v. Yocum*, *supra*, 69 Cal.2d at p. 376, emphasis added; *Alexander v. State Personnel Bd.* (2000) 80 Cal.App.4th 526, 537.) The fallacy in petitioners' argument that the four issues they focus on must be decided by the Legislature is that it lacks a limiting principle—courts should not be in the business of choosing among items litigants find important to decide whether separation of powers has been violated. (*Association of Cal. Ins. Cos. v. Jones* (Jan. 23, 2017, S226529) __ P.3d __, 2017 WL 280822, at *12 ["To conclude that these statutory schemes require the Legislature to define in advance every problem it expects an agency to address is to suggest that the Legislature had little need for agencies in the first place."].)

Petitioners' argument hinges on *Clean Air Constituency v. California State Air Resources Board* (1974) 11 Cal.3d 801, which is inapposite. (Opp. at 5-6.) In that case, the Legislature promulgated an urgent statutory scheme for installation of nitrogen oxide pollution devices on motor vehicles, specifying when these must be installed, and tasked an administrative agency with implementation of this scheme, with an escape valve allowing the agency to delay implementation for "extraordinary and compelling reasons." (*Clean Air Constituency v. California State Air Resources Board*, *supra*, 11 Cal.3d at p. 807.) The agency thrice postponed

[2] Petitioners are similarly incorrect that their complaint adequately alleges why "pain, speed, reliability, and transparency" are "fundamental" issues. (Opp. at 7.) This is a legal determination, and therefore the complaint's allegations that these issues are "fundamental" is not entitled to any deference.

the statutory deadlines, the third time to conserve resources in light of the energy crisis. (*Id.*) The Court concluded that with this last delay the agency exceeded its authority under the statute's "extraordinary and compelling reasons" clause. In enacting the statute, the Legislature "concluded as a matter of fundamental policy that urgent action against automobile pollution was essential for the health of California's residents," and to that end directed the agency to "establish a program that would accomplish the goal of pollution control." (*Id.* at p. 817.) In delaying the program to avoid aggravating the effects of the energy crisis, the agency "inverted the priorities by making energy consumption loftier in significance than concern for clean air." (*Ibid.*) The agency action was improper because it made a fundamental policy decision at odds with that of the Legislature. (*Ibid.*) The Court concluded that the agency's authority under the compelling reasons clause was circumscribed by the requirement that an agency's regulations be "consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."[3] (*Id.* at pp. 815, 819.) Thus, it was *not* that the Legislature's delegation of authority to the agency violated separation of powers in *Clean Air Constituency*, but that the action of the agency was at odds with the Legislature's expression of its fundamental policy choice, in violation of Government Code section 11374. (*Id.* at 819.) Petitioners allege no action by the Department that exceeds its authority under section 3604.

This case presents no separation of powers problem because the Legislature already made the "fundamental policy determination" in enacting section 3604, and establishing a broad statutory framework of primary standards governing the implementation of the death penalty. (Pen. Code, § 3600 [setting forth conditions for delivery and detention of male inmates pending execution, among other things]; § 3601 [same for female inmates pending execution]; § 3602 [designating prison for execution of female prisoners]; § 3603 [general rule for place of executions]; § 3604 [setting forth methods of execution, etc.]; § 3605 [procedures regarding

[3] This requirement was based on Government Code, section 11374, which provided "Whenever by express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." That statutory provision was renumbered, and now appears at Government Code, section 11342.2.

witnesses to executions].) In fact, the California Supreme Court later distinguished *Clean Air Constituency* on similar grounds because the Legislature had set out the requisite fundamental policy decision. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419 [holding that the challenged regulation "merely implements one aspect of the statutory program . . . [and] does not amount to a 'fundamental policy determination' within the meaning of the [unconstitutional delegation of power] rule."].)

Petitioners' argument is even less persuasive given the stringent standard for invalidating a statute on constitutional grounds. Before a court may declare an act of the Legislature invalid because of a constitutional conflict, "such conflict must be clear, positive, and unquestionable." (*Wilkinson v. Madera Community Hospital* (1983) 144 Cal.App.3d 436, 442, citation omitted.) This standard reflects deference to the Legislature's decision to delegate to an administrative agency the authority to implement and administer regulations, deference based on the fact that no legislative body can reasonably address every contingency within a particular area of legislation. "Doctrinaire legal concepts should not be invoked to impede the reasonable exercise of legislative power properly designed to frustrate abuse." (*Kugler v. Yocum*, *supra*, 69 Cal.2d at p. 384.) Because petitioners fail to make this showing, the demurrer should be sustained.[4]

**B. The Legislature Provided the Necessary Guidance to the Department.**

Similarly off the mark is petitioners' argument that the Legislature has not provided the Department with adequate guidance in enacting section 3604. "The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse." (*People v. Wright* (1982) 30 Cal.3d 705, 712.) In assessing whether a legislative grant of authority provides adequate standards, the "standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose." (*Id.* at p. 713.)

