DONALD W. BROWN (SBN 83347)
MICHAEL E. BOWLUS (SBN 307277)
COVINGTON & BURLING LLP
One Front Street
San Francisco, California 94111-5356
Telephone: + 1 (415) 591-6000
Facsimile: + 1 (415) 591-6091
Email: dwbrown@cov.com

MITCHELL KAMIN (SBN 202788)
MARK CHEN (SBN 310450)
KEANDRA BARLOW (SBN 308837)
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Suite 1500
Los Angeles, California 90067
Telephone: + 1 (424) 332-4800
Facsimile: + 1 (424) 332-4749
Email: mkamin@cov.com

LINDA LYE (SBN 215584)
American Civil Liberties Union
Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
Attorneys for Plaintiffs-Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE 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.

Civil Case No.: RG16838951

SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS'-RESPONDENTS' DEMURRER TO PLAINTIFFS'-PETITIONERS' VERIFIED PETITION FOR A WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Date: April 24, 2017
Time: 9:00 a.m.
Dept.: 511
Action Filed: November 15, 2016

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I. Background

On March 30, 2017, the Court issued (1) an order requesting this supplemental briefing, and (2) a tentative order sustaining Defendants'-Respondents' demurrer (the "Order"). For the reasons explained below, Plaintiffs-Petitioners respectfully disagree with the Order's analysis of the separation of powers claim and request that Defendants' demurrer be overruled.

II. A policy decision is not rendered non-fundamental solely because it relates to implementation.

The Order states that the pain, speed, and reliability of executions relate to the implementation of the fundamental policy decisions but are not themselves fundamental policy decisions. Order at 11 (discussing *Wilkinson v. Madera Cmty. Hosp.*, 144 Cal. App. 3d 436 (1983)). However, a policy decision that relates to implementation may nonetheless be fundamental.

For example, in *People v. Wright*, the Supreme Court identified the means of implementing a determinate sentencing system to be part of the Legislature's fundamental policymaking. 30 Cal.3d 705, 709 (1982). There, the Supreme Court addressed the constitutionality of the Determinate Sentencing Act ("DSA"), which shifted California from a system of indeterminate sentencing to one of determinate sentencing. *Id.* at 709. One provision of the DSA dealt specifically with implementing this shift. The provision specifically required that judges implement determinate sentencing by imposing "the middle term" of a sentence, "unless there are circumstances in aggravation or mitigation of the crime." *Id.* In upholding the DSA, the Supreme Court explained that this provision resolved the "fundamental policy decision" that the sentencing "terms were to be fixed by choosing one of the alternatives on the basis of circumstances relating to the crime and to the defendant." *Id.* at 713. Accordingly, *Wright* supports the proposition that fundamental policy issues include those that relate solely to the implementation of a statutory scheme. Similarly, in *Clean Air Constituency v. Cal. State Air Res. Bd.*, the Supreme Court held that the agency's decision to delay implementation of a pollution-

control measure ran counter to the Legislature's fundamental policy decision to prioritize clean air over fuel economy concerns. 11 Cal.3d 801, 817 (1974).

Indeed, the separation of powers doctrine is rooted in "the belief that the Legislature as the most representative organ of government should settle insofar as possible controverted issues of policy" whether or not related to implementation, "and that it must determine critical issues whenever it has the time, information and competence to deal with them." *Id.* at 816. *Wilkinson v. Madera Community Hospital* is not contrary. The statute at issue in *Wilkinson* permitted hospitals to require their doctors to obtain malpractice insurance. 144 Cal.App.3d 436, 440 (1983). The petitioner alleged that the statute was unconstitutional because it delegated to hospitals the authority to decide which insurance companies are acceptable, and what insurance amounts are required. *Id.* at 441-42. The court ruled that this basic, administrative function was not a "policy-making function." *Id.* at 442.

In contrast to deciding which insurance companies are acceptable and minimum policy amounts, the issues of pain, speed, reliability, and transparency of lethal injection executions are controverted, critical issues that the Legislature is capable of answering because they are basic value-judgments that can be answered at a high level of generality. *Cf.* Ohio Rev. Code § 2949.22(A) (requiring lethal injection executions to utilize substances that cause death "quickly and painlessly"). As alleged in the Complaint, there is intense public debate around these issues, including whether and to what extent the state should strive to make executions speedy and painless. The intense coverage of these same issues in relation to botched executions further underscores their importance to the public and the need for the Legislature to itself address these issues.

III. The Legislature's intent that CDCR comply with the Eighth Amendment *at a minimum* does not establish a standard that would satisfy the separation of powers doctrine.

