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May 8, 2014

County Clerk/Registrar of Voters (CC/ROV) Memorandum #14120

TO: All County Clerks/Registrars of Voters

FROM: /s/ Lowell Finley
Chief Counsel

RE: Voter Registration: Felon Voting Court Ruling

On May 7, 2014, Alameda Superior Court Judge Evelio Grillo entered an order granting the petition for writ of mandate requested by petitioners League of Women Voters, All of Us or None, and three individuals in Scott, et al. v. Bowen, Case No. RG14 712570. A copy of the order is attached. The purpose of this CC/ROV is to summarize the order, describe the next steps the judge has laid out in the litigation, and explain the legal status quo.

The key passage in the court's order states:

> The court holds as a matter of law that Election Code 2101 requires that the State of California provide all otherwise eligible persons on Mandatory Supervision (Penal Code 1170(h)(5)(B)) and Post-Release Community Supervision ("PRCS") (Penal Code 3451) the same right to register to vote and to vote as all other otherwise eligible persons. (Order, p. 1.)

The order does not, however, permit all otherwise eligible persons on Mandatory Supervision (Penal Code 1170(h)(5)(B)) and Post-Release Community Supervision ("PRCS") (Penal Code 3451) to register to vote. Rather, the order directs the parties to meet and confer on how a judgment and writ of mandate should be framed, provides for additional briefing if the parties cannot agree, and sets a further hearing on this issue for June 4, 2014, at 1:30 p.m. (Order, p. 2.) Specifically, the order states:

> The court in this order does not decide the nature or scope of the appropriate relief. Petitioners seek a writ directing the Secretary (1) to withdraw the Memorandum [CC/ROV #11134 (12/5/11)] because it misstates the law and was issued in violation of the APA and and (2) to issue a memorandum informing the county clerks and elections officials that otherwise eligible Californians on Mandatory Supervision of PRCS have the right to vote, and (3) to amend voter-registration and information materials to be consistent with the law. (McPherson, 145 Cal.App.4th at 1486.) The Secretary cautions that the Memorandum addresses issues other than those at issue in this case.

> Petitioners are seeking a traditional writ of mandate to compel a public official to perform an official act required by law. (CCP 1085.) The court can issue a writ to compel the Secretary to exercise her discretion under a proper interpretation of the applicable law, but the court cannot issue a writ to compel the Secretary to exercise her discretion in a particular manner, such as by issuing a new memorandum. (Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 442; County of Los Angeles v. Superior Court (2013) 222 Cal.App.4th 434, 444.) If the parties cannot agree on the appropriate remedy, then in further briefing the parties are to address whether the court can order the relief sought by Petitioners and, if not, what alternative relief might be lawful and appropriate in this case.

CC/ROV #11134, issued on December 5, 2011, remains in place. The court hearing scheduled for June 4, 2014, will likely provide greater clarity concerning specific remedies the court intends to order.

If you have any questions, please feel free to contact me at Lowell.Finley@sos.ca.gov or (916) 654-7244.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

MICHAEL SCOTT, et al, Plaintiffs, v. DEBRA BOWEN, Secretary of State of California, Defendant.	Case No. RG14-712570 ORDER (1) GRANTING PETITION OF PETITIONERS FOR WRIT OF MANDATE AND (2) SETTING HEARING ON ISSUE OF REMEDY. DATE: 4/2/14 TIME 1:30 PM DEPT. 31

The petition of Michael Scott, et al ("Petitioners") for a writ of mandate came on for hearing on April 2, 2014, in Department 31 of this Court, the Honorable Evelio Grillo presiding. After consideration of the briefing and the argument, IT IS ORDERED: The petition for a writ of mandate is GRANTED.

1. The court holds as a matter of law that Election Code 2101 requires that the State of California provide all otherwise eligible persons on Mandatory Supervision (Penal Code 1170(h)(5)(B)) and Post-Release Community Supervision ("PRCS") (Penal Code 3451) the same right to register to vote and to vote as all other otherwise eligible persons.

2. The court directs the parties to meet and confer regarding the appropriate scope of the remedy and the text of a proposed judgment and writ. If the parties cannot reach agreement, then on or before May 21, 2014, the parties may file cross-opening briefs of up to 8 pages on the remedy. On or before May 28, 2014, the parties may file cross-opposition briefs of up to 5 pages on the remedy. The court will hold a further hearing on the remedy at 1:30 pm on June 4, 2014, in Department 31.

EVIDENCE.

The court GRANTS the requests of Petitioners for judicial notice of Exhibits A-G (Dictionary definitions) (*Sierra Club v. Superior Court* (2113) 57 Cal.4th 157, 171), of Exhibit H (legislative history in the form of ballot Initiative materials) (*Sierra Club, supra.*), and of Exhibit I (data from Chief Probation officers of California website) (*People v. Alexander* (1985) 163 Cal.App.3d 1189, 1201 fn 3).

The court GRANTS the request of the Secretary for judicial notice of Exhibit 1 (The Memorandum), of of Exhibits 2-3 (Court records), of Exhibits 4-8 and 11-14 (legislative history). (*Sierra Club, supra.*), and of Exhibits 9-10 (Governor's budget summary) (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287,293, fn 2).

FACTUAL BACKGROUND.

The first California Constitution, adopted in 1849, permanently disenfranchised all persons "convicted of any infamous crime." In 1972, the voters passed an initiative to amend the California Constitution to state: "[T]he legislature shall prohibit improper practices that affect elections and shall provide that no severely mentally deficient person, insane person, person

convicted of an infamous crime, nor person convicted of embezzlement or misappropriation of public money shall exercise the privileges of an elector in this State." (*League of Women Voters of California v. McPherson* (2006) 145 Cal.App.4th 1469, 1475-79 [historical summary].)

On 11/4/74 the people of the State of California through a referendum amended the California Constitution, Article II to read: "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for the conviction of a felony."

