IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

MAY 29 2012

Frederick K. Ohlrich Clerk

Deputy

ALL OF US OR NONE, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, and ALISHA COLEMAN,

Petitioners,

vs.

DEBRA BOWEN, Secretary of State of the State of California; and JOHN ARNTZ, Director of the Department of Elections, County of San Francisco,

Respondents.

PETITION FOR REVIEW AFTER AN ORDER FROM THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE, CASE NO. A134775

JORY STEELE (206944)
DIANA TATE VERMIERE (232264)
MARGARET C. CROSBY (56812)
NOVELLA COLEMAN (281632)
LINNEA NELSON (278960)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: 415-621-2493
Facsimile: 415-255-8437
Email: jsteele@aclunc.org

PETER SHEEHAN (51555)
SOCIAL JUSTICE LAW PROJECT
449 15th Street, suite 301
Oakland, CA 94612
Telephone: 510-891-9794 ext. 628
Facsimile: 510-891-9727

OREN SELLSTROM (161074)
MEREDITH DESAUTELS (259725)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
131 Steuart Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444
Facsimile: (415) 543-0296

Additional Counsel Listed on Next Page

JOSHUA KIM (257260)
CT TURNEY (279241)
A NEW WAY OF LIFE REENTRY PROJECT
PO Box 875288
Los Angeles, CA 90087
Telephone: (323) 563-3575
Facsimile: (323) 563-3445

CATHERINE MCKEE (267126)
LEGAL SERVICES FOR PRISONERS WITH CHILDREN
1540 Market St., Suite 490
San Francisco, CA 94102
Telephone: (415) 255-7036
Facsimile: (415) 552-3150

ROBERT RUBIN (85084)
LAW OFFICE OF ROBERT RUBIN
315 Montgomery St., 10th Fl.
San Francisco, CA 94104
Telephone.: (415) 434-5118

Attorneys for Petitioners

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I. ISSUE PRESENTED FOR REVIEW

This case raises a significant and novel constitutional question arising from the intersection of voting rights under the California Constitution with the Legislature's historic revision of the state's criminal justice system, known as Realignment. The issue is:

> Are California citizens who are convicted of low-level felonies following Realignment, and either released into their communities under county supervision or sentenced to county jail, entitled to vote?

II. WHY REVIEW SHOULD BE GRANTED

Petitioners seek review of a Court of Appeal order summarily denying an original writ petition involving the fundamental voting rights of more than 85,000 California citizens. These people are barred from registering to vote and from voting because of a memorandum issued by the Secretary of State. *No court* has reviewed the validity of the analysis that has resulted in their disenfranchisement, even though their eligibility to vote turns on legal, not administrative, issues involving application of the California Constitution to changes in the California Penal Code.[1] The Court of Appeal has refused to resolve the issue. Thus, petitioners have come to this Court to clarify Californians' eligibility to vote before the

[1] Hereinafter, unless otherwise noted, all references to the Constitution and statutes refer to California's Constitution and statutes.

November election. Prompt judicial resolution is important for people throughout California – potential voters, probation officers, sheriffs and elections officials.

For decades, this Court has recognized that the franchise is the cornerstone of democracy and has insisted that courts protect the right to vote. Because voting "is one of the most important functions of good citizenship," *Otsuka v. Hite*, 64 Cal.2d 596, 604 (1966), California courts have an obligation to guard this precious right. No "construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning." *Id.*

The heart of this case is article II, section 4 of the California Constitution, enacted by Proposition 10 in 1974 to expand the voting rights of people with criminal convictions. The voters enacted this provision in response to a series of landmark opinions from this Court striking down laws that broadly disenfranchised people with criminal convictions. Under article II, section 4, people may temporarily lose the right to vote only while they are "imprisoned or on parole for the conviction of a felony." Because voting is a fundamental right, the temporary felony exception is narrowly construed to disenfranchise only those "imprisoned in state prison or… on parole as a result of the conviction of a felony." *League of Women Voters v. McPherson*, 145 Cal. App. 4th 1469, 1486 (2006). *McPherson*

clarified that people with felony convictions placed on probation serving a portion of their sentence in county jail are eligible to vote, because they are neither in state prison nor on parole.

Article II, section 4 is a self-executing provision. *Flood v. Riggs*, 80 Cal. App. 3d 138, 155 (1978). Therefore, changes to California's criminal laws affect eligibility to vote by operation of the state Constitution. A bill reclassifying a crime (for example, shoplifting merchandise worth less than $1000) from a felony to a misdemeanor expands the pool of eligible voters, even if it says nothing about enfranchisement.

The Legislature enacted a major change in California's criminal justice system by passing Realignment Legislation in 2011. [2] People convicted of non-serious, non-violent, non-sexual felonies, such as drug possession or counterfeiting a driver's license,[3] may no longer be sent to state prison or placed on parole. Pen. Code § 1170(h). They will remain in their communities, sentenced under a variety of new options such as home confinement or supervised release. In addition, parole was eliminated for

[2] Assemb. Bill 109 2011-12 Reg. Sess. (Cal. 2011-12) (enacted Apr. 4, 2011); Assemb. Bill 117 2011-12 Reg. Sess. (Cal. 2011-12) (enacted June 30, 2011); Assemb. Bill X1 17 2011-12 Extraordinary Sess. (Cal. 2011-12) (enacted Sept. 20, 2011). Hereinafter the enactments are collectively referred to as "Realignment" or "Realignment Legislation."