The Order states that the legislative history of Penal Code 3604 demonstrates that the "legislature intended the CDCR to devise an execution protocol that met the constitutional minimum standard and that the legislature did not intend for the CDCR's execution protocol to meet any higher

standard." Order at 13. The Order cites a Bill Analysis and a Floor analysis from 1996 regarding an amendment made to Penal Code section 3604 in light of *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996). The *Fierro* decision held that execution by lethal gas under the then-current protocol violated the Eighth Amendment. The statutory amendment remedied this federal constitutional defect by specifying lethal injection as the default method of execution. The Order also cites to a provision in Proposition 66 which grants the sentencing court exclusive jurisdiction to hear method of execution challenges. Order at 13.

This scant legislative history is insufficient to conclude that the Legislature intended the Eighth Amendment to serve as both the minimum and maximum standard guiding and directing CDCR's implementation of section 3604. The purpose of the bill was merely to replace a method of execution that had been invalidated by a federal court with one that had not. The most that can be inferred from this legislative history is that the Legislature intended to not have an unconstitutional statute in the Penal Code, or that it hoped to avoid future invalidation on these same constitutional grounds. *See* Order at 12 (citing Bill Analysis for AB 2082 dated March 15, 1996 ("ARGUMENTS IN SUPPORT: This [amendment] to the current statute would bring the state into conformity with the Gomez decision . . . .").[1]

The legislative history and statutory text of section 3604(a) contain no statements or suggestions that the Legislature intended to direct CDCR to carry out lethal injection executions at the outer limits of Eighth Amendment jurisprudence. The bill analyses do not promote (or criticize) the proposed statutory amendment as clearing the way forward for CDCR to carry out lethal injection executions using any non-unconstitutional means at its disposal, and there is no indication that the Legislature considered or debated this question at all. The statutory text and legislative history in California do not point one way or the other. Furthermore, Proposition 66 does not suggest that CDCR should aim only to meet the Eighth Amendment's minimum standards and no higher; to the contrary, it

[1] The Order refers to a Bill Analysis for AB 2082 dated March 15, 1996. Plaintiffs-Petitioners respectfully note that they were unable to locate a Bill Analysis on that date containing the language quoted in the Order. However, Plaintiffs-Petitioners identified a Bill Analysis for AB 2082 dated March 12, 1996, with substantially identical language (the only difference is the use of the word "amendment" rather than "bill"). *See* California Bill Analysis, A.B. 2082 Assem., 3/12/1996.

grants jurisdiction on the sentencing court to hear *any* constitutional challenge, or *any other challenge* that the method of execution is "otherwise invalid." Such ambiguous legislative history and statutory text cannot supply "an adequate yardstick" to guide the agency. Decisions finding that the Legislature implicitly provided sufficient guidance based on legislative purpose have involved much more explicit evidence of that purpose. *See, e.g.*, *Birkenfeld*, 17 Cal.3d at 165, 168 (identifying legislative purpose based on legislative statement that the statute "is intended to counteract the ill effects of 'rapidly rising and exorbitant rents exploiting [the housing] shortage'" (alteration in original)); *People ex rel. Lockyer v. Sun Pacific Farming Co.*, 77 Cal. App. 4th 619, 633, 635 (2000) (identifying a legislative purpose where the statute directed the agency to use "the best known and accepted methods" for eradicating pests).

Moreover, the presumption that the Legislature intended for its statute to survive constitutional scrutiny cannot satisfy the Legislature's obligation under the California constitution to "provide an adequate yardstick for the guidance of the administrative body empowered to execute the law." *Clean Air Constituency*, 11 Cal. 3d at 817. Otherwise, the obligation would be illusory because the Legislature is always *presumed* to enact laws that comply with the U.S. Constitution. *See Prof'l Eng'rs v. Dep't of Transp.*, 15 Cal.4th 543, 575 (1997) ("[D]ecisions dating back to the turn of the century require the courts to always presume that the Legislature acts with integrity and with an honest purpose to keep within constitutional restrictions and limitations"); *see also Birkenfeld*, 17 Cal.3d 129, 172 (agencies should be presumed to act in conformity with Constitutional requirements).

Furthermore, the adequacy of the Legislature's prescribed standards also depends in part on "the experience and qualifications of the agency." *People v. Wright*, 30 Cal. 3d at 713. In *Wright*, the court held that the standards in the Determinate Sentencing Act were "sufficiently precise in the circumstances" *because* the Judicial Council had "extensive experience in determining sentences" and had "conducted seminars and institutes for judges on sentencing practices in criminal cases." *Id.* Here, the mere admonition that CDCR should comply with the Eighth Amendment is insufficient because CDCR is a corrections, not a judicial, agency, and moreover has demonstrated a lack of expertise in formulating a constitutional protocol. Courts have struck down as unconstitutional CDCR's execution protocols in whole or in part multiple times. Petition ¶¶ 58-70. In light of this, it is evident that the brief

references to the Eighth Amendment in the legislative history of section 3604 have failed to provide a standard that is sufficient to guide CDCR's exercise of its delegated authority for separation of powers purposes.