On 1/12/10, a three judge panel of the federal District Court ordered California to reduce its prison population to 137.5% of the prisons' design capacity within two years. (*Coleman v. Schwarzenegger* (E.D. Cal. 2010) 2010 WL 99000.)[1]

In 2010, the California Governor proposed a realignment plan that included what the Legislative Analyst's Office described as a "Proposal to Shift Adult Parole" (Secretary RJN, Ex. 8, pp12-14.) The Legislative Analyst stated that the Governor's proposal was designed to both reduce the cost to the state and to "improve offender outcomes and reduce their risk of reoffending." The Governor later issued Budget Summaries that stated his goals. (Secretary RJN, Ex. 9, 10.)

On 4/4/11, AB109 (the "Realignment Act") was filed with the Secretary of State. Section 479 of the Realignment Act added Penal Code 3450 et seq, which "shall be known and may be cited as the Postrelease Community Supervision Act of 2011."

The Legislature's stated purpose for the Realignment Act and in the Postrelease Community Supervision Act was to address both the stagnant or worsening reincarceration rates and the unsustainable policy of building and operating more prisons by reinvesting criminal

[1] On 5/23/11, the United States Supreme Court affirmed the decision directing California to reduce its prison population. (*Brown v. Plata* (2011) 131 S.Ct. 1910.)

justice resources to support community-based corrections programs with the goal of achieving improved public safety returns. To accomplish this goal, the Realignment Act transferred responsibility for low-level felony offenders who do not have prior convictions for serious, violent, or sex offenses to locally run community-based corrections programs with the goal of improving public safety outcomes and facilitating their reintegration back into society. (Penal Code 17.5(a)(1)-(6); Penal Code 3450(a)(1)-(6).) The Legislature noted that such correctional practices would align with sound fiscal policy because the realignment will "manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable." (Penal Code 17.5(a)(8); Penal Code 3450(a)(8).)

The Realignment Act created two new forms of noncustodial supervision:

- Mandatory Supervision. The Realignment Act states that defendants without prior or current felony convictions for serious, violent, or sex related crimes are sentenced to county jail rather than to state prison. (Penal Code 1170(h).) Under Penal Code 1170(h)(5)(B), the court may suspend the term and release the defendant to Mandatory Supervision, "during which time the defendant shall be supervised by the county probation officer in accordance with the terms, conditions, and procedures generally applicable to persons placed on probation." A person on Mandatory Supervision is serving their felony sentence under the supervision of a county probation officer instead of in a county jail.

- Post-Release Community Supervision ("PRCS"). The Postrelease Community Supervision Act states that defendants without prior or current felony convictions for serious, violent, or sex related crimes will, upon release from state prison, "be subject to community supervision provided by a county agency." (Penal Code 3451(a).) A person on PRCS is serving their mandatory period of supervision following release under the supervision of a county agency instead of the state Department of Corrections and Rehabilitation.

There is no indication that the Legislature ever considered how the creation of Mandatory Supervision or PRCS would affect the voting rights of persons who would be placed on Mandatory Supervision or PRCS.

On 12/5/11, Respondent Debra Bowen as California Secretary of State (the "Secretary") issued Secretary of State County Clerk/Registrar of Voters Memorandum #11134 (the "Memorandum"). The Memorandum was supported by an 18 page legal analysis and concluded that persons on Mandatory Supervision or PRCS were ineligible to vote because mandatory supervision was "akin to parole." (Secretary RJN, Ex. 1.) The Memorandum reasoned that PRCS is "functionally equivalent" to parole (Memorandum, page 11) and that Mandatory Supervision is a "form of probation that is more akin to parole than to [] post-conviction, pre-sentencing probation" (Memorandum, page 13). When the Secretary issued the Memorandum there was no case law interpreting the the Realignment Act and addressing whether, or how, Mandatory Supervision or PRCS were different from parole.

On 3/7/12, an organization filed a petition directly in the Court of Appeal seeking to resolve whether otherwise eligible persons on Mandatory Supervision and PRCS had the right to vote. On 5/17/12, the Court of Appeal denied that petition without issuing an opinion. (Secretary RJN, Ex. 2.) On 5/30/12, the petitioner sought review in the California Supreme Court. On 7/26/12, the California Supreme Court denied the petition for review without issuing an opinion. (Secretary RJN, Ex. 2.)

On 2/22/13, Assemblyman Weber introduced AB938, which would have amended Elections Code 2101 to state that Mandatory Supervision and PRCS are not state parole. The bill's author stated that it "clarifies that people sentenced pursuant to the Criminal Justice Realignment Act retain their constitutional right to vote." The legislative analyst stated that the bill would make "significant changes to voter eligibility." (Secretary RJN, Exh 5.) Ultimately the bill was withdrawn by its author before it was subjected to a vote by the full Assembly. There is no evidence in the record of any legislator having introduced any legislation to state

affirmatively that Mandatory Supervision and PRCS are within the definition of "parole" for purposes of voting rights.

This petition squarely presents the question of whether in enacting the Realignment Act the Legislature intended Mandatory Supervision and PRCS to be "parole" for purposes of voting rights under the California Constitution, Article II, Section 2 and Election Code 2101.

PROCEDURE.

Plaintiff seeks a traditional writ of mandate under CCP 1085 to compel the Secretary to perform the ministerial duty of permitting qualified voters to register. Mandamus is the proper remedy for compelling an officer to register voters according to law. (*Legal Services for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447, 451 fn 2.)

ANALYSIS.

THE COURT OF APPEAL HAS DETERMINED THAT MANDATORY SUPERVISION AND PRCS ARE NOT "PAROLE."