[3] Health & Safety Code § 11357(a) (possession of concentrated cannabis); Pen. Code § 470a (counterfeiting a driver's license).

individuals sentenced to state prison for low-level felonies. Instead, these individuals are released onto postrelease community supervision (hereinafter "PRCS"). Pen. Code §§ 3000.08(b), 3451(a). Thus, they, too, are not disenfranchised under the California Constitution, which requires either a felony conviction *and* imprisonment in state prison or a felony conviction *and* parole in order to bar a citizen from voting.

The Secretary of State, however, issued a directive in December 2011, advising elections officials that people convicted of low-level felony offenses following Realignment may not register or vote, although they are neither in prison nor on parole. Thus, thousands of Californians, living in their communities, in county jail, home detention or on supervised release, will be barred from participating in the important November 2012 election. Many – perhaps most – of these people would have been placed on felony probation following conviction of non-serious, non-violent felonies prior to Realignment,[4] and thus eligible to vote, even if they were serving time in jail during probation. Thus, the Secretary of State's memorandum has the anomalous effect of disenfranchising men and women following the passage of a historic law intended to emphasize rehabilitation and

[4] Dean Misczynski, Pub. Policy Inst. of Cal., *Rethinking the State-Local Relationship: Corrections*, 12 (Aug. 2011).

reintegration into society of people who have committed low-level offenses.

Petitioners are the organizations committed to voting rights and the reintegration of individuals with convictions into society who brought the *McPherson* case, as well as an African-American woman with a daughter, serving a sentence of three years in San Francisco's county jail and one year of mandatory supervision for possession of drugs for sale and sale/transport of drugs. She has voted in the past and wishes to continue to vote. Petitioners believe that the Secretary of State's interpretation of the California Constitution and the Realignment Legislation is, quite simply, wrong. They brought this writ proceeding to obtain a conclusive judicial resolution of voting rights of thousands of Californians. Respondents are the Secretary of State and the San Francisco Registrar of Voters. While the parties disagree on the merits – the San Francisco Registrar agrees with petitioners that people convicted of non-serious offenses are entitled to vote and the Secretary of State disagrees – *no* party to the case has disputed the importance of swift and definitive judicial resolution of this important constitutional issue. However, the Court of Appeal has refused to hear the case, which was pending for more than two months and has been fully briefed.

This Court has resolved major voting rights cases in original proceedings, and has reminded appellate courts of their duty to clarify elections issues by statewide writ relief. While voting rights are always precious, the issue arises here in a profoundly important context. Statutes and court decisions affecting the right to vote have long had a significant impact on people of color's ability to participate in the political process. Felony disenfranchisement laws, in particular, raise serious racial justice concerns.

As scholar Michelle Alexander has written in an important new book:

> During the Jim Crow era, African-Americans were denied the right to vote through poll taxes, literacy tests, grandfather clauses, and felon disenfranchisement laws, even though the Fifteenth Amendment to the U.S. Constitution specifically provides that, "the right of citizens of the United States to vote shall not be denied…on account of race, color, or previous condition of servitude." Formally, race-neutral devices were adopted to achieve the goal of an all-white electorate without violating the terms of the Fifteenth Amendment….Finally, because blacks were disproportionately charged with felonies – in fact some crimes were specifically defined as felonies with the goal of eliminating blacks from the electorate – felony disenfranchisement laws effectively suppressed the black vote as well. Following the collapse of Jim Crow, all of the race-neutral devices for excluding blacks from the electorate were eliminated through litigation or legislation, except felon disenfranchisement laws….Felon disenfranchisement laws have been more effective in eliminating black

> voters in the age of mass incarceration than they were during Jim Crow.

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*187-88 (The New Press 2010). The racially disproportionate impact of laws disenfranchising individuals with felony convictions only underscores the urgency of ensuring that California citizens living in their communities under county supervision or in county facilities for low-level crimes have an opportunity to participate in the political process.

Petitioners have come to this Court following the Court of Appeal's unexplained refusal to decide this case, which has a complete record and set of briefs. No facts are in dispute. Petitioners ask this Court to decide this important voting rights issue in time for the November 2012 election.[5]

III. FACTS

In 1974, the Legislature proposed and the voters passed Proposition 10, which amended the California Constitution to expand the voting rights of citizens with convictions. The initiative replaced California's felony disenfranchisement provision from a permanent ban to a limited and temporary exclusion. Now, article II, section 4 grants voting rights to all

[5] The deadline for registration is October 22, 2012.

California citizens except those "imprisoned or on parole for the conviction of a felony." The Legislature subsequently enacted Elections Code section 2101, which authorizes registration by any mentally competent citizen residing in the state, at least 18 years old at election time, "not in prison or on parole for the conviction of a felony." In 2006, the Court of Appeal, continuing this tradition, held that article II, section 4 of the Constitution disenfranchises only those "in state prison or…on parole for the conviction of a felony." *McPherson*, 145 Cal. App. 4th at 1486. The Legislature amended Elections Code section 2016 in 2009 after the *McPherson* decision, retaining the phrase "in prison," together with "on parole" as the exceptions to enfranchisement. Stats. 2009, ch. 364, § 3. Thus, in California, all felony probationers, including those serving time in county jails, are eligible to register to vote and to vote. California jail officials have devised systems to allow felony probationers to participate in elections while they are confined in jail.

