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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 COUNTY OF MARIN
17

18 JARVIS JAY MASTERS and WITNESS
TO INNOCENCE,

19 Plaintiffs,

20 vs.

21 CALIFORNIA DEPARTMENT OF
22 CORRECTIONS AND
REHABILITATION; SCOTT KERNAN,
23 SECRETARY OF THE CALIFORNIA
DEPARTMENT OF CORRECTIONS
24 AND REHABILITATION; and RONALD
DAVIS, WARDEN OF SAN QUENTIN
25 STATE PRISON,

26 Defendants.
27
28

FILED

MAY 16 2018

JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: T. Jones, Deputy

CASE NO. CIV 1800580

OPPOSITION TO DEMURRER TO
PLAINTIFFS' COMPLAINT

Hearing Date: May 30, 2018
Hearing Time: 1:30 p.m.
Dept: B
Judge: The Honorable Roy O. Chernus
Trial Date: None Set
Action Filed: February 16, 2018

TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
BACKGROUND.....	2
I. California’s Statutory Scheme for Administration of the Death Penalty.....	2
II. CDCR’s Predecessor Death Penalty Regulations.	3
III. Proposition 66 Sought to Revise Procedures for Reviewing Death Sentences.	4
IV. CDCR Issued the 2018 Execution Protocol Without Public Notice and Comment.	5
ARGUMENT	6
I. Plaintiffs Have Stated a Claim That Section 3604.1 Does Not Exempt All Regulations Related to Execution of the Death Penalty from the APA.....	6
A. Legal Standards for Construction of Penal Code Sections 3604 and 3604.1.....	6
B. Under the Plain Language of Penal Code Sections 3604 and 3604.1, the Execution Protocol Is Not Exempt from the APA.	8
C. The Ballot Materials for Proposition 66 Confirm that Section 3604.1 Exempts from the APA Only Standards Related to Execution Methods.	12
D. The Execution Protocol Is an Invalid Underground Regulation.	14
II. The Doctrine of Administrative Exhaustion Does Not Bar This Suit.....	15
CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Abelleira v. Dist. Court of Appeal</i> (1941) 17 Cal.2d 280.....	15
<i>Armistead v. State Personnel Bd.</i> (1978) 22 Cal.3d 198.....	8, 12
<i>Briggs v. Brown</i> (2017) 3 Cal.5th 808.....	5, 13
<i>California Hotel & Motel Assn. v. Industrial Welfare Com.</i> (1979) 25 Cal.3d 200.....	7
<i>California School Bds. Assn. v. State Bd. of Educ.</i> (2010) 186 Cal.App.4th 1298.....	8, 12
<i>Coastside Fishing Club v. California Fish & Game Com.</i> (2013) 215 Cal.App.4th 397.....	15
<i>Engelmann v. State Bd. of Educ.</i> (1991) 2 Cal.App.4th 47.....	14, 15
<i>Gressley v. Williams</i> (1961) 193 Cal.App.2d 636.....	14
<i>Hassan v. Mercy American River Hospital</i> (2003) 31 Cal.4th 709.....	12
<i>Heckart v. A-1 Self Storage, Inc.</i> (2018) 4 Cal.5th 749, 415 P.3d 286	6, 7
<i>Morales v. California Dept. of Corr. & Rehab.</i> (2008) 168 Cal.App.4th 729.....	3, 6
<i>Morning Star Co. v. State Bd. of Equalization</i> (2006) 38 Cal.4th 324.....	7, 12
<i>Ogo Assoc. v. City of Torrance</i> (1974) 37 Cal.App.3d 830.....	15
<i>People v. Cook</i> (1984) 158 Cal.App.3d 948.....	10
<i>Professional Engineers in California Government v. Kempton</i> (2007) 40 Cal.4th 1016.....	6, 7, 12, 13

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Parthemore v. Col</i> (2013) 221 Cal.App.4th 1372.....	15
<i>Sierra Club v. State Bd. of Forestry</i> (1994) 7 Cal.4th 1215.....	7
<i>Sims v. Dept. of Corr. & Rehab.</i> (2013) 216 Cal.App.4th 1059.....	3, 4, 5, 13
<i>Stoneman v. Rushen</i> (1982) 137 Cal.App.3d 729.....	15
<i>Tidewater Marine Wester, Inc. v. Bradshaw</i> (1996) 14 Cal.4th 557.....	6
<i>Wildlife Alive. v. Chickering</i> (1976) 17 Cal.3d 190.....	7
<i>Wright v. State</i> (2004) 122 Cal.App.4th 659.....	15
 FEDERAL CASES	
<i>Fierro v. Gomez</i> (9th Cir 1996) 77 F.3d 301	13
<i>Hillery v. Rushen</i> (9th Cir. 1983) 720 F.2d 1132.....	15
<i>Morales v. Hickman</i> (N.D.Cal. 2006) 415 F.Supp.2d 1037	4, 13
<i>Morales v. Tilton</i> (N.D.Cal. 2006) 465 F.Supp.2d 972	4
<i>Texas v. United States</i> (5th Cir. 2015) 787 F.3d 733.....	7, 12
 STATE STATUTES	
Cal. Code Regs., Title 1, § 6(b)(3)(A) & (G).....	5

TABLE OF AUTHORITIES (continued)

Page(s)

