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FILED
ALAMEDA COUNTY

JAN 17 2017

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By: ERICA BAKER, Deputy

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19 FOR THE COUNTY OF ALAMEDA

20 MITCHELL SIMS; MICHAEL MORALES;
AMERICAN CIVIL LIBERTIES UNION OF
21 NORTHERN CALIFORNIA,

22 Plaintiffs-Petitioners,

v.

23 SCOTT KERNAN, AS SECRETARY OF THE
24 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION;
25 CALIFORNIA DEPARTMENT OF
CORRECTIONS AND REHABILITATION,

26 Defendants-Respondents.

Civil Case No.: RG16838951

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

Date: February 3, 2017
Time: 9:31 a.m.
Dept.: 30
Judge: Honorable Brad Seligman
Trial Date: n/a
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I. INTRODUCTION

This action seeks to enforce Plaintiffs' constitutional right to have elected legislators, not bureaucrats, establish the state's policy governing the death penalty. The Separation of Powers Clause reflects the "belief that the Legislature as the most representative organ of government should settle" "controverted" and "crucial issues." *Clean Air Constituency v. Ca. State Air Res. Bd.*, 11 Cal.3d 801, 817 (1974). The "non-delegation" doctrine thus prohibits the Legislature from "explicitly delegating [fundamental policy decisions] to others or … failing to establish an effective mechanism to assure the proper implementation of its policy decisions." *Kugler v. Yocum*, 69 Cal.2d 371, 376-77 (1968). Yet in enacting Penal Code § 3604, the Legislature has done just that. In the most barebones fashion, the statute merely provides that the death penalty is to be administered through lethal injection or lethal gas "by standards established under the direction of the Department of Corrections." Penal Code § 3604(a).

Recent botched executions across the country—involving painful procedures, lengthy executions, and administration of the wrong drug—starkly illustrate the ways in which implementation of the death penalty inherently raises crucial, controversial issues: To what extent should an execution protocol seek to cause death painlessly, effectuate a swift execution, ensure a reliable process, or minimize secrecy? If any policies regarding these issues conflict, how should they be prioritized relative to each other? And if the State chooses to adopt any or all of these objectives, to what extent, if any, can concerns of administrative convenience outweigh them? Our Constitution's Separation of Powers Clause vests the solemn duty of addressing these fundamental questions of social policy with democratically accountable legislators.

The death penalty in California, as in other states, is a politically divisive issue. Perhaps not surprisingly, the Legislature has dodged answering these difficult questions and instead delegated that task entirely to unelected officials at the California Department of Corrections and Rehabilitation ("CDCR"). Political hot potatoes though they may be, fundamental policy questions pertaining to the manner in which the state conducts executions cannot be tossed carelessly from one branch to another. Penal Code § 3604 unconstitutionally abdicates the Legislature's duty to address the fundamental issues raised when a state conducts an execution, and to provide guidance to corrections officials charged with

implementing the death penalty.

Defendants' demurrer relies largely on a series of baseless procedural arguments. Buried among them is an attempt to defend the statute on its merits. Defendants primarily contend that the Legislature fully discharged its duty once it designated lethal injection and lethal gas as methods of execution. But addressing only one fundamental issue does not then permit the Legislature to delegate other fundamental issues that are raised by the statute. *See, e.g.*, *Clean Air Constituency*, 11 Cal.3d at 817. Nor does it provide the agency with adequate guidance on how to implement the statute. Courts have repeatedly invalidated statutes that, like Section 3604, sought to give agencies unbridled discretion to implement a broad statutory objective. *See, e.g.*, *People v. Parks*, 58 Cal. 624, 636, 642 (1881).

Defendants' procedural arguments fare no better. The *res judicata* doctrine does not bar this suit. Defendants point to a prior challenge by two of the three Plaintiffs in this case under the Administrative Procedure Act ("APA") to CDCR's 2006 execution protocol. But the claims in that case and this one are not "identical" because they involve different rights (*e.g.*, the right to comment on regulations v. the right to have elected legislators decide fundamental policy questions), duties, and breaches. *See Boeken v. Philip Morris USA, Inc.*, 48 Cal.4th 788, 797 (2010). And *res judicata* does not bar Plaintiff ACLU, which was not a party or in privity with the parties to the 2006 APA challenge.