IV. The separation of powers doctrine does not permit the Legislature to rely on courts to provide the necessary standards or safeguards.

The Order states that the "legislature can rely on safeguards to take the place of standards," and that the legislative history "makes clear that the legislature was relying on the courts to provide the relevant safeguards." Order at 14-15. As an initial matter, the Supreme Court has held that the separation of powers doctrine requires both adequate guidance (in the form of standards) *in addition to* adequate safeguards. *See Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 168-69 (1976) (holding that statute provided sufficient guidance, but nevertheless striking down statute for insufficient safeguards).

Furthermore, the sparse legislative history does not reflect any intent by the Legislature to rely on courts to supply adequate safeguards. Even if it did, *Samples v. Brown* does not support the conclusion that the Legislature may do so. 146 Cal. App. 4th 787 (2007). In that case, which addressed a statute that dealt with the impoundment of vehicles, the Court of Appeal held that the Legislature provided adequate safeguards because the statute expressly set a maximum period of impoundment and specifically identified mitigating circumstances that would require early release of the vehicle. 146 Cal. App. 4th at 806. The Court of Appeal never suggested that a Legislature may satisfy the "safeguards" requirement by simply relying on the courts' general duty to restrain unlawful agency action.

The fact that courts may strike down unconstitutional agency action cannot relieve the Legislature of its own obligation to impose adequate safeguards. To hold otherwise would render the separation of powers doctrine a nullity because courts are always available to provide a check against unlawful agency action. Indeed, the separation of powers doctrine explicitly requires that the *Legislature itself* resolve fundamental issues and establish adequate standards or safeguards. *See id.* at 804-05. By relying on the other branches of government to provide these safeguards, the Legislature is by definition abdicating this responsibility. Indeed, in *Birkenfeld v. City of Berkeley*, the Supreme Court held that a rent control measure lacked adequate safeguards because it would result in unlawfully low rent ceilings. 17 Cal.3d at 169 ("most rent ceilings would be or become confiscatory"). If courts could provide the

necessary safeguards, the rent control measure in *Birkenfeld* would have survived, because landlords could have challenged any confiscatory rent ceilings. *See id.* at 172 (rejecting argument that, if the agency acted improperly, "the fault lies with the [agency] and not the statute").

The Order further states that, "[a]fter the legislature has indicated that the CDCR was to develop an execution protocol to comply with the United States Constitution, then the legislature could add little more." Order at 14. The Legislature can always choose to impose a higher standard or provide further guidance than what is set forth in the U.S. Constitution, as has been the case with other statutory delegations. *See, e.g.*, California End of Life Option Act, § 443.5(b)(1) (authorizing doctors to dispense euthanasia drugs directly to terminally ill patients, but requiring that the process include medication "intended to minimize the [patient's] discomfort").

V. *Association of California Insurance Companies v. Jones* and *Ralphs Grocery Co. v. Reimel* are inapposite.

The Order states that "the legislature can give an executive branch department a general mandate to use its expertise and power of regulations as it sees fit within broad parameters." Order at 15 (discussing *Assoc. of Cal. Ins. Cos. v. Jones*, 2 Cal.5th 376 (2017) and *Ralphs Grocery Co. v. Reimel*, 69 Cal.2d 172 (1968)). As the Order recognizes, neither of these decisions discusses the separation of powers doctrine. Rather, both *Jones* and *Ralphs* address whether an agency's actions exceeded the scope of authority granted by the underlying statutes. *See* 2 Cal.5th at 389 *and* 69 Cal.2d at 174. Nevertheless, the Order relies on these cases based on the proposition that "the analysis of the limits of administrative rulemaking authority is the obverse of the separation of powers analysis." Order at 15.

Jones and *Ralphs* are inapposite because the delegations in both cases simply do not implicate the "limits" of administrative rulemaking authority. Rather, they involved delegations of authority related to a core administrative agency function: the enforcement of legislative prohibitions. In *Jones*, the "problem" that the Legislature tasked the agency with solving was not a value-laden policy question regarding the design of an execution protocol, but instead the enforcement-related duty of policing the statutory bar on untrue, deceptive, or misleading statements by insurers. *See Jones*, 2 Cal.5th at 398. Similarly, in *Ralphs*, the Legislature had tasked the agency with the fact-specific duty of policing certain alcohol marketing restrictions. *Ralphs*, 69 Cal.2d at 182-83. None of the parties in

either case claimed that these tasks were in any way fundamental or that the Legislature ***could not*** delegate them. Rather, the challenge was solely over whether the Legislature ***did*** delegate these tasks to the agency.