Stripped to its essence, Petitioner's argument is (1) Elections Code 2101 states that United States citizens who are residents of California and "not in prison or on parole for the conviction of a felony" are entitled to register to vote; (2) persons on Mandatory Supervision and PRCS are not on "parole for the conviction of a felony," so (3) persons on Mandatory Supervision and PRCS are entitled to register to vote. Petitioner's argument finds substantial support in three recent opinions published by three separate panels of our Court of Appeal, each of which concluded that Mandatory Supervision and PRCS are not "parole." *People v. Cruz*

(2012) 207 Cal.App.4th 664; *People v. Fandinola* (2013) 221 Cal.App.4th 1415; *People v. Isaac* (2014) 224 Cal.App.4th 143.

In *People v. Cruz* (2012) 207 Cal.App.4th 664, the Court of Appeal (Fifth District) held that disparate treatment of defendants sentenced before and after operative date of Realignment Legislation did not violate equal protection. In the course of reaching that decision, the Court noted that a defendant sentenced under Penal Code 1170(h), whether for a straight jail term or a hybrid term of jail time and Mandatory Supervision, is not subject to a state parole period after his or her sentence is completed. The Court then observed, "Accordingly, such a defendant is not subject to a parole revocation restitution fine." (207 Cal.App.4th 672 fn 6.) The holding that a person sentenced to Mandatory Supervision "is not subject to a parole revocation restitution fine," is a holding that Mandatory Supervision is not "parole."

In *People v. Cruz, supra*, 207 Cal.App.4th at 672, the Court of Appeal also stated, "A defendant sentenced to state prison is subject to a mandatory period of supervision following release, either parole supervision by the state (§ 3000 et seq.), or postrelease community supervision by a county probation department (§ 3450 et seq.)." The reference to parole and PRCS in the alternative is a strong indicator that PRCS is not "parole."

In *People v. Fandinola* (2013) 221 Cal.App.4th 1415, the Court of Appeal (Third District) directed the parties to address whether the court could impose a probation supervision fee under Penal Code 1203.1b where a defendant was sentenced to Mandatory Supervision under Penal Code 1170(h). The Court of Appeal resolved the issue, stating "We conclude the answer is no." After reviewing the plain text of 1203.1b (the probation supervision fee), the Court observed that the Legislature, following enactment of the Realignment Act, amended Penal Code 1202.45 (concerning a parole revocation restitution fine) to also provide for a "mandatory

supervision revocation restitution fine." The Court then stated, "this amendment indicates *the Legislature understood mandatory supervision is neither probation nor parole,* and specific authorization for a mandatory supervision revocation restitution fine was therefore required even though probation and parole revocation restitution fines were already authorized by sections 1202.44 and 1202.45, respectively." (Emphasis added.) The finding that "the Legislature understood mandatory supervision is neither probation nor parole" is tantamount to a holding that Mandatory Supervision is not "parole."

In *People v. Isaac* (2014) 224 Cal.App.4th 143, the Court of Appeal (First District) held that the trial court lacked authority to impose a parole revocation restitution fine because the defendant was sentenced to PRCS rather than to parole. The court first reaffirmed the holding in *Cruz*, 207 Cal.App.4th at 672 fn 6, that under former Penal Code 1202.45, "defendants facing [Mandatory Supervision] instead of parole are 'not subject to a parole revocation restitution fine.'" The court then addressed the Attorney General's argument that under former Penal Code 1202.44, a defendant's sentence to PRCS was "substantially equivalent to a 'conditional sentence' referenced in [Penal Code 1202.44]." The court found no merit to the "substantially equivalent" argument advanced by the Attorney General. The court noted that the defendant was sentenced to PRCS and that PRCS is different from the statutory definition of "conditional sentence" in Penal Code 1203(a). (*Isaac*, 224 Cal.App.4th at 147.) The court then observed that "the Attorney General's sweeping interpretation of the term "conditional sentence" under section 1202.44 would render that section applicable to parolees, and make the original provisions of 1202.45, now located in subdivision (a), entirely superfluous." (*Isaac*, 224 Cal.App.4th at 148.) The holding that a person sentenced to PRCS is not subject to a parole revocation restitution fine, is a holding that PRCS is not "parole."

This trial court is required to follow the Court of Appeal's decisions in *Cruz*, *Fandinola*, and *Isaac*. (*People v. Taylor* (2009) 47 Cal.4th 850, 880 [Court of Appeal decisions are binding on a trial court].) (See generally *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455).[2] The Secretary must raise an argument in the trial court to preserve it for appeal, but a trial court is not free to reach a conclusion contrary to that of the Court of Appeal.

In short: (1) the plain language of Elections Code 2101 states that United States citizens who are residents of California and "not in prison or on parole for the conviction of a felony" are entitled to register to vote; (2) *Cruz*, *Fandinola*, and *Isaac* each hold that Mandatory Supervision and PRCS are not "parole," so (3) persons on Mandatory Supervision and PRCS are entitled to register to vote.

The court can discern two potential arguments with the above analysis and conclusion. First, *Cruz*, *Fandinola*, and *Isaac* addressed whether Mandatory Supervision and PRCS were "parole" under Penal Code 1202.44 and 1202.45, not whether Mandatory Supervision and PRCS were "parole" under Elections Code 2101. *Cruz*, *Fandinola*, and *Isaac* never considered Elections Code 2101 or voting rights. Cases are not authority for propositions not decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) Second, *Cruz*, *Fandinola*, and *Isaac* addressed the definitions of Mandatory Supervision, PRCS, and parole under Penal Code 1202.44 and 1202.45, and "parole" could have a different definition for purposes of Elections Code 2101. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 222; *Heritage Residential Care, Inc. v. Division of Labor Standards Enforcement* (2011) 192 Cal.App.4th 75, 84.)

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[2] (See also *Lavie v. Procter & Gamble Co.* (2003) 105 Cal.App.4th 496, 514 (Haerle, concurring) [Stating "As I am sure the Attorney General's office understands, we are required to follows applicable precedent" and noting that the Attorney General's office was asking court "to become *the only court* to" adopt the asserted reading of the statute].)