Nor is there any doubt that this case can be brought as a writ and as a taxpayer action. A writ of prohibitory mandate may be used to prevent enforcement of an unconstitutional statute. *See, e.g.*, *Comm. to Defend Repro. Rights v. Myers*, 29 Cal.3d 252, 285 (1981); *Hardie v. Eu*, 18 Cal.3d 371, 374 (1976). Similarly, a taxpayer action plainly lies to restrain enforcement of unconstitutional statutes. *See, e.g.*, *Van Atta v. Scott*, 27 Cal.3d 424, 433, 453 (1980); *Blair v. Pitchess*, 5 Cal.3d 258, 268 (1971).

In sum, Plaintiffs have adequately stated a Separation of Powers claim, and Defendants' procedural objections are wide of the mark. This Court should overrule the demurrer.

II. LEGAL STANDARD

A demurrer must be overruled if the complaint, standing alone, states a cause of action under any possible legal theory. *Gervase v. Superior Court*, 31 Cal.App.4th 1218, 1224 (1995).

III. FACTUAL ALLEGATIONS

Although Californians care deeply about the death penalty, the Legislature has addressed it only

in passing and instead delegated policy-setting to CDCR. But botched executions across the country illustrate the ways in which choices in the design of an execution protocol dramatically impact searing issues, such as the amount of pain an inmate will experience, the length of an execution, as well as the reliability and transparency of the process. Without legislative guidance, agencies designing an execution protocol are likely to prioritize administrative convenience over priorities that the people's elected representatives might otherwise establish. CDCR's execution protocols underscore this concern.

Californians feel passionately about the death penalty and its implementation. Voters have repeatedly voted on death penalty initiatives, with consistently narrow margins. Compl. ¶¶ 24-25. When CDCR has provided the public with an opportunity to comment on its standards for conducting lethal injection executions, the public has evinced extraordinary interest. The public submitted almost 30,000 comments on CDCR's 2009 regulations and 35,000 on its 2015 regulations. *Id.* ¶¶ 26-28.

Despite—or perhaps because of—the public's deeply held views on the topic, the Legislature has avoided setting policy on how the state should conduct executions and instead delegated that task entirely to CDCR. Section 3604 provides that executions shall be carried out "by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections." Penal Code § 3604(a).[1] The Legislature has provided no further guidance, either in Penal Code § 3604 or elsewhere.

Botched executions highlight several of the key issues that are necessarily implicated by any execution protocol, but left completely unaddressed by Section 3604.

Pain. Choices in the design of a protocol, for example, related to intravenous access, reflect value-laden policy judgments about the acceptable level of pain and whether a death penalty protocol should endeavor to minimize pain (or, as some victims' rights groups advocate, whether some degree of pain is a necessary component). In 2009, Ohio attempted to execute Romell Broom but called off the execution after the team failed to establish intravenous access through 18 different injection sites over a 95-minute to two-hour period. The team punctured Broom many more than 18 times, repeatedly

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[1] Lethal injection is the default method unless an inmate elects lethal gas. *See* Penal Code § 3604(b).

withdrawing the catheter partway and then reinserting it at different angles into already bruised and swollen sites in a procedure known as "fishing." *Id.* ¶¶ 31-32.

Speed. Choices in protocol design also reflect policy judgments about the acceptable duration of an execution. As noted above, the attempted Broom execution lasted 95 minutes to two-hours before it was called off. *Id.* ¶ 32. Executions in Ohio, Oklahoma, and Arizona of Dennis McGuire, Clayton Lockett, and Joseph Wood lasted up to two hours, with inmates convulsing throughout. *Id.* ¶¶ 35-38.