Government Code

§ 11340.5(a)	6, 14
§ 11346(a)	7, 12, 14
§ 11346.2(b)(1).....	4
§ 11346.2(b)(4)(A)	4
§ 11346.4	3
§ 11346.5	3
§ 11346.8(a)	3, 4
§ 11346.9(a)(4).....	4
§ 11349(b)	3
§ 11349.9	3
§ 11350	15
§ 11350(c)	5

Penal Code

§ 1193	2
§ 1227	2, 11
§ 3600	2
§ 3601	2, 5
§ 3602	5
§ 3603	2
§ 3604	1, passim
§ 3604.1	1, passim
§ 3605	2, 5
§ 3607	2, 5
§ 3700.5	2, 5, 9, 11
§§ 3701-03.....	2
§ 3704	2, 9
§ 5058	3, 11
§ 5058(a)	3
§ 5058.1	3
§ 5058.3	3
§ 5061	2, 5

INTRODUCTION

The Court of Appeal has held that the California Department of Corrections and Rehabilitation's ("CDCR") execution procedures constitute "regulations" that must be adopted in conformity with the procedural requirements of the Administrative Procedure Act ("APA"). The CDCR adopted the Execution Protocol at issue here without providing for the public notice and comment required by the APA. Defendants' demurrer is based on the argument that Penal Code section 3604.1, adopted as part of Proposition 66, exempts the entirety of the Protocol from the APA. The argument is meritless.

The plain language of Section 3604.1, its statutory context, and the ballot materials for Proposition 66 all demonstrate that it exempts from the APA only those regulations that govern the authorized methods of execution in California (lethal gas and lethal injection) or a condemned inmate's opportunity to choose between methods. Drafted by "frontline death penalty prosecutors who know the system inside and out," Section 3604.1 exempts only standards "promulgated pursuant to Section 3604," which governs solely those two issues. Section 3604.1 makes no mention of the remainder of Title 3 of Part 3 of the Penal Code, which governs myriad other aspects of administration of the death penalty in California addressed by the Execution Protocol. In light of the plain statutory language, there is no need to consult the ballot materials; but in any event those only reinforce the limited scope of the APA exemption: the Official Title and Summary of Proposition 66 states that it "[e]xempts prison officials from existing regulation process for developing execution methods," and nothing more. Well-settled California law establishes that the plain language of the statute must be enforced; that the Court may not imply additional exemptions where only one is expressed; that exemptions from the APA must be stated expressly and construed narrowly; and that any doubt as to the applicability of the APA must be resolved in favor of the APA. The text of Sections 3604.1 and 3604, considered in light of these rules of statutory construction, mandates that Defendants' demurrer be overruled.

BACKGROUND

I. California's Statutory Scheme for Administration of the Death Penalty.

As Defendants acknowledge, "Penal Code section 3604 is only one part of the statutory framework for administration of the death penalty." (Demurrer at 9.) CDCR's extensive duties with respect to administration of the death penalty are set forth in Title 3 of Part 3 of the Penal Code. (Pen. Code, §§ 3600-3706.) These duties are triggered by the imposition of a judgment of death and the issuance of an execution warrant. (*Id.*, §§ 1193, 1227.)

Section 3604, part of Title 3, makes lethal injection the default method of execution but authorizes an execution by lethal gas if the inmate so elects. (*Id.*, § 3604.) Section 3604 delegates to CDCR the duty to develop "standards" governing the method of execution, i.e., standards for administering lethal gas or intravenously administering a lethal substance or substances in a "quantity sufficient to cause death." (*Id.*, § 3604, subd. (a).)

In addition to giving CDCR responsibility for developing standards governing the method of execution pursuant to Section 3604, Title 3 imposes numerous other duties on the agency in administering the death penalty. Title 3 specifies where CDCR is to house male and female inmates under a judgment of death. (*Id.*, §§ 3600, 3601.) It requires CDCR to conduct executions at San Quentin State Prison. (*Id.*, § 3603.) Title 3 further requires CDCR, upon issuance of an execution warrant, to investigate the sanity of the inmate. (*Id.*, § 3700.5.) If the Warden of San Quentin has "good reason to believe" that the inmate "has become insane," certain procedures to determine the defendant's sanity must follow. (*Id.*, §§ 3701-03.) The Warden must suspend the execution if the inmate is "insane" but proceed if he is not. (*Id.*, § 3704.) Title 3 requires CDCR, no earlier than three days before a scheduled execution, to transfer a female inmate to San Quentin. (*Id.*, § 3601.) Title 3 requires the Warden to be present at the execution and to invite members of the public and others to witness the execution. (*Id.*, § 3605.) Finally, Title 3 requires the Warden to make a return upon the death warrant. (*Id.*, § 3607.) Although not specific to CDCR's duties in administering the death penalty, Penal Code section 5061 addresses the agency's duties with respect to remains of an inmate who dies while confined. (*Id.*, § 5061.)

1 **II. CDCR's Predecessor Death Penalty Regulations.**

2 The Secretary of Corrections is authorized by Penal Code section 5058 to issue "rules and
3 regulations" to carry out his duties in administering the state prisons. (Pen. Code, § 5058, subd.
4 (a).) These rules and regulations must comply with the APA, including the requirement of public
5 notice and comment, "except as otherwise provided in this section and Sections 5058.1 and
6 5058.3, inclusive." (*Ibid.*; see Gov. Code, § 11349.9 [listing APA exemptions].)