In 2011, the Legislature enacted Realignment. Realignment fundamentally transformed California's criminal justice system, moving away from incarceration and punishment toward rehabilitation and reintegration into society. This change, described as "vast and historic,"[6]

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[6] Misczynski, *supra*, at 30 (quoting the California Department of Finance) (Aug. 2011).

reforms California's approach to its adult inmate population "more comprehensively than any time since statehood."[7]

While reducing prison overcrowding and saving money,[8] Realignment did far more. The Legislature recognized that California's previous approach to criminal justice was an expensive failure. Despite "the dramatic increase in corrections spending over the past two decades, national reincarceration rates for people released from prison remain unchanged or have worsened. National data show that about 40 percent of released individuals are reincarcerated within three years. In California, the recidivism rate for persons who have served time in prison is even greater than the national average." Pen. Code § 17.5(a)(2). The Governor also acknowledged, in signing the Realignment Legislation, that reform was

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[7] *Id*. at 5.

[8] The Legislative Analyst Office found, between 1976 and 2007, California spent only 5% of its rapidly growing corrections budget on rehabilitation programming but 45% on incarceration. Cal. Dep't of Corr. & Rehab. Expert Panel on Adult Offender and Recidivism Reduction Programming, *Report to the California Legislature: A Roadmap for Effective Offender Programming in California* 6 (June 29, 2007), http://ucicorrections.seweb.uci.edu/pdf/Expert_Panel_Report.pdf. Despite the $10 billion annual corrections budget, "California's adult offender recidivism rate [was] one of the highest in the nation." *Id.* at 88.

overdue: "For too long, the State's prison system has been a revolving door for lower-level offenders and parole violators."[9]

The goal of Realignment is to improve the results of the penal system by keeping people who have committed low-level felonies like drug offenses in their communities and providing them with services that will help them change their lives. The Legislature granted courts new authority to tailor a range of sanctions while also addressing the problems that lead people to commit crimes. As the Public Policy Institute of California observed, key to this goal is keeping people close to their friends, families and people who know them:

> In this case, counties have a far greater stake than the state does in trying to rehabilitate as many of these offenders as possible, because they have to live with them. Those going to county jail are from local communities and are known and have family and friends there. They will almost surely return to those communities after serving their sentences.
>
> Counties also run a variety of programs that support the rehabilitative goal, such as drug and alcohol abuse treatment, mental health treatment, job training, housing and others. If they use these programs creatively to support rehabilitation, they might be more successful than the state.[10]

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[9] Governor Edmund G. Brown, Jr.'s AB 109 signing message (April 5, 2011).

[10] Misczynsi, *supra*, at 24 n. 4.

The people who will now be in their communities following implementation of Realignment are men and women whose offenses are neither violent nor serious. They include, for example, people who have forged a train ticket, possessed morphine, taken items from an empty building during an emergency, or received stolen metal from a junk dealer. Garrick Byers, Fresno County Public Defenders Senior Defense Attorney, Realignment, Appendix 1 (Dec. 19, 2011), Ex. 4.[11] In Realignment, the Legislature recognized that these men and women may be punished safely in their home communities and that they will benefit from a variety of services and supervision. Pen. Code § 17.5. They may be rehabilitated and reintegrated into their communities.[12]

Under Realignment, people who have committed low-level felonies will now be under the authority of the counties rather than the state California Department of Corrections and Rehabilitation. They will be treated very differently. The Legislature has directed counties to devise

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[11] Pen. Code §§ 481 (forging a train ticket); 463 (taking items from an empty building during an emergency); 496a (receiving stolen metal from a junk dealer); Health & Safety Code § 11350 (possessing morphine).

[12] "Realigning low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs, which are strengthened through community-based punishment, evidence-based practices, improved supervision strategies, and enhanced secured capacity, will improve public safety outcomes among adult felons and facilitate their reintegration back into society." Pen. Code § 17.5(a)(5).

Realignment Implementation Plans "to maximize the effective investment of criminal justice resources in evidence-based correctional sanctions and programs, including, but not limited to, day reporting centers, drug courts, residential multiservice centers, mental health treatment programs, electronic and GPS monitoring programs, victim restitution programs, counseling programs, community service programs, educational programs, and work training programs." Pen. Code § 1230.1(a), (d). The California State Association of Counties has stated that "the only way realignment will be successful is if the planning effort results in a significant shift away from a predominantly incarceration model and movement to alternatives to incarceration."[13]

Realignment created two new categories within the criminal justice system for lesser criminal offenses. Individuals sentenced to the first category are those sentenced on or after October 1, 2011, who are convicted of a felony punishable pursuant to Penal Code section 1170(h) and whose current and prior felony convictions are non-serious, non-violent, and non-registrable as a sex offense. Pen. Code §§ 18(a), 1170(h)(3). In addition, individuals in this category have not received the aggravated white collar

[13] Letter from Paul McIntosh, Executive Dir., Cal. State Ass'n of Counties, to County Bd. of Supervisors and Admin. Officers 2 (Feb. 23, 2012), *available at* http://www.cpoc.org/php/realign/ab109home.php (follow "CSAC Memo Re: AB 117 and the Community Corrections Partnership").

crime enhancement pursuant to Penal Code section 186.11. Pen. Code § 1170(h)(3)(D). The Legislature consistently refers to these individuals as "low-level" offenders, clearly separating them from the class of individuals traditionally disenfranchised due to a conviction for a more serious felony. Pen. Code § 17.5(a)(5)-(6). CDCR has estimated that by June 2013, the total number of individuals in this category who will have been sentenced to county supervision and custody, is projected to be 30,541.[14]

The second category created by Realignment is PRCS supervisees. A PRCS supervisee is someone who will be released from state prison on or after October 1, 2011 for a non-serious offense.[15] When released from state prison, people under PRCS supervision will be supervised by the designated local supervising agency, typically the county probation department, rather than placed on parole under the supervision of CDCR.