[4] Petitioners also posit, without any legal support, that "the politically divisive nature of the death penalty," and public comment to the Department's past attempts to develop an execution protocol demonstrates that the issues they cite are "controverted," and thus must be decided by the Legislature. (Opp. at 6.) This argument finds no support in case law.

Petitioners also ignore that Penal Code section 3604 is part of a wider statutory scheme that provides specific direction and limits discretion.[5] It sets forth the fundamental policy choice that the death penalty exists in California, provides for two alternative methods, and directs that the methods should be used to achieve death for condemned prisoners. (Pen. Code, § 3604, subd. (a).) It also grants the condemned the choice of two methods of execution, specifies how to make this election, and renews this choice each time an execution date is reset. (*Id.*, subds. (b) & (c).) Further, it sets a default that the execution should take place by lethal injection, absent a contrary choice. (*Id.*, subd. (b).) It provides that, if either method is held invalid, the second method should be used. (*Id.*, subd. (d).) Additional statutory provisions in the Penal Code, enacted with section 3604, set forth the standards for the execution of the death penalty, including place and method of execution and election, guidelines for suspension of the execution, transfer and delivery of inmates, witnesses to the execution, and accountability to the court for compliance with the execution warrant. (*Id.* §§ 3600-3607.)

These statutory guideposts are supplemented by additional constitutional provisions, including the federal and state constitutional prohibitions of cruel and unusual punishment. "The requisite legislative guidance need not take the form of express standards." (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 805; *Kugler v. Yocum*, *supra*, 69 Cal.2d at p. 381 ["The requirement for 'standards' is but one method for the effective implementation of the legislative policy decision; the requirement possesses no sacrosanct quality in itself so long as its purpose may otherwise be assured."].) Petitioners point out that the statute does not emphasize either "swift executions" or minimizing pain, but the separation of powers clause does not require this.[6] (Opp. at 9.) As the Supreme Court recently pointed out, "the Legislature may also choose to grant an administrative agency broad authority to apply its expertise in determining whether and how to address a problem without identifying specific examples of the problem or articulating possible

[5] Proposition 66, passed by the voters at the November, 2016 election, amends some of these provisions. The proposition is currently being challenged in California Supreme Court. (*Briggs v. Brown*, No. S238309 (Cal.).) These amendments do not impact the separation of powers claim at issue here.

[6] To these extent these issues raise constitutional concerns, they sound in the Eighth Amendment, not under the separation of powers clause.

solutions." (*Association of Cal. Ins. Cos. v. Jones* (Jan. 23, 2017, S226529) __ P.3d __, 2017 WL 280822, at *12.) That the Legislature chose not to address these issues—or any number of other questions that might arise in the process—does not violate the California Constitution.

### C. To the Extent It Has Any Relevance to the Legal Issues Here, Out of State Authority Weighs Against Petitioners' Legal Claims.

Petitioners invite this Court to adopt non-binding authority from Arkansas to find the Legislature's section 3604 delegation unconstitutional. (Opp. at 10.) They argue that section 3604 suffers from the same infirmities as the statute struck down by the Arkansas Supreme Court in *Hobbs v. Jones* (Ark. 2012) 412 S.W.3d 844. There, the court concluded that the death penalty statute violated the Arkansas Constitution because it gave an agency unfettered discretion to determine execution protocols, including "the chemicals to be used" in an execution. (*Id.* at p. 854.) Three justices dissented, noting that "[w]ith this holding, Arkansas becomes the only state to find such a violation." (*Id.* at p. 858.) This Court should not adopt the Arkansas court's analysis because it is at odds with the California case law discussed above.[7]

If this Court were to look to other jurisdictions, it would find that the weight of authority has rejected similar challenges to execution protocols. To be precise, at least four other states have rejected similar challenges. (*Hobbs v. Jones*, *supra*, 412 S.W.3d at pp. 858-861 [in dissent, discussing decisions from courts in Texas, Delaware, Idaho, and Florida].) Two of these cases are particularly illuminating, involving state laws in Delaware and Idaho that were substantially the same (and arguably less detailed) than California's scheme. (*Ibid.*) Additionally, the dissenting opinion noted, "a multitude of other states provide general guidance in the form of granting discretion to the director of the department of corrections to administer a substance or substances in a quantity sufficient to cause death." (*Id.* at p. 860, citing statutes from nine states.)

## II. PETITIONERS' CLAIMS ARE BARRED BY RES JUDICATA.

Petitioners' arguments against the bar of res judicata fare no better. Specifically, they contend that this action and the previous litigation did not litigate the same primary right, and that

[7] It is also worth noting that in 2015 the Arkansas Supreme Court upheld the amended state execution protocol. (*Hobbs v. McGehee* (Ark. 2015) 458 S.W.3d 707, 714.)

petitioner American Civil Liberties Union (ACLU) was not in privity with petitioners Sims and Morales in the previous action. (Opp. at 11.) Both arguments fail.