The court is not persuaded by either argument. First, in prior appellate cases, Attorney General Opinions and administrative memoranda, the Court of Appeal, the Attorney General, and the Secretary of State have all relied on the Penal Code when considering California Constitution Article II, section 4 and Elections Code 2101. (*McPherson*, 145 Cal.App.4th 1469; *Flood v. Riggs* (1978) 80 Cal.App.3d 138, 153 fn 19; 88 Ops. Cal. Atty. Gen. 207; Ptnr, RJN, Ex. 1 (Memorandum).) If the Court of Appeal, the Attorney General and the Secretary of State rely on the Penal Code when seeking to define "parole" in various contexts, then this court should similarly rely on the Penal Code when determining the meaning of "parole" in the context of Elections Code 2101. Second, Mandatory Supervision and PRCS should have consistent definitions in the Realignment Act and throughout the Penal Code. It should make no difference whether the Court of Appeal held that Mandatory Supervision and PRCS were not "parole" under Penal Code 1202.44, Penal Code 1202.45, or any other section of the Penal Code. (*Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 755-756; *Miranda v. National Emergency Services, Inc.* (1995) 35 Cal.App.4th 894, 905 ["A word or phrase ... accorded a particular meaning in one part or portion of a law, should be accorded the same meaning in other parts or portions of the law, especially if the word is used more than once in the same section of the law"]; *Legal Services for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447, 459 and fn 7 ["identical words used in different parts of the same act are intended to have the same meaning"].)

The court will now address the statutory construction, legislative intent, and other arguments presented by the parties.

THE TEXT OF ELECTIONS CODE 2101.

The court will address the meaning of the word "parole" in the context of Elections Code 2101 rather than in the context of the Constitution. This is consistent with the principle that the

court should reach Constitutional issues only as a last resort. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190; *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 585.)

The Legislature can determine the precise scope of the terms in the California Constitution, Article II, section 4, and therefore the precise scope of the right to vote. (*Ramirez v. Brown* (1973) 9 Cal.3d 199, 204.) (See also *McPherson,* 145 Cal.App.4th at 1484 [Legislature's interpretation of Constitution deserves great deference]; *In re Fain* (1983) 145 Cal.App.3d 540, 554-556 [summary of legislative changes to "parole"].) Elections Code 2101 is the statute that implements California constitution, Article II, section 4. (*Legal Services for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447, 452.) Section 2101 states: "A person entitled to register to vote shall be a United States citizen, a resident of California, not in prison or on parole for the conviction of a felony, and at least 18 years of age at the time of the next election." Neither Petitioners nor the Secretary cite to Elections Code 2101 in their briefs, and the Realignment Act does not mention Elections Code 2101. The text of Elections Code 2101 provides no assistance to the court, and the court must therefore look to the Realignment Act for guidance.

THE REALIGNMENT ACT'S DEFINITION OF "PAROLE."

The text of the Realignment Act is the starting point for determining whether the Legislature intended Mandatory Supervision and PRCS to be "parole" for purposes of voting rights under Elections Code 2101. When examining the text of a statute to ascertain the Legislature's intent, the court must first look to the words of the statute, giving them their usual and ordinary meaning. If the language of the statute is susceptible to more than one reasonable construction, then the court may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme

encompassing the statute. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) (See also *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 582.) Where the language of a statute is clear, trial courts should not engage in exercises of statutory construction in order to determine the plain meaning of the statute's words. (*Regents of University of California v. Superior Court* (2013) 222 Cal.App.4th 383, 399 [no further analysis necessary where statute defining meaning of "public records" is clear].)

The Legislature did not define "parole" in the Penal Code. The Realignment Act contains neither a definition of parole, nor does the statute address whether Mandatory Supervision and PRCS are "parole" for purposes of voting rights under Elections Code 2101. The court must therefore resort to extrinsic aids to assist in its task.

The definitions of parole contained in dictionaries are of limited assistance to the court because modern dictionaries conflate the term "parole" with "probation." "Parole" is consistently defined as something in the nature of "The release of a prisoner before his or her term as expired on condition of continued good behavior." (Ptnr RJN, Ex. A-G.) The Merriam Webster online dictionary[3] defines probation first as "a situation or period of time in which a person who has committed a crime is allowed to stay out of prison if that person behaves well, does not commit another crime, etc." and then states the Full Definition as "the action of suspending the sentence of a convicted offender and giving the offender freedom during good behavior under the supervision of a probation officer." The online "Free Dictionary"[4] states that the American Heritage Dictionary (2000) defines probation as "The act of suspending the sentence of a person convicted of a criminal offense and granting that person provisional freedom on the promise of good behavior"; the Collins English Dictionary (2003) defines probation as "a system of dealing with offenders by placing them under the supervision of a

[3] http://www.merriam-webster.com/dictionary/probation
[4] http://www.thefreedictionary.com/probation

probation officer"; and the Webster's College Dictionary (2010) defines probation as "the conditional release of an offender under the supervision of a probation officer."

Courts, too, have accorded great similarity to the words "parole" and "probation." The California Supreme Court in *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 347 fn 7 stated, "the purpose and procedures involved in parole matters closely resemble those present in the probation context." Similarly, in *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 781, fn 3, The United States Supreme Court referred to "undoubted minor differences between probation and parole." In this case, however, the distinction between probation and parole is crucial. *McPherson,* 145 Cal.App.4th at 1484, holds that persons on probation can vote but persons on parole cannot vote.