7 In 2008, the Court of Appeal held that CDCR's execution protocols are "regulations" that
8 must be promulgated in compliance with the APA. (*Morales v. California Dept. of Corr. &*
9 *Rehab.* (2008) 168 Cal.App.4th 729 (*Morales*).) In 2009 and again in 2015, CDCR proposed
10 execution regulations. They are notable in two respects.

11 First, they implemented numerous provisions of Title 3, relating to CDCR's duties in
12 administering the death penalty. (See, e.g., Complaint, Exh. B [2009 Regulations], § 3349.2.3
13 [selection of witnesses, observers and media]; Exh. C [2015 Regulations], Text of Proposed
14 Regulations, § 3349.5(h) [sanity review].) Thus, the regulations went beyond merely establishing
15 procedures governing the method of execution pursuant to Section 3604.

16 Second, CDCR relied on its general authority to issue rules and regulations under Penal
17 Code section 5058 as the "[a]uthority" for these additional regulations. (See Gov. Code,
18 § 11349(b) ["'Authority' means the provision of law which permits or obligates the agency to
19 adopt, amend, or repeal a regulation."]; see also, e.g., Exh. B (2009 Proposed Regulations) at 1 &
20 Exh. C (2015 Proposed Regulations), Notice of Proposed Regulations at 2, Text of Proposed
21 Regulations at 1, 3, 6, 8, 9, 14, 21, 24, 27, 29.) All but one of these proposed regulations cited
22 *only* Section 5058 (and not Section 3604) as authority for the regulation.

23 Although CDCR provided for public notice and comment in adopting the 2009 regulations,
24 the Court of Appeal held those regulations invalid based on CDCR's substantial failure to comply
25 with the APA. (*Sims v. Dept. of Corr. & Rehab.* (2013) 216 Cal.App.4th 1059 (*Sims*).) The APA
26 imposes on agencies both procedural requirements, e.g., to provide public notice and comment
27 (Gov. Code, §§ 11346.4, 11346.5, 11346.8, subd. (a)), and substantive ones, e.g., to provide the
28 rationale for the regulation, reasonable alternatives, reasons for rejecting those alternatives, and an

1 explanation with supporting documentation that no alternative would be more effective (*id.*,
2 § 11346.2, subd. (b)(1), 11346.2, subd. (b)(4)(A), 11346.9, subd. (a)(4)).

3 In the 2009 regulations, CDCR made the controversial decision to opt for a three-drug
4 protocol, rather than a one-drug protocol, as the standard for lethal injection under Section 3604.¹
5 *Sims* invalidated the 2009 regulations largely because of CDCR's failure to explain that decision
6 regarding method of execution in the manner required by the APA. (*Sims*, at pp. 1068, 1074-75.)

7 **III. Proposition 66 Sought to Revise Procedures for Reviewing Death Sentences.**

8 The voters adopted Proposition 66 in November 2016. The measure was primarily aimed
9 at "[c]hang[ing] procedures governing state court appeals and petitions challenging death penalty
10 convictions and sentences." (Defs.' RJN, Exh. A., p. 104.) The bulk of the Initiative addresses
11 procedures for filing state habeas corpus petitions, the appointment of counsel in such cases, and
12 the establishment of implementing rules by the Judicial Council. (Proposition 66, §§ 3, 5-7.)

13 Proposition 66 also added Section 3604.1 to the Penal Code, which reads in relevant part:
14 "The Administrative Procedure Act shall not apply to standards, procedures, or regulations
15 promulgated *pursuant to Section 3604*." (Emphasis added.) Proposition 66 does not state that it
16 exempts standards, procedures, or regulations promulgated pursuant to any of the other code
17 sections in Title 3 of Part 3 of the Penal Code, governing CDCR's other duties related to
18 "Execution of Death Penalty," or any other provision of the Penal Code.

19 Section 3604.1's exclusive focus on "standards, procedures, or regulations promulgated
20 pursuant to Section 3604"—which authorizes CDCR to adopt standards governing the method of
21 execution—is consistent with the "Official Title and Summary," which states that Proposition 66
22 "[e]xempts prison officials from existing regulation process for developing execution *methods*."
23 (RJN, Exh. A, p. 104 [emphasis added].) The ballot materials emphasize that "Proposition 66 was
24 written by frontline death penalty prosecutors who know the system inside and out. They know
25 how the system is broken, and they know how to fix it." (*Id.*, p. 108.)

26 ¹ CDCR previously acknowledged that if an inmate is not properly rendered unconscious in a
27 three-drug protocol, injection of the second and third drugs causes "excruciating pain." (*Morales*
28 *v. Hickman* (N.D.Cal. 2006) 415 F.Supp.2d 1037, 1040.) Indeed, a federal court found that
CDCR's prior three-drug protocol created "an undue and unnecessary risk" of pain, in violation of
the Eighth Amendment. (*Morales v. Tilton* (N.D.Cal. 2006) 465 F.Supp.2d 972, 981.)