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[14] Cal. Dep't of Corr. & Rehab, *Fall 2011 Adult Population Projections 2012-2017* 11, http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Projections/F11pub.pdf.

[15] PRCS supervisees are those released from state prison after serving a sentence for *none* of the following offenses: a serious felony, a violent felony, a crime for which the offender was sentenced with a prior "strike," a crime where the person was classified as a high risk sex offender, and a crime for which the offender was sentenced as a "mentally disordered offender." Pen. Code §§ 3000.08(a), (c); 3451(b). In addition, a PRCS supervisee cannot be a sex-registerable offender who was on parole for a period of more than three years when he committed the current state prison felony and neither can the person have been on life parole when the current state felony was committed. Pen. Code § 3000.08(c).

Pen. Code §§ 3000.08(a) – (c), 3451(a). PRCS differs from parole not merely by name. Different agencies supervise PRCS supervisees and parolees. Pen. Code §§ 3000.08(a), (c); 3056(a); 3454(a); 3456(a); 3457. CDCR estimates that by June 2013, 54,590 individuals will have been released into PRCS.[16]

On December 5, 2011, respondent Bowen issued Memorandum # 11134, directed to all County Clerks/Registrars of Voting, stating that none of the individuals convicted of low-level offenses and sentenced under Realignment – people confined in county jails for non-serious, non-violent, non-sexual felonies, people released onto mandatory supervision for the concluding portion of those low-level felony sentences, or people on PRCS – are eligible to vote.

IV. PROCEDURAL HISTORY

Petitioners, All of Us or None, Legal Services for Prisoners with Children, League of Women Voters in California, and Alisha Coleman filed this proceeding on March 7, 2012. Respondents are Secretary of State Debra Bowen and San Francisco Registrar of Voters John Arntz. On March 15, the Court of Appeal set a briefing schedule and issued a *Palma*

[16] Cal. Dep't of Corr. & Rehab., *supra*, note 12, at 17 (noting that lower projections for the active parole population are primarily due to the implementation of PRCS).

notice. Criminal justice scholars from across the country submitted an amicus curiae brief in support of petitioners on March 21. After the Court granted the Attorney General's application to extend the briefing schedule, the Secretary of State filed an Opposition on the merits on April 16, along with a volume of exhibits to supplement the exhibits petitioners had filed. On the same day, the San Francisco Registrar filed a responsive brief addressing the constitutional issues, agreeing with petitioners on the merits and requesting that the peremptory writ permit local elections officials to obtain adequate information to determine eligibility to register and vote. Petitioners filed their reply brief on April 27.

On May 17, the Court of Appeal issued an order denying the scholars' application for leave to file an amicus brief and an order summarily denying the writ petition.

V. ARGUMENT

This case presents a pure issue of law: what are the voting rights of people who have committed low-level felonies, and who are either released into their communities under the supervision of the county, or sentenced to county jail? The Secretary of State's Memorandum is premised on the theory that for individuals sentenced under Realignment, "only the place of imprisonment is changed, from state prison to county jail." Ex. 1 at 16. But that is simply not true. Realignment adopts a fundamentally new

approach to crime and punishment in California. It reflects the state's acknowledgment that its heavy reliance on incarceration has been a failure, and grants new authority to judges to tailor sentencing options, such as home detention, that have a better chance of rehabilitating and reintegrating individuals convicted of low-level felonies into their communities and society. Pen. Code § 17.5.

Following Realignment, California will be more like the state that the voters knew in 1974, when they passed Proposition 10 to limit disenfranchisement to individuals convicted of serious crimes, who were deemed to be dangerous and thus confined in state prison or under the custody of what was then called the California Department of Corrections. At that time, California had 12 state prisons, housing fewer than 25,000 inmates. California now has 33 state prisons, 42 incarceration camps and 13 Community Correctional facilities, confining more than 142,000 inmates.[17] The percentage of residents in state custody has increased well past population growth; while California's population has increased by 78%, its population in custody has increased by 474%.[18] This huge

[17] Dean Misczynski, Pub. Policy Inst. of Cal., *Rethinking the State-Local Relationship: Corrections*, 8 (Aug. 2011).

[18] In 1974, the estimated California population was 21,173,865. (Population Distribution and Population Estimates Branches U.S. Bureau of the Census Intercensal Estimates of the Total Resident Population of States: 1970 to 1980 (1995)

expansion of the state prison population resulted from many factors, including mandatory sentencing, the war on drugs, and initiative measures, all of which combined to substantially increase sentences for non-violent offenses, such as narcotics.