It is noteworthy that California's Penal Code contains a spectrum of categories under which a court can sentence a person convicted of a felony to noncustodial supervision, including parole, Mandatory Supervision (Penal Code 1170(h)), PRCS (Penal Code 3451), probation (Penal Code 1203(a)), alternative custody programs for female inmates (Penal Code 1170.05), post-guilty plea diversion (Penal Code 1000), pre-guilty plea diversion (Penal Code 1000.5), and participation in the Back on Track deferred entry of judgment reentry program (Penal Code 1000.8 et seq).[5] Each of these species of noncustodial supervision is defined differently and has unique procedural and substantive attributes and the courts have been careful to distinguish between them. (*E.g*., *People v. Willis* (2013) 222 Cal.App.4th 141, 145 [work release is not probation].) The court has no confidence that any dictionary defines California's categories of noncustodial supervision and accurately describes each such category.

[5] California's Penal Code also contains numerous categories under which persons convicted of misdemeanors are under noncustodial supervision, including probation (Penal Code 1203(a)), post-guilty plea diversion (Penal Code 1000), pre-guilty plea diversion (Penal Code 1000.5), conditional sentences (Penal Code 1203(a)), and a Work Release Program (Penal Code 4024.2).

Given California's detailed statutory scheme with numerous categories of noncustodial supervision and the generalized non-state specific dictionary definitions of "parole," the court finds that there is no commonly understood definition of "parole" and that dictionaries are of limited use in determining the meaning of the word "parole" as used in Elections Code 2101.

TEXT OF THE REALIGNMENT ACT - FUNCTIONAL EQUIVALENCE WITH "PAROLE"

The Secretary argues that Mandatory Supervision and PRCS are the functional equivalent of parole and should be considered to be parole for purposes of Elections Code 2101. As a starting point, the Secretary has not cited, and this court has not found, any California case law, statute, or principle of statutory construction suggesting that when the Legislature uses a word or phrase to describe something specific that the Legislature presumptively intends to include other specific (but unlisted or unidentified) things that are "functionally equivalent."

The Secretary rests her "functional equivalence" argument on *Young v. Harper* (1997) 520 U.S. 143, where the United States Supreme Court held that the right to due process in the protection of a parolee's liberty interest under the 14th Amendment applies equally to a persons on "preparole" under Oklahoma law. In *Young*, the Court held that there were minor differences between parole and preparole under Oklahoma law, but that preparole "differed from parole in name alone," was "fundamentally parole-like," and that preparole was sufficiently parole like for the purpose of determining whether that parolees have a constitutionally protected due process liberty interests. *Young* concerned whether preparole and parole are equivalent for the purposes of due process analysis. *Young* contributes little or nothing to a meaningful, reasoned, analysis of the definition of "parole" in the context of Mandatory Supervision and PRCS under California's Realignment Act. *Young* concerned the concept of "due process" under the 14th Amendment, in the context of the Oklahoma Legislature's definitions of parole and preparole. In contrast, this case concerns the California Legislature's definition of the precise meaning or

scope of "parole," and whether Mandatory Supervision and PRCS are within the scope of "parole" for purposes of Election Code 2101.

The court's analysis of the "functional equivalent" argument is guided by *People v. Superior Court* (*Flores*) (2014) 223 Cal.App.4th 1535, where the court held that a Penal Code section that applies to offenders with a specific type of sentence does not apply to offenders with functionally equivalent sentences. The court stated:

> There is nothing in the language that indicates the Legislature intended for [Penal Code 1170(d)(2)] to also apply to sentences that may be the functional equivalent of life without the possibility of parole. Had the Legislature intended that effect, we presume it would have expressly stated so. It is not "the province of this court to rewrite the statute to imply an intent left unexpressed by the Legislature.... The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein."

(*Flores*, 223 Cal.App.4th at 1541.) Similarly, in *People v. Isaac* (2014) 224 Cal.App.4th 143, the Court of Appeal rejected the Attorney General's argument that that under former Penal Code 1202.44, a defendant's sentence to PRCS was "substantially equivalent to a 'conditional sentence' referenced in [Penal Code 1202.44]."[6]

Similarly in this case, there is nothing in the language of the Realignment Act indicating the Legislature intended "parole," as defined in Elections Code 2101, to apply to noncustodial supervision that might be the functional equivalent of parole. As stated in *Flores*, had the Legislature intended that effect, this court presumes it would have expressly stated so and, as in *Flores*, it is not the province of this court to rewrite a statute to make it express an intention not expressed therein. (See also *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 59.)

[6] The "functional equivalent" argument advanced by the San Diego District Attorney in *Flores* and the "substantially equivalent" argument advanced by the Attorney General in *Isaac* were both rejected by the Court of Appeal.

Given the lack of California authority for this court to apply a "functional equivalency" analysis under the facts of this case, and the California authorities holding that courts should not presume an unexpressed legislative intent, the court finds the Secretary's "functional equivalency" analysis unsound and lacking legal support.

TOOLS OF STATUTORY CONSTUCTION.

Express statement of legislative purpose. A prime consideration in statutory interpretation is to ascertain the objective sought to be achieved by a statute as well as the evil to be prevented. (*People v. Superior Court* (2014) 223 Cal.App.4th 1535.) The Realignment Act states that the purpose of the Act is to address the state's stagnant or worsening reincarceration rates by supporting community-based corrections programs. (Penal Code 17.5(a)(1)-(4); Penal Code 3450(a)(1)-(4).) (*People v. Lynch* (2012) 209 Cal.App.4th 353, 361 ["The Legislature's stated purpose for the Realignment Act, codified in section 17.5, is to reduce crime and use resources more efficiently by moving less dangerous felons from prison to local supervision"].)

The Realignment Act states its purpose as follows:

> 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*.