Reliability. Choices in protocol design also impact the reliability of the execution process. Oklahoma used the wrong drug to execute Charles Warner—who called out as he was dying "my body is on fire"—and almost did the same with Richard Glossip. A grand jury investigated and faulted the state's execution protocol, which lacked adequate controls. *Id.* ¶¶ 45-48.

Transparency. Choices in protocol design affect the level of secrecy surrounding the process, with implications for other issues, like reliability. For example, the Oklahoma grand jury found that the state's protocol entailed the "surreptitious" acquisition of drugs, and that this "contributed greatly to the Department's receipt of the wrong execution drugs." *Id.* ¶ 50.

In the absence of legislative guidance, CDCR has consistently developed execution protocols that elevate administrative convenience over potentially competing policy considerations, such as reducing the risk of inmate pain or promoting transparency. The result has been execution protocols that courts have struck down in whole or in part five times. *Id.* ¶¶ 58-72.

A federal court in 2006 held CDCR's protocol to violate the Eighth Amendment because it lacked adequate procedures for screening, training, and supervising the execution team; record-keeping; and preparation of execution drugs. Adopting safeguards in these areas would incrementally increase administrative burden and reduce agency discretion, but also reduce the risk of pain. *Id.* ¶¶ 65-66. Another federal court invalidated on First Amendment grounds a portion of CDCR's execution protocol that secretively prevented the public from viewing the initial portion of an execution. The restriction was "an exaggerated, unreasonable response" to concerns about safety of prison staff. *Id.* ¶ 68.

CDCR has proposed a new lethal injection protocol, now pending administrative review. *Id.* ¶¶ 75-76. This protocol reflects myriad explicit, haphazard, and sometimes inconsistent policy choices about the acceptable level of pain (the protocol lacks any safeguards regarding intravenous access that

1 would prevent a Romell Broom-type execution from occurring), speed (an execution conducted under
2 the protocol could last as long as 14 hours and 45 minutes), reliability (the protocol authorizes the use of
3 two drugs that have never been used in an execution), and transparency (the protocol contains no
4 mechanism for informing the inmate or the public about the source of the drug, information that is
5 essential to evaluating its safety). *Id.* ¶¶ 78-110. Given the absence of any standards in Section 3604,
6 CDCR made all of these choices without the benefit of any legislative guidance. *Id.* ¶ 107.

7 **IV. ARGUMENT**

8 **A. Plaintiffs Have Pleaded A Separation Of Powers Claim**

9 The Complaint alleges a claim under the Separation of Powers Clause. "An unconstitutional
10 delegation" occurs when a statute (1) "leaves the resolution of fundamental policy issues to others"
11 outside the Legislature, or (2) "fails to provide adequate direction for the implementation of that policy."
12 *Carson Mobilehome Park Owners' Ass'n v. City of Carson*, 35 Cal.3d 184, 190 (1983).[2] Section 3604
13 fails on both counts.

14 **1. Section 3604 Improperly Delegates Fundamental Policy Decisions To CDCR**

15 The Complaint adequately alleges why pain, speed, reliability, and transparency are fundamental
16 policy issues. Yet the Legislature in Section 3604 unconstitutionally left their resolution to CDCR.

17 A. Issues are "fundamental," and hence issues the Legislature is constitutionally obligated to
18 decide, if they are "controverted issues of policy" or "crucial issues" that the Legislature "has the time,
19 information, and competence to deal with." *Clean Air Constituency*, 11 Cal.3d at 817. Expertise is key,
20 and it is one of the factors that distinguishes "fundamental" issues, *i.e.*, issues that present "basic policy
21 decisions" that "the legislative body must itself effectively resolve," from "details," *i.e.*, "minor
22 question[s]" that legislators lack "the resources [and] expertise" to address and that an agency may "fill
23 up." *Kugler*, 69 Cal.2d at 375-76, 383-84.
24
25

26 [2] Defendants' attempt to distinguish *Carson* on the ground that it involved a city rather than state
27 measure is baseless. *See Kugler v. Yocum*, 69 Cal.2d 371, 375 (1978) (discussing nondelegation
doctrine and stating that "the same doctrine precludes delegation of the legislative powers of a city").
28

The execution of an inmate manifestly presents a number of "crucial issues." *Clean Air Constituency*, 11 Cal.3d at 817. As illustrated by the grisly ways in which executions have been botched, these include pain, speed, reliability, and transparency. *See* Compl. ¶¶ 30-51.