1 Proposition 66 went into effect on October 15, 2017.²

2 **IV. CDCR Issued the 2018 Execution Protocol Without Public Notice and Comment.**

3 On January 29, 2018, CDCR decided not to proceed with its proposed 2015 execution
4 regulations, which had never been finalized. (Complaint, Exh. A, Notice of Filing of
5 Regulations.) Instead, it issued the Execution Protocol that is the subject of this suit, but without
6 providing for public notice and comment. (*Id.* [“These regulations...do not require a public
7 hearing or a public comment period.”].)³

8 Some portions of the Execution Protocol set forth procedures related to the method of
9 execution. (Compare Pen. Code, § 3604, with Execution Protocol, § 3349.7 [“Administration of
10 the Lethal Injection Chemical”].) Other portions set forth procedures related to administration of a
11 death judgment other than the method of execution. For example:

- 12 • the “sanity review” of the inmate (compare Pen. Code, §§ 3700.5-3704, with, e.g.,
13 Execution Protocol, § 3349.5(e)(5)-(6), 3349.5(h), 3349.6(a), 3349.6(b)(2)-(4));
- 14 • the transport and housing of female inmates to San Quentin (compare Pen. Code,
15 §§ 3601-3602, with Execution Protocol, § 3349.6(d));
- 16 • the inmate’s request for a last meal and its maximum cost (Execution Protocol,
17 §§ 3349.6(b)(7), 3349.6(f)(1)(E), CDCR Form 1801-D);
- 18 • who may witness the execution and what they may witness (compare Pen. Code, §
19 3605, with Execution Protocol, § 3349.5(e)(C), 3349.6(h)(1), 3349.7(d), CDCR
20 Form 1801-C);
- 21 • the inmate’s access to in-person visits and telephone calls with spiritual advisors,
22 attorneys, and others (Execution Protocol, §§ 3349.5(g)(2)(E), 3349.5(g)(3),
23 3349.6(b)(5)-(6), 3349.6(f)(2), 3349.6(g)(1));
- 24 • the disposition of the inmate’s remains (compare Pen. Code, § 5061, with
25 Execution Protocol, § 3349.5(g)(2)(D), 3349.8(c), CDCR Form 1801-F); and
- 26 • the Warden’s duty to return the execution warrant (compare Pen. Code, § 3607,
27 with Execution Protocol, § 3349.8(m), CDCR Form 2178).

28 ² See *Briggs v. Brown* (2017) 3 Cal.5th 808, *as modified on denial of rehearing*, Oct. 25, 2017.

³ “CDCR submitted [the Execution Protocol as] File and Print regulations” to the Office of
Administrative Law (“OAL”), which subsequently filed it with the Secretary of State. (Demurrer
at 2.) Because file and print regulations do not receive from OAL the review applicable to a
“[r]egular rulemaking” (Cal. Code Regs., tit. 1, § 6(b)(3)(A) & (G)), OAL’s filing of the
Execution Protocol does not constitute “approval.” In any event, OAL approval is not relevant to
a judicial determination as to the validity of regulations under the APA. (*Sims*, 216 Cal. App. 4th
at 1071; Gov. Code, § 11350, subd. c. [OAL approval “shall not be considered by a court”].)

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ARGUMENT

I. Plaintiffs Have Stated a Claim That Section 3604.1 Does Not Exempt All Regulations Related to Execution of the Death Penalty from the APA.

CDCR adopted the Execution Protocol without public notice and comment. (Complaint ¶ 2.) Regulations adopted without adhering to these and other APA requirements are invalid underground regulations and must be set aside. (*Tidewater Marine Wester, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 570-71; Gov. Code, § 11340.5, subd. (a).) CDCR's execution protocol is a regulation subject to the APA. (*Morales*, at p. 742.) Section 3604.1 exempts solely regulations adopted pursuant to Section 3604 from the APA, but it does not exempt death penalty regulations other than those addressing the method of execution. Because the Execution Protocol contains numerous such regulations, Plaintiffs have stated a claim.

A. Legal Standards for Construction of Penal Code Sections 3604 and 3604.1.

This case turns on the scope of the APA exemption in Section 3604.1. Three canons of statutory construction bear on the analysis: plain language, *expresio unius*, and specific rules of construction related to the APA.

First, in interpreting both Penal Code sections 3604 and 3604.1 (added by Proposition 66), the Court applies the same principles of statutory construction. (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 ["[I]n interpreting a voter initiative ..., we apply the same principles that govern statutory construction." [citations omitted].) "[A court] turn[s] first to the language of the [initiative], giving the words their ordinary meaning." (*Ibid.*) The [initiative's] language must also be construed in the context of the statute as a whole and the [initiative's] overall ... scheme." (*Ibid.*; see also *Heckart v. A-1 Self Storage, Inc.* (2018) 4 Cal.5th 749, 415 P.3d 286, 291 ["We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent."].) "Absent ambiguity, [a court] presume[s] that the voters intend the meaning apparent on the face of an initiative measure ... and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its

1 language.” (*Professional Engineers*, 40 Cal.4th at p. 2017; see also *Heckart*, 4 Cal. 4th 749 [“The
2 plain meaning controls if there is no ambiguity in the statutory language.”].) “Where there is
3 ambiguity in the language of the measure, ‘[b]allot summaries and arguments may be considered
4 when determining the voters’ intent and understanding of a ballot measure.” (*Professional*
5 *Engineers*, 40 Cal.4th at p. 2017.)

6 Second, under the maxim *expressio unius est exclusio alterius*, “if exemptions are
7 specified in a statute, [the Court] may not imply additional exemptions unless there is a clear
8 legislative intent to the contrary.” (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215,
9 1230; see also *Wildlife Alive. v. Chickering* (1976) 17 Cal.3d 190, 196 [“[U]nder the doctrine of
10 *expressio unius est exclusion alterius*, the creation of a limited express exemption suggests that a
11 broader implied exemption could not have been intended.”].)