The voters who approved Proposition 10 understood that only people who had committed "*serious*" crimes – the term repeatedly used in the ballot arguments – who were sent away to state prison would temporarily lose the right to vote. Men and women who had committed non-violent, non-serious crimes, who were not dangerous and remained in their communities, would be eligible to vote. The ballot pamphlet specifically contemplated, for example, a woman with a conviction participating in school board elections that would affect her children. Sec'y of State, *California Voters Pamphlet: General Election November 5, 1974* (Nov.

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http://www.census.gov/popest/data/state/asrh/1980s/tables/st7080ts.txt). Today, the California state population as reported by the most recent Census data is 37,691,912 people. (U.S. Census Bureau, State and County QuickFacts (2012), http://quickfacts.census.gov/qfd/states/06000.html.). In 1974, the California Department of Corrections reported that the total institution population was 24,741 individuals (Health and Welfare Agency, California Department of Corrections, *California Prisoners 1974-1975*, 4 (1975) *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd1974_75.pdf). Today, the total population of individuals in state custody as of February 15, 2012 is 142,008. (Data Analysis Unit, CDCR, *Weekly Report of Population: February 15, 2012* (2012) *available at* http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad120215.pdf).

1974) (full text, analysis by Legislative Counsel, ballot arguments), Ex. 14 at 314 (argument in favor of Proposition 10). Realignment now returns those California citizens to their communities. They have a constitutional right to vote.

A. This Court Should Definitively Resolve Who Can Vote in 2012.

At stake in this case is the ability of thousands of Californians to participate in a Presidential election and vote on a ballot that will include major initiatives. The Court of Appeal's summary denial of the petition, after extensive briefing, represents a departure from California's tradition of swift judicial resolution of electoral issues through statewide writ proceedings. As this Court recently reaffirmed in its opinion determining the district maps for the November 2012 election on an expedited basis:

> In past cases this court has repeatedly held that this court may appropriately exercise its jurisdiction over a petition for an original writ of mandate when "the issues presented are of great public importance and must be resolved promptly." (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845; see, e.g., *Clean Air Constituency v. California State Air Resources Bd.* (1974) 11 Cal.3d 801, 808; *see generally* 8 Witkin, Cal. Procedure, *supra*, Extraordinary Writs, § 146, pp. 1043–1046.) We have frequently found challenges ripe for the invocation and exercise of our original writ jurisdiction under this standard in cases involving significant legal issues affecting the electoral process, when a speedy resolution of the underlying controversy is necessary to avoid a disruption of an upcoming election.

Vandermost v. Bowen, 53 Cal.4th 421, 453 (2012). *Vandermost* resolved the issue of *where* California citizens will vote in November. This proceeding seeks to clarify the related issue of *who* can vote in the same election. Like *Vandermost*, it represents the paradigmatic case for invoking statewide writ jurisdiction. Indeed, all of the major contemporary California cases on felony disenfranchisement have been decided in original writ proceedings. *Ramirez v. Brown*, 9 Cal.3d 199, 203, 217 (1973), *rev'd sub nom. Richardson v. Ramirez*, 418 U.S. 24 (1974) (original writ of mandate issued to compel election officials to register ex-felons who have completed sentences); *Legal Services for Prisoners with Children v. Bowen*, 170 Cal. App. 4th 447, 451 & n.2 (2009) ("Mandamus is clearly the proper remedy for compelling an officer to conduct an election according to law."); *League of Women Voters v. McPherson*, 145 Cal. App. 4th 1469, 1473 (2006) (same).

This Court has a proud tradition of acting swiftly to define voter eligibility. *Jolicouer v. Mihaley*[19] illustrates this well. In *Jolicoeur*, this Court heard and decided an original writ proceeding to enforce the voting rights of 18 to 20 year olds in California. *Id.* at 570. Newly enfranchised by the 26th Amendment, they were considered minors under existing state law. *Id*. at 571, 579. Relying on an Attorney General opinion issued in

[19] 5 Cal.3d 565 (1971).

February, 1971, local registrars declined to accept registrations of minors not living with their parents, effectively disenfranchising those whose parents lived outside the state. *Id.* at 569. This Court heard and decided the case in time for the young people to register and vote in the November 1971 election, noting:

> Cases affecting the right to vote and the method of conducting elections are obviously of great public importance. Moreover, the necessity of adjudicating the controversy before the election renders it moot usually warrants our bypassing normal procedures of trial and appeal. Thus we have exercised our original jurisdiction where electors sought to qualify an initiative for the ballot (*Perry v. Jordan* (1949) 34 Cal.2d 87, 90-91); *Farley v. Healey* (1967) 67 Cal.2d 325, 326-327), where a proposed local election would have violated the city charter (*Miller v. Greiner* (1964) 60 Cal.2d 827, 830) and where an individual sought certification by the city clerk as a candidate for office (*Camera v. Mellon* (1971) 4 Cal.3d 714.)

5 Cal.3d at 570, n.1.

Similarly, here, thousands of people will be disenfranchised because local registrars are, understandably, following a directive from the Secretary of State, barring people convicted of low-level offenses and living in their communities from registering to vote and voting. That conclusion, which petitioners contest, raises a pure issue of law that is appropriate for appellate resolution in the first instance. *See, e.g., Indus. Welfare Comm'n v. Superior Court*, 27 Cal.3d 690, 699-700 (1980).

The effect of the Legislature's historic revision of California's criminal justice system on the franchise raises novel and significant questions of constitutional law that must be resolved by a court. Fundamental voting rights cannot be extinguished by the unexamined conclusion in a memorandum issued from an administrative agency.