Particularly given the politically divisive nature of the death penalty in California and the high public participation rate on CDCR's lethal injection regulations, *id.* ¶¶ 18-29, these are also issues that are "controverted." *Clean Air Constituency*, 11 Cal.3d at 817.

Further, resolution of these issues falls squarely within the Legislature's "competence." *Id.* It does not require any specialized expertise, as might be housed with an administrative agency, to decide whether and to what extent an execution protocol should prioritize reducing the risk of pain, or ensure a swift, reliable, or transparent execution process. Rather, these questions present "basic policy decision[s]." *Kugler*, 69 Cal.2d at 384.[3] Indeed, Legislatures in other states have accepted their responsibility to make such decisions. *See, e.g.*, Ohio Rev. Code § 2949.22(A) (stating that lethal injection must "quickly and painlessly cause death"). These core policy questions are simply not the type of "details" that an agency may permissibly "fill up." *Kugler*, 69 Cal.2d at 376.

It bears mention that Plaintiffs do not contend that the Legislature must get into the weeds of writing executions protocols. But it must set basic policy direction on whether, if at all, a protocol should seek to accomplish these four objectives, what to do in the event they conflict, and how to weigh them against considerations of administrative convenience. CDCR's current protocol reflects dozens of choices on these issues, without the benefit of any legislative guidance. Compl. ¶¶ 73-74.

At root, these issues are "fundamental" because their resolution rests upon core value judgments

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[3] Defendants suggest that the Legislature's delegation is appropriate given the *agency's* purported expertise in implementing the death penalty. Demurrer at 1. But the analysis turns on whether the *Legislature* has the competence or expertise to address the issue. *Clean Air Constituency*, 11 Cal.3d at 817; *see Kugler*, 69 Cal.2d at 383. In any event, CDCR lacks expertise regarding these value judgments, as evidenced by its repeated failures to promulgate a constitutional protocol. Compl. ¶¶ 58-72. Nor does it have the requisite technical expertise, given its profound lack of knowledge regarding drugs and medical terminology. *Id.* ¶ 112 (7 of 19 drugs that CDCR describes as opioids are not opioids); ¶ 113 (regulation authorizing insertion of catheter into a location—"percutaneous portal vein access"—that is "not a recognized medical term").

regarding basic questions of social policy. *See* Compl. ¶ 72. Precisely because the death penalty is one of society's most divisive issues, elected legislators have an incentive to duck these difficult, hot-button issues. The purpose of the Separation of Powers clause—to prevent elected legislators from "escap[ing] responsibility," *People v. Wright*, 30 Cal.3d 705, 712 (1982)—compels the conclusion that these are the very type of "fundamental" issues that the Legislature must itself decide.

Section 3604 requires CDCR to establish "standards" for lethal injection and lethal gas executions and delegates to the agency the task of fashioning these standards from whole cloth. Because the Legislature indisputably failed to set any policy in Section 3604 regarding pain, speed, reliability, and transparency, and because the complaint sufficiently alleges why these issues are "fundamental," Plaintiffs have stated a Separation of Powers claim. Defendants fail to advance any legal authority for the position that Plaintiffs' allegations are insufficient to establish these issues as "fundamental."

B. Defendants contend that the Legislature adequately discharged its duty because the statute designates lethal injection and lethal gas as methods of execution. Demurrer at 10. But the resolution of one fundamental policy issue does not mean that the Legislature can delegate others.

The Legislature's policy choice on one issue can generate other—also fundamental—policy questions. *See Wright*, 30 Cal.3d at 713 (in context of Legislature's overarching choice to move from indeterminate to determinate sentencing, Legislature made additional "fundamental" decision that, in setting determinate sentences, "terms were to be fixed by choosing one of the alternatives on the basis of circumstances relating to the crime and to the defendant").