12 Third, certain rules of statutory construction apply with special force to the APA. The
13 California Supreme Court has emphasized the important purposes of the APA “to ensure that
14 those persons or entities whom a regulation will affect have a voice in its creation [citation]” and
15 to facilitate “public participation in the regulatory process [in order to] direct[] the attention of
16 agency policymakers to the public they serve, thus providing some security against bureaucratic
17 tyranny.” (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333 [internal
18 quotation marks, citations omitted].) Consistent with those purposes, the APA explicitly provides
19 that the provisions of this “chapter shall not be superseded or modified by any subsequent
20 legislation except to the extent that the legislation shall do so expressly.” (Gov. Code, § 11346,
21 subd. (a).) “[A]bsent an express exception, the APA applies to all generally applicable
22 administrative interpretations of a statute,” and, “to remove what would otherwise constitute a
23 regulation from the APA’s scope,” the Legislature—or, here, the voters—must speak “clearly.”
24 (*Morning Star*, 38 Cal.4th at p. 335.) For that reason, as under the federal Administrative
25 Procedure Act, exemptions from the APA’s notice-and-comment requirements must be narrowly
26 construed. (See, e.g., *Texas v. United States* (5th Cir. 2015) 787 F.3d 733, 763; see also
27 *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 214 n.36
28 [relying on constructions of federal APA in construing California APA].) If anything, that rule

1 must be applied with even more force under California's APA, given the Legislature's "desire to
2 achieve in the California APA a much greater coverage of rules than Congress sought in the
3 federal APA." (*Armistead v. State Personnel Bd.* (1978) 22 Cal.3d 198, 201-202.)

4 Consistent with that legislative intent, "any doubt as to the applicability of the APA's
5 requirements should be resolved in favor of the APA." (*California School Bds. Assn. v. State Bd.
6 of Educ.* (2010) 186 Cal.App.4th 1298, 1328.) There is no such doubt here; but, even if the Court
7 thinks otherwise, this rule mandates the rejection of Defendants' position.

8 **B. Under the Plain Language of Penal Code Sections 3604 and 3604.1, the**
9 **Execution Protocol Is Not Exempt from the APA.**

10 The plain language of Sections 3604 and 3604.1, either standing alone or read in the
11 context of Title 3 of Part 3 of the Penal Code, does not exempt from the APA regulations other
12 than those governing method of execution. Section 3604.1 states that "[t]he Administrative
13 Procedure Act shall not apply to standards, procedures, or regulations promulgated *pursuant to*
14 *Section 3604.*" Section 3604.1 does not exempt from the APA standards, procedures, or
15 regulations promulgated pursuant to any other section of the Penal Code.

16 As explained above, Section 3604 is merely one of many sections in Title 3 that govern
17 CDCR's duties related to "Execution of Death Penalty." Section 3604 relates exclusively to the
18 authorized methods of execution and the opportunity for a condemned inmate to choose among
19 them. Subdivision (a) provides that "[t]he punishment of death shall be inflicted by the
20 administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal
21 quantity sufficient to cause death, by standards established under the direction of the [CDCR]." A
22 "standard" is "something established by authority, custom, or general consent as a model or
23 example" or "something set up and established by authority as a rule for the measure of quantity,
24 weight, extent, or quality." (Merriam-Webster.com, [www.merriam-](http://www.merriam-webster.com/dictionary/standard)
25 [webster.com/dictionary/standard](http://www.merriam-webster.com/dictionary/standard).) Section 3604(a) thus relates only to "something established by
26 authority ... as a model or example [or] ... as a rule for the measure of quantity, weight, extent, or
27 quality" for "administration of a lethal gas or ... an intravenous injection of a substance or
28 substances in a lethal quantity sufficient to cause death." (Penal Code, § 3604, subd. (a).)

1 Subdivision (b) of Section 3604 relates exclusively to a condemned inmate’s “opportunity
2 to elect to have the punishment imposed by lethal gas or injection.” (*Id.*, § 3604, subd. (b).) It
3 provides that “[t]his choice shall be made in writing and shall be submitted to the warden pursuant
4 to regulations established by the [CDCR].” (*Ibid.*) Subdivision (c) provides that, if a subsequent
5 date for execution is set, the inmate shall again have the opportunity to elect the method of
6 execution. (*Id.*, § 3604, subd. (c).) Subdivision (d) provides that, “if either manner of execution
7 described in Subdivision (a) is held invalid,” the other means shall be used. (*Id.*, § 3604, subd.
8 (d).) And Subdivision (e) requires that CDCR maintain the ability to execute judgments of death.
9 (*Id.*, § 3604, subd. (e).)

10 The plain language of Section 3604 authorizes promulgation of only standards and
11 regulations for the “manner” or “method” of execution—administration of lethal gas or lethal
12 injection—and the condemned inmate’s right to choose between those execution methods. It does
13 not authorize standards or regulations for any of the many other steps and procedures related to
14 administration of a judgment of death and contained in the Execution Protocol. These include, to
15 name just a few, procedures related to the “sanity review” of the inmate, transport and housing of
16 female inmates to San Quentin, the inmate’s last meal, who may witness the execution and what
17 they may witness, visits and telephone access, disposition of the inmate’s remains, and the
18 Warden’s duty to return the execution warrant. See *supra* Background, Part III. None of these
19 regulations relates to or is dependent upon the methods of execution or an inmate’s right to choose
20 among them, the subjects covered by Section 3604. They instead implement other provisions of
21 the Penal Code, including, among many others, Penal Code §§ 3700.5 through 3704, pertaining to
22 evaluation of the “sanity” of the condemned inmate. See *id.*, Parts I & III.