B. The California Constitution Guarantees the Right to Vote to Californians not in Prison or on Parole.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Otsuka v. Hite*, 64 Cal.2d 596, 601 (1966) (internal citations and quotations omitted). For this reason, "no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible to any other meaning." *Id.* at 604 (internal citations omitted). Applying this principle to the Realignment Legislation compels a conclusion that California citizens living in their communities following low-level felony convictions may vote. The purpose of Realignment – to facilitate the reentry of people who have committed crimes that are neither serious nor violent into society – is consistent with voting rights and *nothing* in the Realignment Legislation suggests that the Legislature intended to strip voting rights from individuals sentenced under Realignment.

In considering felony disenfranchisement, it is important to remember that it is not a form of punishment for people who have committed crimes. This Court has been very clear that the purpose of felony disenfranchisement laws is to protect the integrity of the elections process. *Id.* at 603; *see also McPherson*, 145 Cal. App. 4th at 1477 ("[T]he manifest purpose [of denying the vote to felony offenders] is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny."). Denying the franchise to people convicted of felony offenses is therefore explicitly *not* about punishment. *Id.* Broadly disenfranchising thousands of California citizens who have been convicted of low-level felonies plainly does not protect the integrity of the electoral process.

Why, then, should individuals sentenced to county jail pursuant to Realignment or released onto PRCS be barred from voting? The Secretary of State memorandum essentially says that the Legislature's silence on elections in the Realignment laws should be interpreted to mean that it intended to prohibit all these people from voting. But that conclusion ignores constitutional rights, doctrine and precedent. It is the *Constitution*, and not the Legislature, that determines who has the right to vote. "It is not within the legislative power, either by *silence* or direct enactment, to

modify, curtail, or abridge a self-executing grant of constitutional power." *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765, 778 (1990) (emphasis added); *see also, e.g., Flood v. Riggs*, 80 Cal. App. 3d 138, 154 (1978); *Garibaldi v. Zemansky*, 171 Cal. 134, 135 (1915).

The Legislature is bound by the voting rights provisions contained in the Constitution. For example, the Legislature could not simply decide to permit those in state prison or on parole to vote because article II, section 4 of the Constitution prohibits individuals in these categories from voting. It is therefore outside the Legislature's authority to enfranchise them in the absence of a constitutional amendment. The converse is also true: the Legislature cannot simply decide to disenfranchise individuals who are not "in state prison or… on parole for the conviction of a felony." *McPherson*, 145 Cal. App. 4th at 1486; *Flood*, 80 Cal. App. 3d at 154-155 (holding that the constitutional "directive must be interpreted to mean simply that the Legislature's authority to implement is well recognized; conversely, *and of paramount importance*, it in no wise sanctions establishment of standards or procedures, through legislative action or inaction, not in harmony with and tending to frustrate the clear constitutional design") (emphasis added) (internal citations omitted).

Even if legislative intent rather than constitutional enforcement governed, there is no basis whatever for the Secretary of State's conclusion

that the Legislature wanted to disenfranchise thousands of men and women sentenced pursuant to Realignment. The Legislature is presumed to know what the law is. *McPherson*, 145 Cal. App. 4th at 1482 ("The enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted.") (citations omitted). This includes the Constitution, here, article II, section 4, and case law, here, *McPherson*. This also means that the Legislature is presumed to know that the Constitution is self-executing. *Flood*, 80 Cal. App. 3d at 155 ("We hold, therefore, that the provisions of article II, section 4, of the California Constitution for the disqualification of electors while imprisoned or on parole for the conviction of a felony are self-executing."). The Legislature's silence on the voting rights of individuals sentenced pursuant to Realignment is thus entirely reasonable: the Legislature is presumed to know that: 1) these individuals retain the franchise and 2) if the Legislature wanted to *disenfranchise* people confined in county jail or on supervised release in their communities, it would have to place an initiative on the ballot to amend article II, section 4.

C. The Secretary of State's Analysis Cannot Be Reconciled with the Constitution.

Judicial evaluation of the Secretary of State's memorandum disenfranchising thousands of people is urgently needed, petitioners submit, because the analysis is seriously flawed. It adopts an ahistoric and de-

contextualized analysis, it ignores case law, principles of constitutional and statutory interpretation, the goals of Realignment and article II, section 4 itself, and it disregards the central importance of the right to vote in our democracy. While the analytic errors are detailed in the briefs on the merits, petitioners briefly summarize them here.

The central flaw in the Memorandum is its failure to recognize this Court's basic constitutional principle: Because voting is a fundamental right, the limited, temporary exception to that right carved out in article II, section 4 must be very narrowly construed. It is not an elastic provision, allowing either the legislative or executive branch the right to bar people from voting who are not in state prison or on parole for the conviction of a felony. Failing to start from this indispensable premise, the Memorandum's conclusion that people have lost the right to vote is wrong.

The Memorandum speculates that any person who falls into any of the categories created by Realignment would have been disenfranchised prior to Realignment and therefore that these individuals "*remain* disqualified from voting." Ex. 1 at 1 (emphasis added). But it is impossible to know how individuals sentenced pursuant to Realignment would have been sentenced prior to its passage. In fact, shortly before Realignment was implemented, it was estimated that "almost three-quarters

of felony offenders are put on probation rather than being sent to prison."[20] All of the individuals placed on probation (the majority of individuals convicted of felonies) would have *retained the right to vote*, while only those sent to state prison would have been disenfranchised.

