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

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13 **MITCHELL SIMS; MICHAEL**
14 **MORALES; AMERICAN CIVIL**
15 **LIBERTIES UNION OF NORTHERN**
CALIFORNIA,
16
17 Plaintiffs-Petitioners,

18 **v.**
19 **SCOTT KERNAN, AS SECRETARY OF**
20 **THE CALIFORNIA DEPARTMENT OF**
21 **CORRECTIONS AND**
22 **REHABILITATION; CALIFORNIA**
DEPARTMENT OF CORRECTIONS AND
REHABILITATION,
23
24 Defendants-Respondents.

Case No. RG16838951

**SUPPLEMENTAL REPLY BRIEF IN
SUPPORT OF DEMURRER TO
VERIFIED PETITION FOR 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

25 Defendants respectfully submit this supplemental reply brief in support of their demurrer
26 pursuant to this Court’s Order Requesting Briefing filed March 30, 2017. The Court’s Tentative
27 Order on Merits of Demurrer correctly concludes that petitioners have failed to state a claim
28 under the separation of powers clause. As the Court points out, petitioners have provided no
authority for their claim that pain, speed, reliability, and transparency are “fundamental policy

1 issues” that must be decided by the Legislature. On the contrary, the Legislature can make a
2 policy decision and then leave its implementation to an administrative agency like the
3 Department, without violating the Constitution. Plaintiffs engage in circular reasoning in their
4 supplemental brief by claiming that the implementation of the Legislature’s fundamental policy
5 decisions is itself a fundamental policy decision. Despite multiple opportunities to do so,
6 petitioners have cited no authority for their claim that the issues they focus on are fundamental
7 issues, as the case law requires. For these reasons, the Court should confirm its tentative ruling,
8 and sustain the petitioners’ demurrer, without leave to amend.

9 **I. SECTION 3604 AND RELATED STATUTORY PROVISIONS SET FORTH THE**
10 **LEGISLATURE’S FUNDAMENTAL POLICY DECISION ADOPTING THE DEATH**
11 **PENALTY.**

12 As the Court correctly points out, the Legislature made the fundamental policy decision to
13 establish the death penalty in 1941, which was reaffirmed by the people of California in 1972,
14 and again in 2016. (Tentative Order at 10.) In 1941, the Legislature adopted a statutory
15 framework of primary standards governing the execution of the death penalty (including section
16 3604) providing that the default method for implementing the death penalty would be by lethal
17 gas. It also decided what criminal offenses would be eligible for the death penalty. Following
18 federal court challenges, the Legislature later amended section 3604, providing that the default
19 method for implementing the death penalty would be through lethal injection by standards
20 established by the California Department of Corrections. Consistent with the primary standards
21 delineated by section 3604, specifically that “(a) The punishment of death shall be inflicted by the
22 administration of a lethal gas or by an intravenous injection of a substance or substances in a
23 lethal quantity sufficient to cause death, by standards established under the direction of the
24 Department of Corrections[],” the Legislature appropriately delegated to the Department the
25 “...task of prescribing administrative rules and regulations to promote the purposes of the
26 legislation and carry it into effect.” (Pen. Code, § 3604; *People v. Wright* (1982) 30 Cal.3d 705,
27 713.)

28 As the Court further pointed out, legislative materials concerning section 3604 buttress the
statute and provide requisite guidance. (Tentative Order at 12-14). “The doctrine prohibiting

1 delegations of legislative power does not invalidate reasonable grants of power to an
2 administrative agency, when suitable safeguards are established to guide the power’s use and to
3 protect against misuse.” (*People v. Wright, supra*, (1982) 30 Cal.3d at p. 712.) In assessing
4 whether a legislative grant of authority provides adequate standards, the “standards for
5 administrative application of a statute need not be expressly set forth; they may be implied by the
6 statutory purpose.” (*Id.* at p. 713; see also *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129,
7 168.)

8 Petitioners overlook the statutory and legal background supplementing section 3604,
9 including subdivisions (a), (b), (c), and (d) of the statute, which address issues the Legislature
10 deemed important for the death penalty. Other sections of the Penal Code, enacted with section
11 3604, set forth the standards for the execution of the death penalty, including place and method of
12 execution and election, guidelines for suspension of the execution, transfer and delivery of
13 inmates, witnesses to the execution, and accountability to the court for compliance with the
14 execution warrant. (Penal Code, §§ 3600-3607.) Petitioners also ignore section 3604’s
15 legislative history, which is indicative of the Legislature’s intent.

16 Moreover, the federal and state constitutional prohibitions of cruel and unusual punishment
17 are part of section 3604, as indicated by the legislative history the Court discusses. (Tentative
18 Order at 10.) Ultimately, “the requisite legislative guidance need not take the form of express
19 standards.” (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 805; *Kugler v. Yocum* (1968) 69
20 Cal.2d 371, 381 [“The requirement for ‘standards’ is but one method for the effective
21 implementation of the legislative policy decision; the requirement possesses no sacrosanct quality
22 in itself so long as its purpose may otherwise be assured.”].)