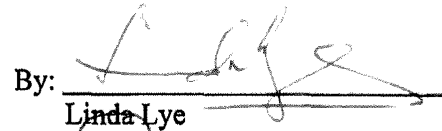
Specifically, the plaintiffs' arguments in both cases were that the Legislature, by expressly identifying certain items to regulate, necessarily intended to prohibit the agencies from regulating other items that were not listed in the statute. *Jones*, 2 Cal.5th at 398; *Ralphs*, 69 Cal.2d at 182. In resolving the issues presented in *Jones* and *Ralphs*, the Supreme Court examined the broader statutory scheme and held that the Legislature did not intend for its list of items to be exhaustive. *See Jones*, 2 Cal.5th at 398-99; *Ralphs*, 69 Cal.2d 182-83. The Supreme Court's analysis did not engage any of the constitutional issues present in this case, such as whether the Legislature could have delegated these responsibilities or whether it could constitutionally rely on the agencies to enforce the statutes at issue. Indeed, it was uncontroverted that the enforcement of legislative prohibitions falls squarely within the type of delegations that the Legislature may make. Those types of delegations are a far cry from the policy-making delegations at issue in this case.

VI. Conclusion

For the foregoing reasons, Plaintiffs-Petitioners respectfully request that the Court reconsider the Order and overrule Defendants'-Respondents' demurrer.

Dated: April 7, 2017

Respectfully submitted,



By: ____________
Linda Lye

By: ____________
Donald W. Brown

Attorneys for Plaintiffs-Petitioners

DONALD W. BROWN (SBN 83347)
MICHAEL E. BOWLUS (SBN 307277)
COVINGTON & BURLING LLP
One Front Street
San Francisco, California 94111-5356
Telephone: + 1 (415) 591-6000
Facsimile: + 1 (415) 591-6091
Email: dwbrown@cov.com

MITCHELL KAMIN (SBN 202788)
MARK CHEN (SBN 310450)
KEANDRA BARLOW (SBN 308837)
COVINGTON & BURLING LLP
1999 Avenue of the Stars, Suite 1500
Los Angeles, California 90067
Telephone: + 1 (424) 332-4800
Facsimile: + 1 (424) 332-4749
Email: mkamin@cov.com

LINDA LYE (SBN 215584)
American Civil Liberties Union
Foundation of Northern California, Inc.
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

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Dept. 511

PROOF OF SERVICE

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I, the undersigned, declare as follows:

I am employed with the law firm of Covington & Burling LLP, whose address is One Front Street, San Francisco, CA 94111. I am readily familiar with the business practices of this office for collection and processing of correspondence for mailing with the United States Postal Service; I am over the age of eighteen years and not a party to this action. On April 7, 2017, I served the following:

- **SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS'-RESPONDENTS' DEMURRER TO PLAINTIFFS'-PETITIONERS' VERIFIED PETITION FOR A WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

on the parties in this action by placing true and correct copies thereof as indicated below, addressed as follows:

Ms. Tamar Pachter
Mr. Jose A. Zelidon-Zepeda
Deputy Attorney General
455 Golden Gate Ave. Ste. 11000
San Francisco, CA 94102-7004

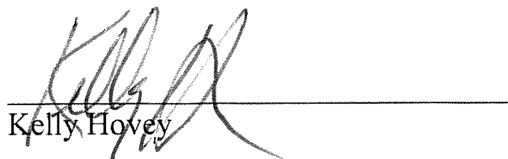
Counsel of Record for California Dept. of Corrections and Rehabilitation and Scott Kernan, Secretary of the California Dept. of Corrections and Rehabilitation

☐ (BY MAIL). I placed true copies thereof in sealed envelopes, addressed as shown, for collection and mailing pursuant to the ordinary business practice of this office which is that correspondence for mailing is collected and deposited with the United States Postal Service on the same day in the ordinary course of business.

X (BY OVERNIGHT MAIL). I placed true copies thereof in sealed envelopes, addressed as shown, for collection and mailing pursuant to the ordinary business practice of this office which is that correspondence for Federal Express mailing is collected by Federal Express on the same day in the ordinary course of business.

☐ (BY ELECTRONIC MAIL). I caused such document(s) to be delivered by electronic mail to the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service was executed on April 7, 2017, in San Francisco, California.



Kelly Hovey