The Secretary of State assumes without analysis that individuals sentenced pursuant to Realignment would have all gone to prison and therefore would have been disenfranchised. However, many people who would have received long probationary terms pre-Realignment (thus never losing their right to vote) will now be sentenced to jail or various alternatives to incarceration instead. If the Secretary's reading prevails, the irony is that it is possible that many more people would lose the right to vote *after* Realignment than would have been disenfranchised in a pre-Realignment world.

Furthermore, how individuals would have been sentenced prior to Realignment is entirely beside the point. It is a new day in California. The California Legislature has reshaped the criminal justice system to de-emphasize incarceration and to focus instead on rehabilitation. Pen. Code § 17.5. The purpose of Realignment is to move away from the prior, dysfunctional system into a new era. *Id.* It is wholly incompatible with

[20] Dean Misczynski, Pub. Policy Inst. of Cal., *Rethinking the State-Local Relationship: Corrections*, 12 (Aug. 2011).

these new goals to determine something as fundamental as whether individuals may vote based on the Secretary's speculation about what sentences individuals would have received under the former, out-dated, criminal justice system.

A second major flaw in the memorandum, which warrants judicial review, is the conflation of "prison" with jail and the conflation of "parole" with supervised release. The Legislature knows how to use the terms "prison" and "parole" and expressly created whole new categories post-Realignment for people convicted of low-level felonies. It did this, knowing (and legally presumed to know) that article II, section 4 of the California Constitution limits felony disenfranchisement to individuals who are "imprisoned or on parole for the conviction of a felony." Subsequent Elections Code provisions clarify that, in this context, the Legislature understood "imprisoned" to mean "in prison." *See* Elec. Code §§ 2101, 2106, and 2300. The *McPherson* court ruled that in the voting rights context, "imprisoned" means "in state prison." *McPherson*, 145 Cal. App. 4th at 1486.

In 2009, following *McPherson*, the Legislature amended Elections Code section 2106, continuing to use the phrase "in prison." Stats. 2009, ch. 364, § 3. "Where the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms

have been used in the precise and technical sense which had been placed upon them by the courts." *People v. Weidert*, 39 Cal.3d 836, 845-46 (1985) (internal quotations omitted). The fact that the Legislature kept the same phrasing leads to the "almost irresistible" conclusion that it used the phrase "in prison" as understood by the *McPherson* court.

The Memorandum's discarding of the right to vote of thousands of California citizens ultimately flows from a free-wheeling assertion that "imprisoned' is a broader term than 'in prison' because it is not specific as to the place of confinement – it can mean 'imprisoned' in a state prison for a felony conviction or 'imprisoned' in a county jail for a felony conviction." Ex. 1 at 9. This kind of literal dictionary definition of the word "imprisoned" as including locked up anywhere is explicitly and properly disapproved in *McPherson*. Ex. 1 at 9-11; *McPherson,* 145 Cal. App. 4th at 1480. In the voting rights context, "imprisoned" means "in state prison." *Id.* at 1486.

Similarly, the Memorandum equates PRCS with parole because of their superficial resemblance, since both involve release following confinement. But that term exists nowhere in article II, section 4, which temporarily excludes people "*on parole*" from voting. The California Constitution's limited exception to the franchise for all citizens is not an elastic term that may be stretched by saying that PRCS and parole are

"functionally equivalent." Ex. 1 at 11-12. The voters did not contemplate PRCS in passing Proposition 10, and people falling into this newly created category may vote. Moreover, the Legislature *retained* the term "parole" for release of serious offenders from state prison. The Legislature knows how to say "parole" when it wants to do so, and it did not do that here.

Perhaps most disconcerting is the Memorandum's treatment of individuals who are placed on mandatory supervision, which disposes of their voting rights in a footnote.[21] Mandatory supervisees are individuals who have served a portion of their sentence in county jail and *have been released* into their communities under the supervision of the county probation department. Pen. Code § 1170(h)(5)(B). They are neither in state prison, nor are they on parole, nor are they even in jail. They are living in their communities, and the statute *requires* treating them like probationers, who retain the franchise. *Id.* Under the plain language of both article II, section 4, and *McPherson*, they should be entitled to vote.

The Secretary's Memorandum ignores the tectonic shift that has occurred in the criminal justice system through Realignment. The Memorandum seems to contend that the passage of Realignment itself has somehow transformed the term "in prison" as used in the Elections Code to

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[21] Ex. 1 at 13, n.6.

mean "imprisoned," claiming that "[t]he only significant difference [between those sentenced to prison and those sentenced pursuant to Realignment] is the facility in which the person is imprisoned." Ex. 1 at 17. In addition to being incorrect, this analysis ignores the larger point that Realignment reflects a recognition by the state that our criminal justice system is broken, and that only by shifting our focus from incarceration to reintegration can we hope to fix it. Pen. Code § 17.5.