It is not enough for the Legislature to make one choice (execution by lethal injection or lethal gas), but then fully delegate the responsibility to decide all other fundamental policy issues implicated by that choice. *See Sturgeon v. Cty. of Los Angeles*, 167 Cal.App.4th 630, 656 (2008) ("In giving counties *the option* of providing the benefits, … these statutes in no sense set a fundamental policy with respect to benefits." (emphasis in original)), *superseded by amendments to statute*, 242 Cal.App.4th 1437 (2015); *cf. Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 168 (1976) (upholding rent control statute because it not only set an overarching goal, but also resolved interrelated policy issues by identifying specific factors for the agency to consider in exercising its delegated powers).

As the Supreme Court explained, the constitution requires the Legislature to "settle insofar as

possible controverted issues of policy and … crucial issues whenever it has the time, information and competence to deal with them." *Clean Air Constituency*, 11 Cal.3d at 817. Thus, the Legislature must resolve all "controverted" and "crucial" issues. *Id.* The Legislature's choice in Section 3604 to designate lethal injection and lethal gas as the state's methods of execution does not absolve it of the constitutional duty to decide other fundamental issues implicated by that choice.

C. Defendants also suggest that an issue is fundamental only if the Constitution tasks the Legislature with deciding it. Demurrer at 11 (citing *Sturgeon v. Cty. of Los Angeles*, 167 Cal.App.4th 630 (2008)). While that may be sufficient to make an issue fundamental, it is not necessary. Courts have labeled "fundamental" all manner of policy choices nowhere mandated by the Constitution. *See, e.g.*, *People ex rel. Lockyer v. Sun Pac. Farming Co.*, 77 Cal.App.4th 619, 634 (2000) ("the best interests of society would be served by the control and eradication of citrus pests").

2. The Legislature Has Failed To Provide CDCR With Adequate Guidance

Plaintiffs have also stated a claim because Section 3604 fails to provide CDCR with adequate direction.

A statute is unconstitutional if it sets forth no guidance on how to implement a broad statutory objective. *See, e.g.*, *People v. Parks*, 58 Cal. 624, 627, 636, 642 (1881) (holding unconstitutional drainage statute delegating to board authority to create drainage districts for purpose of controlling mining debris and preventing flooding because statute gave board "almost unlimited discretion" to create drainage districts); *Gerawan Farming, Inc. v. Agric. Labor Relations Bd.*, 236 Cal.App.4th 1024, 187 Cal.Rptr.3d 261, 296-99 (2015) (holding unconstitutional statute that had purpose of improving agricultural employees' working conditions because it "grants to the mediator and the Board the power to establish employment terms … without any definite policy direction, goal or standard that is supposed to be reached or implemented"), *review granted*, 354 P.3d 301 (2015); *Bayside Timber Co. v. Board of Supervisors*, 20 Cal.App.3d 1, 9, 10 n.19, 11 (1971) (holding unconstitutional statute that delegated to "forest practice committees" task for "formulat[ing] forest practice rules" to fulfill statutory objectives of conserving and maintaining timberland productivity and promoting forest sustainability because delegation contained "no guides or standards"); *In re Schillaci*, 196 Cal.App.2d 591, 594, 595 (1961) (holding unconstitutional statute granting agency authority to approve advertisements related to

venereal disease because delegation was "devoid of any guide or standard").

Section 3604 contains the broad statutory objective that death-sentenced inmates in California are to be executed by lethal injection or lethal gas. But this objective "is so general it fails to provide any actual guidance." *Gerawan*, 187 Cal.Rptr. at 297 (citation omitted, alterations omitted). Other than to create and impose "standards" for executing inmates, what is CDCR's "precise purpose, goal or aim under the … statute?" *Id.* Is it to create a protocol that minimizes pain in an execution? That results in swift executions? *See* Compl. ¶¶ 31-51. Section 3604 provides no guidance on these questions; instead, it unconstitutionally grants CDCR "unlimited discretion" to create and impose standards for executing inmates. *Parks*, 58 Cal. at 642. Indeed, CDCR's historic inability to promulgate lawful and constitutional protocols shows that the agency requires more guidance than what the Legislature has provided. Compl. ¶¶ 58-72 (CDCR's protocols invalidated in whole or part on five occasions).