(Penal Code 17.5(a)(5); Penal Code 3450(a)(5).) (Emphasis added.) There is no language in the Realignment Act suggesting the Legislature intended to fight voter fraud by restricting the voting rights of persons on Mandatory Supervision and PRCS, and a legislative goal of improving public safety outcomes by restricting the right to vote should not be read into the statute. (*Ramirez v. Brown* (1973) 9 Cal.3d 199, 216, revd. sub. opn. *Richardson v. Ramirez* (1974) 418 U.S. 24 ["the enforcement of modern statutes regulating the voting process and penalizing its

misuse - rather than outright disfranchisement of persons convicted of crime - is today the method of preventing election fraud which is the least burdensome on the right of suffrage"]; *Collier v. Menzel* (1985) 176 Cal.App.3d 24, 34 [to same effect].) In contrast, the legislative goal of facilitating the reintegration of felons back into society suggests generally that the Legislature would have intended to restore some of the rights of citizens to persons on Mandatory Supervision and PRCS, potentially including the right to vote.[7]

The Realignment Act also states that the Act was expected to have financial benefits to the state. The Act states:

> Fiscal policy and correctional practices should align to promote a justice reinvestment strategy that fits each county. "Justice reinvestment" is a data-driven approach to reduce corrections and related criminal justice spending and reinvest savings in strategies designed to increase public safety. The purpose of justice reinvestment is to manage and allocate criminal justice populations more cost-effectively, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.

(Penal Code 17.5(a)(8); Penal Code 3450(a)(8).) The Secretary argues that Legislative committee reports and statements by the Legislative Analyst describe the fiscal concerns as the primary motivating factor behind the Realignment Act and suggests that the Legislature was really not concerned about facilitating the reintegration of felons back into society.

The court is persuaded that the Realignment Act was enacted primarily to improve public safety outcomes among adult felons and facilitate their reintegration back into society and that the anticipated financial benefits were a secondary goal of the Act. (Penal Code 17.5(a)(5) and 3450(a)(5).) The statement of legislative purpose states unequivocally that the Act was designed to improve public safety outcomes and facilitate the reintegration of felons back into society, but more cautiously states that "Fiscal policy and correctional practices should align." To the extent

[7] Although the declaration of Jeff Manza submitted by Petitioners suggests that the ability to vote helps integrate felons into society, there is no indication that the Legislature considered Mr. Manza's studies in the decision to enact the Realignment Act.

that the statements of the Legislature in Penal Code 17.5 and 3450 suggest different goals from those identified in in the Governor's Budget Summary and in legislative committee reports, the court finds the Legislature's express statements of its own intent to be more persuasive than suggestions of legislative intent by either the executive branch and by legislative staff analysts. The Secretary has proffered no argument or evidence to support a finding by this court that denying the right to vote to persons under Mandatory Supervision or Post-Release Community Service would either increase public safety, or align fiscal policy with correctional goals, both stated goals of the Act. Conversely, the plain language of the statute suggests that the integration of adult felons into society would be facilitated by allowing persons under Mandatory Supervision or Post-Release Community Service to vote, thus giving full effect to one of the Legislature's stated goals.

For the above reasons, the court finds the legislative intent weighs in heavily favor of interpreting Mandatory Supervision and PRCS as being different from "parole" as "parole" is defined for purposes of Elections Code 2101.

Reading the Statute as a Whole / Use of Different Words. "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed." (*People v. Ramirez* (2014) 224 Cal.App.4th 1078, 1085.) "Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117.) (See also *Joannou v. City of Rancho Palos Verdes* (2013) 219 Cal.App.4th 746, 755-756.)

The Realignment Act expressly created Mandatory Supervision and PRCS as alternatives to parole. The creation of these two categories of noncustodial supervision suggests that the

Legislature intended them to be different from the existing forms of noncustodial supervision and, in fact, they are different from parole regarding organization (the identity of the supervising government entity) and substance (the restrictions placed on the supervised persons). The Legislature has consistently distinguished between parole, Mandatory Supervision, and PRCS. (Penal Code 290.015(c)(2), 667.5(d), 830.5(a)(1) and (3), 1202.45, 1214(a), 7510, 7520(b), 7521(d), 7519, 11105(b)(9), 13155, 13300(b)(9).) The Legislature has also referred to parole and PRCS in the alternative. (Penal Code 3000(a)(1), 3003(a).) The general conditions of parole are different from the conditions of PRCS. (Compare 15 CCR 2512 and 2513 with Penal Code 3453.)

The organizational and substantive distinctions between Mandatory Supervision, PRCS, and parole weigh in favor of holding Mandatory Supervision and PRCS are not "parole" as that term is used in Elections Code 2101. Similarly, the separate legislative references to parole, Mandatory Supervision, and PRCS suggest that the Legislature did not consider them to be functional equivalents.

Presumption in Favor of Right to Vote. The Supreme Court and the Court of Appeal can establish legal presumptions. (*Shadow Traffic Network v. Superior Court* (1994) 24 Cal.App.4th 1067, 1085, fn 12.) This trial court is obliged to follow the decisions of higher courts and apply any such legal presumptions (*Auto Equity Sales, supra,* 57 Cal.2d at 455).

California law requires this court to give every reasonable presumption in favor of the right of people to vote. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." (*Legal Services for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447, 452.) Giving effect to the

importance of the right to vote, in *Otsuka v. Hite* (1966) 64 Cal.2d 596, 603-604, [8] the California Supreme Court stated:

> [W]e keep in mind the rule that 'every reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process. ... The exercise of the franchise is one of the most important functions of good citizenship, and ***no construction of an election law should be indulged that would disfranchise any voter if the law is reasonably susceptible of any other meaning***. (Emphasis supplied.)

(See also *Castro v. State of California* (1970) 2 Cal.3d 223, 234; *McPherson*, 145 Cal.App.4th at 1482.) The presumption in favor of the right of the people to vote weighs heavily in favor of interpreting "parole" in Elections Code 2101 to be limited to "parole" in the Penal Code and not to alternatives to parole such as Mandatory Supervision and PRCS.