Consistent with the analysis in *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, the primary right in the 2006 petition and this case is the same, namely the petitioners' purported right not to be subject to a lethal injection protocol that does not "comply with California law." That the 2006 petition alleged the then-applicable protocol was non-compliant with the Administrative Procedure Act, whereas the instant one alleges that the Department lacks the authority to implement the protocol based on alleged violation of separation of powers, does not relieve petitioners of the res judicata bar. Both cases involve the same primary right and corresponding legal duty, namely the petitioners' right to not be subject to a lethal injection protocol that in some manner did not "comply with California law."[8] Because the separation of powers claim could have been and was not raised in *Morales*, res judicata bars petitioners from raising these claims here.[9]

Petitioners try to evade the res judicata bar by drawing fine distinctions between their 2006 and 2016 legal theories. They contend that the 2006 petition challenged the adoption of a prior execution protocol without providing the public with notice or an opportunity to comment, which in turn purportedly deprived petitioners Sims and Morales of their right to comment on the protocol. (Opp. at 11.) But the primary rights analysis does not permit such claim splitting. "[U]nder the primary rights theory, the determinative factor is the harm suffered," rather than the "particular legal theory asserted by the litigant." (*Boeken v. Philip Morris USA, Inc.*, *supra*, 48

[8] Petitioners contend that different primary rights were at issue in the two cases, relying on *Fujifilm Corporation v. Yang* (2014) 223 Cal.App.4th 326. (Opp. at 12.) That case is inapposite, resting as it did on the fact that "breaching a contract inflicts harms on a legally protected interest different from tortious conduct that renders uncollectable a judgment arising from the breach of contract." (*Fujifilm Corporation v. Yang*, *supra*, 223 Cal.App.4th at p. 332.) Here, the legally protected interest at issue was their right not to be subject to a lethal injection protocol that does not "comply with California law." (Req. for Jud. Not. Exh. 1 at p. 3.)

[9] Petitioners mistakenly argue that res judicata does not preclude issues which could have been but were not raised in the prior action. (Opp. at 12.) As far back as 1940, the California Supreme Court stated that, "[i]f the matter was within the scope of the action, related to the subject-matter and relevant to the issues, so that it *could* have been raised, the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged." (*Sutphin v. Speik* (1940) 15 Cal.2d 195, 202; *Eichman v. Fotomat Corp.* (1983) 147 Cal. App. 3d 1170, 1175.)

Cal.4th at p. 798.) Petitioners Sims' and Morales' prior lawsuit sought "to ensure that the procedures for execution adopted by Defendants *comply with California law*, including the APA." (Req. for Jud. Not. Exh. 1 at p. 3 ¶ 7 [emphasis added].) Petitioners specifically alleged that the Department's "failure to follow California law in adopting the Execution Protocol . . . undermines public, executive and legislative oversight of agency action," among other things. (*Id.* at p. 3 ¶ 6.)

Petitioners' argument that petitioner ACLU was not in privity with Sims and Morales for the 2006 litigation is not convincing. Although petitioner ACLU was not a party to the previous action, res judicata bars not only parties, but also those in privity with the parties to the previous action, and a "party is adequately represented for purposes of the privity rule 'if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action'." (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n* (1998) 60 Cal.App.4th 1053, 1070.) Courts "measure the adequacy of 'representation by inference, examining whether the . . . party in the suit which is asserted to have a preclusive effect had the same interest as the party to be precluded, and whether that . . . party had a strong motive to assert that interest." (*Id.* at p. 1071.) For example, the Court of Appeal has held that an organization seeking to protect the public's right to use certain property was in privity with a state agency which had previously raised the same claim. (*Id.* at 1072 ["The state agencies asserted the same interests in the property as appellant, and . . . seem to have been equally motivated to reach a successful conclusion of the litigation on behalf of the public."].)

It is evident that the interests of the ACLU and Sims and Morales in the 2006 action were the same—challenging the Department's execution protocols as invalid. In fact, petitioners Sims and Morales arguably had a stronger interest in vigorously raising their legal claims than did the ACLU, since (as condemned inmates) they were more likely to be personally affected by the execution protocols.

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## CONCLUSION

For these reasons, the Court should sustain respondents' demurrer, without leave to amend.

Dated: January 27, 2017

Respectfully Submitted,

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## DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: ***Sims, Mitchell, et al. v. Scott Kernan, et al.***
Case No.: **RG16838951**

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; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On January 27, 2017, I served the attached

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

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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 January 27, 2017, at San Francisco, California.

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