Notably, even statutes that delegate a much more discrete task than developing execution protocols—tasks like calculating the "average rate" paid by savings and loan associations—have been invalidated where, as here, they grant the agency "absolute discretion." *People's Fed. Sav. & Loan Ass'n v. State Franchise Tax Bd.*, 110 Cal.App.2d 696, 699 (1952) (holding unconstitutional statute delegating to agency authority to set allowable tax deduction for savings and loans associations based on "average rate paid by all such associations in this State, or … in a particular locality" because statute granted "absolute discretion to select the state as a whole, or any locality or part of the state").[4]

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[4] Moreover, Section 3604 provides much *less* guidance than delegations of authority that required boards to develop "reasonable and just" price schedules for a particular industry and even specified a methodology for doing so, but were nonetheless held invalid. *See, e.g., Allen v. Cal. Bd. of Barber Examiners*, 25 Cal.App.3d 1014, 1019, 1020 (1972) (holding unconstitutional statute delegating to board the power to establish "reasonable and just minimum price schedule" for barbers based on a cost survey and analysis of health and safety conditions affecting the industry); *State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners*, 40 Cal.2d 436, 448 (1953) (statute delegating to a board the authority to "establish a reasonable and just minimum price schedule" for dry cleaners unconstitutionally failed to "establish an ascertainable standard"). Section 3604 nowhere guides the "standards" that it tasks CDCR with developing and certainly does not identify the methodology CDCR is to employ in undertaking the weighty task of developing execution protocols. Although these cases involved delegations to private rather than government entities, the Supreme Court has set forth the same legal test for delegations of authority to "an external private or governmental body." *Kugler v. Yocum*, 69 Cal.2d 371, 382 (1968). This makes sense because the purpose of the nondelegation doctrine is to prevent the Legislature "from

(continued…)

Defendants argue that Section 3604 is part of a greater statutory scheme that provides specific direction, yet their brief does not cite any such "direction." This is because the Penal Code and the rest of the California Code contain no such language.

Defendants also suggest that federal and state constitutional prohibitions against "cruel and unusual punishment" provide sufficient guidance with respect to the fundamental issue of pain. Demurrer at 4. These prohibitions shed no light on other fundamental issues, such as the appropriate amount of transparency. Moreover, the constitution merely places an *outer limit* on the risk and degree of pain. *See Glossip v. Gross*, 135 S.Ct. 2726, 2737 (2015). Well before that limit is reached, there exists a "wide range of 'judgment calls'" about the acceptable risk and degree of pain. *See Baze v. Rees*, 553 U.S. 35, 51 (2008) (constitution does not require executions to be as painless as possible) (quoting *Bell v. Wolfish*, 441 U.S. 520, 562 (1979)). Those judgment calls raise fundamental questions of policy. Moreover, CDCR's protocols have twice been held to violate the Eighth Amendment. Compl. ¶¶ 63, 65. Even if the constitution provided guidance for Separation of Powers purposes, CDCR's repeated inability to adopt a constitutional protocol demonstrates its need for further legislative guidance.

3. The Supreme Court Of Arkansas Has Sustained A Similar Challenge

The Supreme Court of Arkansas held that the state's lethal injection statute violated Arkansas' Separation of Powers Clause. *Hobbs v. Jones*, 412 S.W.3d 844, 850–55 (Ark. 2012). The statute designated lethal injection as the method of execution and instructed the corrections department to "determine … all policies and procedures" for conducting such executions. *Id.* at 853 (quoting Ark. Code Ann. § 5–4–617 (Supp. 2011)). Notably, it actually provided *more* guidance than Section 3604 by, for example, identifying the specific drugs and classes of drugs that could be used. *Id.* But based on Arkansas' parallel Separation of Powers Clause,[5] the Arkansas Supreme Court concluded that the

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escaping responsibility by explicitly delegating [its] function to others," a concern implicated whether the delegation is to a private or public entity. *Id.* at 376.