23 Accordingly, Subdivision (a) of Section 3604.1, which exempts from the APA “standards,
24 procedures, or regulations promulgated *pursuant to Section 3604*,” exempts only standards related
25 to the method of execution. Subdivision (a)’s focus on the method of execution is consistent with
26 the remaining subdivisions of Section 3604.1. Subdivision (b) directly addresses the method of
27 execution by stating that lethal injection executions may be carried out by non-intravenous
28 injections. Subdivision (c) addresses the venue in which an inmate may challenge “the method of

1 execution” and also provides that “[i]f the use of a method of execution is enjoined by a federal
2 court, the Department of Corrections and Rehabilitation shall adopt, within 90 days, a method that
3 conforms to federal requirements as found by that court.” Thus, throughout Section 3604.1, the
4 focus is squarely on the method of execution.

5 Defendants bizarrely claim that “[t]here is no support” for construing the “standards”
6 exempted from the APA to mean standards related to “how gas or chemicals are administered to
7 cause death.” (Demurrer at 9.) But the support for that construction is the plain language of
8 Sections 3604 and 3604.1. Defendants’ arguments to the contrary either reinforce this plain-
9 language reading or lack merit.

10 First, Defendants emphasize that “Penal Code section 3604 is only one part of the statutory
11 framework for administration of the death penalty, and should not be read in isolation.”
12 (Demurrer at 9.) They further note that “this framework, with provisions for witnesses, handling
13 of remains, etc., all existed when the voters adopted Proposition 66.” (*Ibid.*) The existence of this
14 larger statutory scheme—of which Section 3604 is “only one part” (*ibid*)—is further evidence that
15 Section 3604.1—which carefully references *only* Section 3604, rather than referencing all of Title
16 3—exempts from the APA only standards related to the method of execution.

17 With presumed awareness of the entirety of the statutory framework for administration of
18 the death penalty that already existed, the drafters of Proposition 66—self-proclaimed “frontline
19 death penalty prosecutors who know the system inside and out” (Defs’ RJN, p. 108.)—and the
20 voters who adopted it chose carefully to exempt from the APA “only one part.” (Demurrer at 9.)
21 Had Proposition 66 been designed to exempt all regulations related to administration of the death
22 penalty, Section 3604.1 could easily have been drafted to exempt, for example, “standards,
23 procedures, or regulations promulgated pursuant to Title 3 of Part 3 of the Penal Code.”
24 “Obviously, the enactors chose not to list” either Title 3 in its entirety or specific other Penal Code
25 provisions related to CDCR’s administration of the death penalty “though they were undoubtedly
26 fully aware of the[ir] existence.... It thus appears that the omission of [the other Penal Code
27 provisions] must have been intentional.” (*People v. Cook* (1984) 158 Cal.App.3d 948, 953 [under
28

1 canon of *expressio unius*, initiative statute that “expressly lists ‘murder or voluntary
2 manslaughter’” as a “serious” felony excluded involuntary manslaughter].)⁴

3 Second, Defendants argue that “[t]he other Penal Code provisions ... pertaining to the
4 application of the death penalty cannot come into play unless there is an execution set to be
5 performed under Penal Code section 3604.” (Demurrer at 9.) But an execution date is not set
6 pursuant to Section 3604; it is set pursuant to Penal Code section 1227, which instructs the court
7 in which the judgment of death was entered to “make and cause to be entered an order specifying a
8 period of 10 days during which the judgment shall be executed.” (Pen. Code, § 1227, subd. (a).)
9 It is the setting of an execution date pursuant to Section 1227, *not* Section 3604, that triggers the
10 events and procedures governed by the Execution Protocol.

11 Notably, Defendants’ current position—that Section 3604, relating only to execution
12 method, is somehow the source of authority for all execution regulations—is squarely at odds with
13 CDCR’s pre-Proposition 66 position that its execution regulations could be and were issued under
14 its general authority to issue regulations in Penal Code section 5058. *Supra* Background, Part II.

15 Third, in construing the scope of the APA exemption in Section 3604.1, Defendants
16 erroneously fixate on the word “standards,” while willfully disregarding the limitation that
17 follows—“pursuant to Section 3604.” Defendants make the conclusory assertion that “[t]he
18 challenged provisions of the protocol all constitute ‘standards’ to be followed for executions under
19 Penal Code sections 3604 and 3604.1.” (Demurrer at 8.) Whether or not the many provisions
20 related to “sanity review,” qualify as “standards,” they are regulations promulgated pursuant to
21 CDCR’s duties under Penal Code sections 3700.5 through 3704 and CDCR’s general authority to
22 issue rules and regulations in Penal Code 5058. They have nothing to do with the method of
23 execution and are not standards “promulgated pursuant to Section 3604,” which are the only ones
24 exempted from the APA by Section 3604.1. Similarly, Defendants argue, without support, that
25 “just as the standards for administering a lethal injection are exempt from the APA, other aspects
26 of such an execution ‘procedure’ are also exempt ‘standards’ promulgated pursuant to Penal Code

27
28 ⁴ Pre-Proposition 66 execution protocols implemented CDCR’s duties under Section 3604 and
many other code sections related to the death penalty. See *supra* Background, Part II.