The terms "imprisoned," "PRCS," and "mandatory supervision" should be afforded non-disenfranchising meanings if they reasonably exist. *See Otsuka v. Hite*, 64 Cal.2d 596 603-04 (1966). To "seek the meaning of a statute is not simply to look up dictionary definitions and then stitch together the results. Rather, it is to discern the sense of the statute, and therefore its words, *in the legal and broader culture*." *State v. Altus Fin.*, 36 Cal.4th 1284, 1295-1296 (2005) (emphasis in original) (internal citations omitted); *see also Coachella Valley Mosquito and Vector Control Dist. v. Cal. Pub. Employment Relations Bd.*, 35 Cal.4th 1072, 1089 (2005) (statute should be taken in context and "with reference to the whole system of law of which it is a part"); *In re C.H.*, 53 Cal.4th 94, 100 (2011) (same). The California Constitution confers the franchise on *every* mentally competent adult California citizen, unless they are in state prison or on

parole. *League of Women Voters v. McPherson*, 145 Cal. App. 4th 1469, 1486 (2006).

VI. CONCLUSION

Petitioners urge this Court to grant review and to hear and decide this case on an expedited basis. No further briefing is necessary. Ultimately, petitioners ask this Court to reverse the order of the Court of Appeal and direct that Court to issue a peremptory writ of mandate protecting the right to vote.

Dated: May 29, 2012 in San Francisco, California.

Respectfully submitted,

By: 
Jory Steele

JORY STEELE (206944)
DIANA TATE VERMIERE (232264)
MARGARET C. CROSBY (56812)
NOVELLA COLEMAN (281632)
LINNEA NELSON (278960)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.
39 Drumm Street
San Francisco, CA 94111
Telephone: 415-621-2493
Facsimile: 415-255-8437
Email: jsteele@aclunc.org
PETER SHEEHAN (51555)
SOCIAL JUSTICE LAW PROJECT
449 15th Street, suite 301
Oakland, CA 94612

Telephone: (510) 891-9794 ext. 628
Facsimile: (510) 891-9727

OREN SELLSTROM (161074)
MEREDITH DESAUTELS (259725)
LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA
131 Steuart Street, Suite 400
San Francisco, CA 94105
Telephone: (415) 543-9444
Facsimile: (415) 543-0296

JOSHUA KIM (257260)
CT TURNEY (279241)
A NEW WAY OF LIFE REENTRY PROJECT
PO Box 875288
Los Angeles, CA 90087
Telephone: (323) 563-3575
Facsimile: (323) 563-344

CATHERINE MCKEE (267126)
LEGAL SERVICES FOR PRISONERS WITH CHILDREN
1540 Market St., Suite 490
San Francisco, CA 94102
Telephone: (415) 255-7036
Facsimile: (415) 552-3150

ROBERT RUBIN (85084)
LAW OFFICE OF ROBERT RUBIN
315 Montgomery St., 10th Fl.
San Francisco, CA 94104
Telephone.: (415) 434-5118

Attorneys for Petitioners

CERTIFICATE OF COMPLIANCE

I certify pursuant to CRC 8.204(c)(1) that the PETITION FOR REVIEW AFTER AN ORDER FROM THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE, CASE NO. A134775 is proportionally spaced, has a typeface of 13 points or more, contains 6,752 words, excluding the cover, the tables, the signature block and this certificate, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the Microsoft Word word-processing program used to prepare this brief.

May 29, 2012
Date

Jory Steele

Exhibit A

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

Court of Appeal First Appellate District
FILED
MAY 17 2012
Diana Herbert, Clerk
by _____ Deputy Clerk

ALL OF US OR NONE, et al.,

Petitioners,

v.

DEBRA BOWEN, Secretary of State of the State of California, et al.,

Respondents.

A134775

THE COURT:*

The petition for a writ of mandate is denied.

Criminal Justice Scholars' application to file an amicus curiae brief is denied.

Dated: MAY 17 2012

McGuiness, P.J. P.J.

* McGuiness, P.J., Siggins, J., & Jenkins, J.

PROOF OF SERVICE

All Of Us Or None, et al. v. Bowen, et al.

Case No. _____

I, Nishan Bhaumik, declare that I am employed in the City and County of San Francisco, over the age of 18 years, and not a party to the within action or cause. My business address is 39 Drumm Street, San Francisco, CA 94111.

On May 29, 2012, I served a copy of the foregoing:

- PETITION FOR REVIEW AFTER AN ORDER FROM THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION THREE, CASE NO. A134775

on each of the following by directing the document be sent via first class mail and email to the following:

Seth E. Goldstein DEPUTY ATTORNEY GENERAL 1300 I Street, Ste 125 PO Box 944255 Sacramento, CA 94244-2550 Seth.goldstein@doj.ca.gov *Attorney for Respondent Secretary of State of the State of California Debra Bowen*	Mollie Lee SAN FRANCISCO CITY ATTORNEY'S OFFICE City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 Mollie.lee@sfgov.org 415-554-6141 *Attorney for Respondent Director of the Department of Elections, County of San Francisco John Arntz*
Hadar Aviram UNIVERSITY OF CALIFORNIA HASTINGS COLLEGE OF THE LAW 200 McAllister Street San Francisco, CA 94102 415-581-8990 aviramh@uchastings.edu *Attorney for Amici Curiae*	Clerk COURT OF APPEAL FIRST APPELLATE DISTRICT – DIV. THREE 350 McAllister Street San Francisco, CA 94102 415-865-7300 First.District@jud.ca.gov

I have been advised that the above document been delivered as directed. I declare under penalty of perjury that the foregoing is true and correct. Executed on May 29, 2012, at San Francisco, California.

Nishan Bhaumik