[5] *Compare* Ark. Const. art. 4, § 1 ("The powers of the government … shall be divided into three distinct departments…: Those which are legislative, to one, and those which are executive, to another, and those which are judicial to another."), *with* Cal. Const. art. III, § 3 ("The powers of state government are legislative, executive, and judicial.").

legislature "abdicated its responsibility" by attempting to confer upon the executive branch the "unfettered discretion to determine all protocol and procedures" related to lethal injection executions. *Id.* at 854. Section 3604 is invalid for the same reason.

In sum, Section 3604 unconstitutionally abdicates the Legislature's duty to decide fundamental policy questions and provides unelected officials unbridled discretion to fashion execution protocols.

B. Plaintiffs' Procedural Arguments Are Utterly Meritless

1. The 2006 APA Challenge To CDCR's 2006 Protocol Is Not *Res Judicata* To This Constitutional Challenge To Penal Code § 3604

Defendants wrongly contend that a successful challenge under the APA to CDCR's 2006 protocol now shields Section 3604 from any and all constitutional challenges by virtue of Defendants' expansive view of the doctrine of *res judicata*. But the claims in the two cases are not identical, and Plaintiff ACLU was neither a party to nor in privity with parties to the prior action.

a) The Two Cases Do Not Raise Identical Claims

For the 2006 petition to bar this one, Defendants must demonstrate, *inter alia*, that the claims in both actions are "identical." *Boeken*, 48 Cal.4th at 797. This requires Defendants to show that both actions involve (1) the same "primary right" of the plaintiff; (2) the same "corresponding 'primary duty' of the defendant;" and (3) the same "wrongful act by the defendant constituting a breach of that duty." *Mycogen Corp. v Monsanto*, 28 Cal.4th 888, 904 (2002) (citation omitted); *see also Boeken*, 48 Cal.4th at 797-98. Defendants cannot satisfy any of these requirements.

The 2006 petition challenged CDCR's adoption of its 2006 execution protocol without providing the public with notice or an opportunity to comment, as a result of which the plaintiffs were deprived of their right to comment on the protocol. *See Morales v. CDCR*, Complaint ¶¶ 2, 4, 6, attached to Defendants' Req. for Jud. Notice; *see also Boeken*, 48 Cal.4th at 798 (analysis turns on "what plaintiff … *alleged*") (emphasis in original). In contrast, the present action challenges the Legislature's delegation of fundamental policy questions to unelected bureaucrats through the enactment of Penal Code § 3604, as a result of which Plaintiffs have been deprived of their right to have politically accountable leaders decide these issues. *See, e.g.*, Compl. ¶¶ 4, 8, 52. The rights (to comment on execution protocols / to have elected leaders decide fundamental policy issues), duties (of CDCR to

provide public notice and comment before issuing regulations / of the Legislature to decide fundamental policy issues), and breaches (CDCR's adoption of its 2006 protocol / the Legislature's enactment of Penal Code § 3604) are totally different in the two cases.[6]

CDCR attempts to frame the primary right at issue as the "right not to be subject to a lethal injection protocol that does not comport to state law." Demurrer at 7. Extrapolating to this level of generality—that a prior suit involved the right to be free from the defendant's illegal conduct—would mean that the "primary rights" in cases involving the same defendant are always identical. Such an approach would transform a narrow doctrine of judicial economy into a broad grant of immunity for any illegal conduct, whenever a defendant has previously been sued. That is clearly not the law. *See, e.g.*, *Fujifilm Corp. v. Yang*, 223 Cal.App.4th 326, 331-32 (2014) (breach of contract suit arising out of missed installment payments was not *res judicata* to subsequent suit challenging fraudulent transfers arising out of the initial dispute).