1 section 3604.” (Demurrer at 8.) They cite *Hassan v. Mercy American River Hospital* (2003) 31
2 Cal.4th 709, 715, but *Mercy* is irrelevant—it has nothing to do with executions, the Penal Code, or
3 the meaning of “standards” or “procedures”; instead, it construes the word “person” in interpreting
4 the scope of a privilege in the Civil Code. (*Ibid.*) Defendants cannot rewrite and expand the scope
5 of Sections 3604 or 3604.1 through such unsupported arguments.

6 In sum, this Court need not look beyond the plain language of Sections 3604 and 3604.1 to
7 conclude that only those regulations directly related to the administration of lethal gas or lethal
8 injection and to an inmate’s opportunity to choose between those execution methods are exempted
9 from the APA. That conclusion is required in light of the rules, discussed above, that (1) any
10 exception to the APA must be stated “expressly” and “clearly” (Gov. Code, § 11346, subd. (a);
11 *Armistead*, 22 Cal.3d at p. 202; *Morning Star*, 38 Cal.4th at p. 335); (2) exemptions from the APA
12 must be narrowly construed (see *Texas v. U.S.*, 787 F.3d at p. 763); and (3) “any doubt as to the
13 applicability of the APA’s requirements should be resolved in favor of the APA” (*California*
14 *School*, 186 Cal.App.4th at p. 1328).

15 **C. The Ballot Materials for Proposition 66 Confirm that Section 3604.1 Exempts**
16 **from the APA Only Standards Related to Execution Methods.**

17 Because there is no ambiguity in the text of Section 3604.1, there is no reason to consider
18 Proposition 66’s ballot materials. (*Professional Engineers*, 40 Cal.4th at p. 2017 [considering
19 ballot materials “[w]here there is ambiguity in the language of the measure”].) In any event,
20 construing Section 3604.1 to exempt from the APA only standards related to execution methods is
21 fully consistent with the purposes of Proposition 66, as evidenced in the ballot materials.

22 The primary purpose of Proposition 66, as Defendants observe, was to “shorten the time
23 that legal challenges to death *sentences* take,” an issue that has no bearing on the extent to which
24 death penalty regulations must comply with the APA. (Demurrer at 10, quoting Defs’ RJN, Exh.
25 A, p. 105 [emphasis added].) Most of the ballot materials have no relevance to the APA issue
26 because they address direct appeals of death sentences and habeas corpus petitions challenging
27 those sentences. The ballot materials allude to the APA exemption only in passing. The most
28 prominent mention appears in the “Official Title and Summary” on the first page of the ballot

1 materials, which states that Proposition 66 “[e]xempts prison officials from existing regulation
2 process for developing execution *methods*.” (Defs’ RJN, Exh. A, p. 104 [emphasis added].) That
3 official description confirms that Section 3604.1 addresses only methods of execution.

4 Although Defendants contend it would somehow be illogical to exempt only execution
5 methods from the APA (Demurrer at 10-12), this argument fails for multiple reasons. To start,
6 that was the choice made by the drafters of Proposition 66 and the voters, as evidenced by the text
7 of the statute and the ballot materials. It is not for this Court to question the wisdom of that policy
8 choice. (*Professional Engineers*, 40 Cal.4th at p. 1043 [courts “do not, of course, pass upon the
9 wisdom, expediency, or policy of enactments by the voters any more than we would enactments
10 by the Legislature”] [internal quotation marks, citations omitted].)

11 Further, exempting only execution methods is entirely logical given the text and context.
12 The drafters of Proposition 66 were clearly concerned specifically about legal challenges to the
13 method of execution. Section 3604.1, Subdivision (c) addresses the possibility that CDCR’s
14 method of execution will be invalidated by a court: In the event a federal court enjoins CDCR’s
15 method of execution, CDCR must adopt a new method within 90 days. (Pen. Code, § 3604.1,
16 subd. (c).) Section 3604.1, subdivision (a) facilitates CDCR’s ability to meet that 90-day
17 requirement by exempting standards governing the method of execution from the APA.

18 Concerns about the legal viability of CDCR’s method of execution were well-founded.
19 *Sims* invalidated CDCR’s 2009 regulations in large part because of the myriad APA errors related
20 to CDCR’s decision to adopt a three-drug rather than a one-drug protocol—a decision squarely
21 within its duties under Section 3604 to adopt standards governing the method of execution. (*Sims*,
22 at pp. 1068, 1074-75.) Notably, prior to *Sims*, CDCR’s method of execution had twice been
23 invalidated by federal courts. (*Fierro v. Gomez* (9th Cir 1996) 77 F.3d 301 [lethal gas]); *Morales*
24 *v. Hickman* (N.D.Cal. 2006) 415 F.Supp.2d 1037 [lethal injection].)