Workability. When faced with a latent ambiguity, the court is directed to "infer that the Legislature intended an interpretation producing practical, workable results, not one producing mischief or absurdity." (*People v. Childs* (2013) 220 Cal.App.4th 1079, 1101.) It would produce practical and workable results if the Secretary restricted persons on "parole" from voting consistent with the Elections Code 2101. Although not necessarily producing mischief, it would certainly create uncertainty and absurdity if in the absence of clear legislative direction the Secretary could interpret "parole" in Elections Code 2101 as including not only "parole" but also forms of noncustodial supervision that are neither identified by the Legislature as "parole," nor interpreted by the Court of Appeal as constituting "parole." *People v. Cruz* (2012) 207 Cal.App.4th 664; *People v. Fandinola* (2013) 221 Cal.App.4th 1415; *People v. Isaac* (2014) 224 Cal.App.4th 143.

Constitutionality. "[I]f reasonably possible the courts must construe a statute to avoid doubts as to its constitutionality." (*People v. Smith* (1983) 34 Cal.3d 251, 259.) (See also *Powell*

[8] Overruled on other grounds in *Ramirez v. Brown* (1973) 9 Cal.3d 1999, rev'd *Richardson v. Ramirez* (1974) 418 U.S. 24.

v. County of Humboldt (2014) 222 Cal.App.4th 1424, 1444.) It does not raise any Constitutional doubts to use the same definition to "parole" in California Constitution Article II, section 4, Elections Code 2101, and in the Penal Code. Conversely, serious Constitutional issues could arise were the court to adopt the construction of "parole" advanced by the Secretary and hold that the legislative definition of "parole" for purposes of limiting the right to vote in Elections Code 2101, is different from, and broader than, the legislative definition of "parole" in the Penal Code. The court declines the Secretary's invitation to attribute different meanings to parole under the Constitution, the Penal Code and the Elections Code.

No Major Change by Implication. The Legislature was fully aware that the Realignment Act made significant changes in California law regarding where convicted persons would be incarcerated, which government entity would supervise them, how incarcerated persons would be returned to society, and the allocation of responsibility between the state and local entities in achieving those goals. The Legislature was fully aware that it was creating Mandatory Supervision and PRCS as forms of noncustodial supervision that were alternative to, and different from, parole.

In the context of the Realignment Act as a whole and the changes it was making, the effect of the Realignment Act on voting rights was not a significant unconsidered change. Rather, the effect on the voting rights of persons who would no longer be on "parole" was a natural consequence of the purposeful effects of the legislation. It is not surprising that in drafting the Realignment Act the Legislature did not anticipate, consider, and address every effect of the legislation. The Court is guided by *In re Gabriel G.* (2005) 134 Cal.App.4th 1428, 1437, which states:

> Although eliminating a placement option from the juvenile court's consideration may seem illogical, we must recall that in construing a statute, "that which is construed is the statutory text." ... Evidence of legislative inadvertence would have to be quite compelling before we would ignore the plain language of the law. ... The only evidence of inadvertence the Department offers is its assessment of

> the unintended consequences the change will have. *Legislation often has unintended consequences.* But we cannot construe the amendment in a manner wholly unsupported by its text merely to avoid the purported unintended consequences.

(Emphasis added.)

If the Legislature overlooked the effect of the Realignment Act on voting rights and actually intended to restrict the voting rights of persons on Mandatory Supervision and PRCS, then the Legislature can address the issue. "Since passing the Realignment Act of 2011, the Legislature has amended the Penal Code in a number of ways to clarify how the new legislation is to be interpreted in conjunction with preexisting laws." (*People v. Prescott* (2013) 213 Cal.App.4th 1473, 1477.) (See also *People v. Isaac* (2014) 224 Cal.App.4th 143.)

Proposed Legislative Amendment to the Statute. The court can draw "very limited guidance" from the fact that the Legislature did not enact the proposed amendment that would have stated expressly that persons on Mandatory Supervision and PRCS could vote. (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922-923.) Similarly, the court draws very limited guidance from the fact that the Legislature has not enacted an amendment that would have stated expressly that persons on Mandatory Supervision and PRCS cannot vote. This is not a situation where a court has decided an issue of statutory construction, the decision has been followed on many occasions, and the the Legislature has declined to amend the statute despite making numerous other amendments to the statute over a period of many years. (Compare *Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1155-1156.) The Legislature's decision not to enact any amendment to state clearly whether Mandatory Supervision and PRCS fall within the definition of "parole" in Elections Code 2101 does not provide any guidance to the court.

Prior Case in Court of Appeal. An organization previously filed a petition regarding the voting rights of persons on Mandatory Supervision and PRCS directly in the Court of Appeal,

and the Court of Appeal denied that petition without issuing an opinion. (Secretary RJN, Ex. 2.) The California Supreme Court denied review without an opinion. (Secretary RJN, Ex. 2.)

"The summary denial of a petition for a prerogative writ properly is viewed as a refusal by the court to exercise original jurisdiction over the matter." (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1260 fn 18.) Therefore, a summary denial of the petition is "without prejudice to the right of petitioners to seek such relief as they may be advised they are entitled to in the proper tribunal." (*Funeral Directors Ass'n of Los Angeles and Southern California v. Board of Funeral Directors and Embalmers* (1943) 22 Cal.2d 104, 110.) The prior case filed directly in the Court of Appeal does not provide any guidance to the court.

Administrative Interpretation / Secretary of State Memorandum. The law on judicial deference to the interpretations of a state agency is multi-layered. As a general rule, where an agency has authority to adopt a regulation and does so under the Administrative Procedures Act, then Court must give substantial deference to any reasonable interpretation of the regulation advanced by the agency. "An administrative agency's interpretation of its own regulations is generally given great weight by courts, and a reviewing court must "defer to an agency's interpretation of a regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpretive provision." (*Margarito v. State Athletic Com.* (2010) 189 Cal.App.4th 159, 168.) Judicial deference to an agency's interpretation of its own regulations promulgated under the APA is inapplicable on the facts of this case because the Memorandum is not a regulation under the APA, because the Memorandum concerns the Legislature's intent in enacting the Realignment Act and amending the the Penal Code, which is not the Secretary's area of expertise, and because this case concerns the interpretation of Elections Code 2101 and not the interpretation of the Memorandum.