23 As the Court’s order noted, the Legislature is at liberty to set a policy and then delegate its
24 implementation to an administrative agency, like the Department. “[T]he Legislature may also
25 choose to grant an administrative agency broad authority to apply its expertise in determining
26 whether and how to address a problem without identifying specific examples of the problem or
27 articulating possible solutions.” (*Association of Cal. Ins. Cos. v. Jones* (2017) 2 Cal. 5th 376,
28 399.) This is fully consistent with the general rule that the Legislature may delegate

1 implementation of a policy decision to an administrative agency. “The Legislature may, after
2 declaring a policy and fixing a primary standard, confer upon executive or administrative officers
3 the ‘power to fill up the details’ by prescribing administrative rules and regulations to promote the
4 purposes of the legislation and to carry it into effect.” (*Kugler v. Yocum, supra*, 69 Cal.2d at
5 p. 376, citation omitted.) Petitioners’ only answer is that the delegation of authority at issue in
6 these cases “are a far cry” from the Legislature’s delegation under section 3604, but do not
7 demonstrate how this delegation is improper. (Suppl. Mem. at 7.) The mere assertion that the
8 decisions delegated to the Department are fundamental does not make them so.

9 **II. AS THE COURT NOTES, THERE IS NO AUTHORITY THAT THE ISSUES PETITIONERS**
10 **FOCUS ON ARE “FUNDAMENTAL” POLICY DETERMINATIONS UNDER THE**
11 **SEPARATION OF POWERS CLAUSE.**

12 The Court noted that there is no persuasive authority that pain, speed, reliability, and
13 transparency of an execution are fundamental issues within the meaning of the separation of
14 powers clause. (Tentative Order at 11.) Taking issue with the Court’s analysis, petitioners argue
15 that “a policy decision that relates to implementation may nonetheless be fundamental.” (Suppl.
16 Mem. at 1.) But petitioners fail to cite any case, including their misplaced reliance on *Wright*,
17 that supports the argument that the four issues on which they choose to focus are in fact
18 fundamental under California law. Instead, they fall back on what one other state has purportedly
19 decided, referring to Ohio law, which apparently requires use of execution methods to cause
20 death “quickly and painlessly.” (*Id.* at 2.) That another state’s legislature chose to speak in
21 general terms on this issue does not transform the issue into a fundamental policy decision under
22 the California Constitution. Similarly, petitioners’ insistence that an “intense public debate”
23 about the death penalty makes the four issues they insist on “critical” (*ibid.*), does not save their
24 claim under the separation of powers clause, which instead requires that issues be “truly
25 fundamental.” (*Kugler v. Yocum, supra*, 69 Cal.2d at p. 376; *Alexander v. State Personnel Bd.*
26 (2000) 80 Cal.App.4th 526, 537.)

27 Petitioners also take issue with the Court’s conclusion that the legislative history shows that
28 the Legislature intended the Department to implement an execution protocol that complies with
the Eighth Amendment under the federal Constitution. (Suppl. Mem. at 3-4.) They note that

1 there are apparently “no statements or suggestions that the Legislature intended to direct CDCR
2 to carry out lethal injection executions at the outer limits” of the Eighth Amendment. (*Id.*)
3 Petitioners do not cite any case stating that the Legislature has to explicitly state its intent. (See
4 *Wilkinson v. Madera Comm. Hospital* (1983) 144 Cal.App.3d 436, 441 [noting that the legislative
5 history can reveal the purpose of a statute in a separation of powers analysis].) Petitioners simply
6 disagree with the legislative policy as set out in section 3604, noting that the Legislature “can
7 always choose to provide further guidance.” (Suppl. Mem. at 6.) That the Legislature *may* do so
8 does not mean it must do so. (Cf. *Assoc. of Cal. Ins. Companies v. Jones, supra*, 2 Cal. 5th at p.
9 398 [“To conclude that these statutory schemes require the Legislature to define in advance every
10 problem it expects an agency to address is to suggest that the Legislature had little need for
11 [administrative] agencies in the first place.”].) Petitioners have not and cannot demonstrate that
12 the Legislature’s delegation violates the Constitution.

13 As noted above, the Legislature properly set forth the fundamental policy and standards,
14 and then conferred on an administrative agency “the power to fill up the details” through
15 administrative regulations. (*Kugler v. Yocum, supra*, 69 Cal.2d at p. 376.) The Legislature has
16 already performed its essential legislative function in making the “determination and formulation
17 of the legislative policy.” (*Id.* at p. 306 [quoting *First Industrial Loan Co. v. Daugherty* (1945)
18 26 Cal.2d 545, 549].) “Once it has established the law, the Legislature may delegate the authority
19 to administer or apply the law.” (*Wilkinson, supra*, 144 Cal.App.3d at p. 442.)

20 **III. UNDER A DEFERENTIAL STANDARD FOR INVALIDATING A STATUTE, PETITIONERS**
21 **HAVE NOT SHOWN THAT SECTION 3604 VIOLATES THE CONSTITUTION.**

22 Despite multiple opportunities, petitioners have not met their burden to establish their
23 claims, particularly given the stringent standard for invalidating a statute on constitutional
24 grounds. Before a court may declare an act of the Legislature invalid because of a constitutional
25 conflict, “such conflict must be clear, positive, and unquestionable.” (*Wilkinson v. Madera*
26 *Community Hospital, supra*, 144 Cal.App.3d at p. 442, citation omitted.) “Doctrinaire legal
27 concepts should not be invoked to impede the reasonable exercise of legislative power properly
28 designed to frustrate abuse.” (*Kugler v. Yocum, supra*, 69 Cal.2d at p. 384.) Because petitioners

1 fail to make the requisite showing, the demurrer should be sustained, without leave to amend.

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Dated: April 14, 2017

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.: **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. 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 April 14, 2017, I served the attached **SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF DEMURRER TO VERIFIED PETITION FOR 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 April 14, 2017, at San Francisco, California.

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Declarant


Signature