25 Defendants quote the California Supreme Court as having construed Proposition 66 to
26 “remove[] procedural impediments to execution protocols that are evident in published cases.”
27 (Demurrer at 9, quoting *Briggs v. Brown* (2017) 3 Cal. 5th 808, 831.) But the scope of Proposition
28 66’s APA exemption was not before the Court in *Briggs*. And the published cases demonstrate

1 that a major source of delays in administering death sentences was CDCR's inability to develop a
2 method of execution that could withstand legal challenge. Given this history, Section 3604.1
3 logically focuses on the topic at the center of legal challenge and delay—standards governing the
4 method of execution. To address potential delay arising from invalidation of the CDCR's method
5 of execution, Proposition 66, in Section 3604.1, Subdivision (c), requires CDCR to adopt a new
6 method within 90 days and, in Section 3604.1, Subdivision (a), removes a procedural impediment
7 (the APA) that would otherwise make it difficult for CDCR to meet that timeline. But Proposition
8 66 did not exempt from the APA other aspects of CDCR's duties in administering the death
9 penalty, thus leaving some continued agency oversight and public participation—the default under
10 the APA absent specific and express language to the contrary. (Gov. Code, § 11346, subd. (a)
11 [APA exemptions must be “express[]”].)

12 **D. The Execution Protocol Is an Invalid Underground Regulation.**

13 The Execution Protocol is replete with provisions addressing topics other than the method
14 of execution or the inmate's election of method. See *supra* Background, Part III. These
15 provisions were promulgated pursuant to sections of the Penal Code other than Section 3604, but
16 without adherence to the APA. The Execution Protocol is therefore an unlawful underground
17 regulation that CDCR may not “enforce, or attempt to enforce.” (Gov. Code, § 11340.5, subd. a.)

18 CDCR separately argues in its motion to strike that the prayer for relief should be stricken
19 because it seeks to invalidate the entire Execution Protocol. Disputes as to the scope of relief do
20 not establish a basis for a demurrer. (*Gressley v. Williams* (1961) 193 Cal.App.2d 636, 639 [on
21 demurrer, “the complaint will be held good” if “the plaintiff is entitled to *any* relief at the hands of
22 the court against the defendants” [emphasis added].) Invalidation of the Execution Protocol is, in
23 any event, the proper remedy. (*Engelmann v. State Bd. of Educ.* (1991) 2 Cal.App.4th 47, 50, 62-
24 63 [affirming trial court judgment holding “procedures and criteria” for selecting textbooks “void”
25 and prohibiting Board from “using those procedures and criteria until they had been promulgated
26 as prescribed by the APA,” despite agency's argument that some procedures and criteria
27 “obviously” exempt from APA].) CDCR chose to include in the Execution Protocol both
28 standards promulgated pursuant to Section 3604 and regulations implementing non-exempt Penal

1 Code provisions. While it need not in the future “submit the entirety of its procedures” for
2 administering the death penalty through the APA process,” “to the extent any of the contents of” a
3 future execution protocol constitute regulations under non-exempt Penal Code provisions, CDCR
4 “will need to promulgate [them as] regulations.” (*Id.* at 62.)

5 **II. The Doctrine of Administrative Exhaustion Does Not Bar This Suit.**

6 Defendants’ contention that Plaintiff Masters must exhaust administrative remedies is
7 incorrect and irrelevant. First, exhaustion is not required under the APA because Government
8 Code Section 11350 expressly creates a judicial remedy and imposes no prerequisite to filing suit.
9 (*Coastside Fishing Club v. California Fish & Game Com.* (2013) 215 Cal.App.4th 397, 416
10 [rejecting exhaustion argument in light of Section 11350].) This rule applies to a prison inmate’s
11 APA challenge to regulations issued without notice and comment. (*Hillery v. Rushen* (9th Cir.
12 1983) 720 F.2d 1132, 1137-38.) Courts have repeatedly adjudicated merits of inmate APA
13 challenges without indicating that administrative remedies were first exhausted. (*Sims; Morales;*
14 *Stoneman v. Rushen* (1982) 137 Cal.App.3d 729.) None of Defendants’ cases involves a statute,
15 like the APA, that expressly provides a judicial remedy and lacks any exhaustion requirement.
16 (See *Abelleira v. Dist. Court of Appeal* (1941) 17 Cal.2d 280, 291 [“Unemployment Insurance
17 Act...contains a complete administrative procedure”]; *Wright v. State* (2004) 122 Cal.App.4th
18 659, 664 [inmate tort claims]; *Parthemore v. Col* (2013) 221 Cal.App.4th 1372, 1377 [same].)⁵

19 Second, Defendants’ exhaustion argument applies only to Plaintiff Masters. Thus, even if
20 Plaintiff Masters were required to exhaust, which he is not, there is no bar to adjudication of the
21 merits of this suit as Plaintiff Witness to Innocence is not a prison inmate.

22 **CONCLUSION**

23 For the foregoing reasons, Defendants’ demurrer should be overruled.

24
25
26 ⁵ Even if the APA had an exhaustion requirement, this case falls within the futility exception.
27 (*Ogo Assoc. v. City of Torrance* (1974) 37 Cal.App.3d 830, 834.) The Attorney General on behalf
28 of the Secretary of Corrections, the Warden of San Quentin, and CDCR demurs on the ground that
Proposition 66 exempted execution regulations in their entirety from the APA. An internal prison
grievance would have been futile. If the Court believes Mr. Masters was required to exhaust, he
should be granted leave to amend the complaint to plead the futility exception.

1 DATED: May 16, 2018

2 Respectfully submitted,

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