Where an agency has the authority to adopt a regulation under the APA but instead elects to issue a memorandum for "guidance" without complying with APA's notice, and public

comment procedural requirements, the agency has promulgated an underground regulation, and the court gives no deference to agency interpretation. *California Grocers Association v. Department of Alcoholic Beverage Control* (2013) 219 Cal.App.4th 1065, 1073-1074, summarizes the law as follows:

> The APA requires that an agency comply with the notice and comment procedures for formalizing a regulation and the failure to do so voids the regulation. ... A regulation subject to the APA ... has two principal identifying characteristics. First, the agency must intend its rule to apply generally.... Second, the rule must 'implement, interpret, or make specific the law enforced by ... [the agency]. The first is a test of the generality of the agency's promulgation; the second is a test of the conformity of the interpretation with the statute interpreted. ... As to the second test, an agency interpretation of a statute is not subject to the APA if it is "the only legally tenable interpretation" of the statute.... That phrase has been construed to apply only if the interpretation is "patently compelled by ... the statute's plain language." ... An interpretation is "patently compelled" when it " 'can reasonably be read only one way' such that the agency's actions or decisions in applying the law are essentially rote, ministerial, or ... repetitive of ... the statute's plain language."

(See also *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, 516-520.)

The court finds that the Memorandum is an invalid underground regulation, and as such the court is not required to give deference to the Memorandum in arriving at the court's analysis and conclusions. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 576.) First, the Memorandum was written to interpret Elections Code 2101 and implement the Secretary's interpretation of the law. The Memorandum is not exempt from the APA as a mere restatement of the only legally tenable interpretation of a statute. (*California Growers*, 219 Cal.App.4th at 1074.) To the contrary, the Memorandum is supported by 18 page legal opinion that addresses an issue where there is no directly applicable statutory text and no guidance in the legislative history. Second, the Memorandum sets out a policy that the Secretary intended to apply generally to all persons on Mandatory Supervision and PRCS. Third, though in the absence of a regulation the court will give deference to agency interpretation of a statute if the agency has special expertise in the area, "[t]he degree of 'respect' accorded the agency's

interpretation depends on the circumstances. An administrative agency's interpretation of a statute is entitled to significant deference only if ... the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corporation* (2013) 221 Cal.App.4th 867, 880.) (See also *Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 494.) The Memorandum is unrelated to the mechanics of how to implement Elections Code 2101, which would be an area of the Secretary's expertise. Conversely, The Secretary has no special expertise in statutory interpretation, or discerning the Legislature's intent. The Memorandum is not entitled to significant weight in deciding the issue before the court – whether otherwise eligible persons on Mandatory Supervision (Penal Code 1170(h)(5)(B)) and Post-Release Community Supervision ("PRCS") (Penal Code 3451) have the same right to register to vote and to vote as all other otherwise eligible persons.

CONCLUSION ON THE MERITS.

The petition for a writ of mandate is GRANTED. The court holds as a matter of law that California Constitution Article II, section 2 and Elections Code 2101, require the State of California to provide all otherwise eligible persons on Mandatory Supervision (Penal Code 1170(h)(5)(B)) and Post-Release Community Supervision ("PRCS") (Penal Code 3451) the same right to register to vote and to vote as all other otherwise eligible persons. Neither Mandatory Supervision nor PRCS is "parole" under the Penal Code, which compels this court to hold that neither Mandatory Supervision nor PRCS is "parole" under Elections Code 2101. *People v. Cruz* (2012) 207 Cal.App.4th 664; *People v. Fandinola* (2013) 221 Cal.App.4th 1415; *People v. Isaac* (2014) 224 Cal.App.4th 143. The text of the Realignment Act as a whole suggests that the Legislature considered parole, Mandatory Supervision, and PRCS to be distinct forms of

noncustodial supervision that are not functionally equivalent. The legislative history of the Realignment Act states that a Legislative goal was to reintroduce felons into the community, which is consistent with restoring their right to vote when they enter Mandatory Supervision or PRCS. And finally, the presumption in favor of the right of the people to vote weighs heavily in favor of interpreting "parole" in Elections Code 2101 to be limited to "parole" in the Penal Code and not to alternatives to parole such as Mandatory Supervision and PRCS, and this court should not engage in any construction of the an election law that would disfranchise any voter if the law is reasonably susceptible of any other meaning.

THE REMEDY.

The court in this order does not decide the nature or scope of the appropriate relief. Petitioners seek a writ directing the Secretary (1) to withdraw the Memorandum because it misstates the law and was issued in violation of the APA and and (2) to issue a memorandum informing the county clerks and elections officials that otherwise eligible Californians on Mandatory Supervision of PRCS have the right to vote, and (3) to amend voter-registration and information materials to be consistent with the law. (*McPherson*, 145 Cal.App.4th at 1486.) The Secretary cautions that the Memorandum addresses issues other than those at issue in this case.

Petitioners are seeking a traditional writ of mandate to compel a public official to perform an official act required by law. (CCP 1085.) The court can issue a writ to compel the Secretary to exercise her discretion under a proper interpretation of the applicable law, but the court cannot issue a writ to compel the Secretary to exercise her discretion in a particular manner, such as by issuing a new memorandum. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442; *County of Los Angeles v. Superior Court* (2013) 222 Cal.App.4th 434, 444.) If the parties cannot agree on the appropriate remedy, then in further briefing the parties are to address whether the court can order the relief sought by Petitioners and, if not, what alternative relief

might be lawful and appropriate in this case. The briefing schedule is stated at the beginning of this order.

Dated: May 7, 2014

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Evelio Grillo
Judge of the Superior Court