Defendants also emphasize that "the separation of powers claim [in this case] could have been and was not raised" in the prior action. Demurrer at 8. But the argument that "the doctrine of *res judicata* covers any 'issues' which were or could have been litigated in the prior action" "is contrary to established California law"; it relies on the federal transaction test, rather than California's primary rights test. *Brenelli Amedeo, S.P.A. v. Bakara Furniture, Inc.*, 29 Cal.App.4th 1828, 1835 (1994); *see also Fujifilm*, 223 Cal.App.4th at 333.

b) The ACLU Was Not In Privity With Parties To The 2006 Action

In any event, *res judicata* does not bar Plaintiff ACLU. The ACLU was not "a party or in privity with a party to the" 2006 action. *Boeken*, 48 Cal.4th at 797; *see also Clemner v. Hartford Ins. Co.*, 22 Cal.3d 865, 874 (1978) ("privity is a requirement of due process").

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[6] *Boeken*, on which Defendants rely, is distinguishable. There, the Supreme Court held that a loss of consortium claim against a cigarette manufacturer by the wife of a smoker with lung cancer barred the woman's subsequent wrongful death claim. Unlike this case, both actions in *Boeken* challenged the deprivation of the same primary right ("her husband's companionship and affection") and the same conduct by the defendant (inducing her husband to smoke). *Boeken*, 48 Cal.4th at 798.

Defendants' privity argument turns entirely on the assertion that the parties in the prior and current litigation have an interest in declaring CDCR's execution protocols "invalid in some way." Demurrer at 7. But the simple fact that the parties might wish a similar, amorphous litigation outcome does not suffice; the party in the first action must act in some kind of representative capacity to bind the non-party in a subsequent action. *See Rodgers v. Sargent Controls & Aerospace*, 136 Cal.App.4th 82, 93 (2006) (asbestos plaintiff not bound by determination in prior lawsuits that defendant was not a successor entity because "he did not stand in a close relationship with the other two plaintiffs" and "had no control over the proceedings in the other cases"); *Lynch v. Glass*, 44 Cal.App.3d 943, 949-50 (1975) (property owners not bound by prior suit by corporations where both suits sought to establish public easement rights over particular property, even though property owners "stood to gain from any determination in the corporations' favor," were aware of prior litigation, and one appeared as witness).[7]

The ACLU has no relationship to Sims or Morales (other than as co-Plaintiffs in this case), and had no involvement in the 2006 case whatsoever. There is simply no basis for concluding that the ACLU "'should reasonably have expected to be bound by' the adjudication of lawsuits in which [it] did not participate in any way, in which [it] had no proprietary or financial interest, and over which [it] had no control of any sort." *Vega v. Jones, Day, Reavis & Pogue*, 121 Cal.App.4th 282, 299 (2004) (fact that plaintiffs in two lawsuits were "shareholders in the same company" did not establish "a 'sufficiently close' relationship" to warrant finding of privity) (citation omitted).

2. Writs of Prohibitory Mandate Are Used To Challenge Unconstitutional Laws

Defendants contend that writ relief is unavailable, but rely on distinguishable case law involving traditional writs of mandate and writs of administrative mandate. This case involves a writ of prohibitory mandate. Such writs, like a traditional writ, are based on Cal. Code Civ. Proc. § 1085 and

[7] Defendants cite *Citizens for Open Access v. Seadrift Ass'n*, 60 Cal.App.4th 1053 (1998), but that case is consistent with the rule that the plaintiff in the prior action must have "acted in a representative capacity." *Id.* at 1073. The plaintiffs in the first action were public agencies statutorily charged with "representation of the public interest." *Id.* at 1071. The 2006 action was brought by Sims and Morales, two death-sentenced inmates lacking any statutory authority to act in a representative capacity.

are "employed to restrain a public official from the unlawful performance of a duty," including the performance of duties that "would violate the Constitution." *Planned Parenthood Aff'l v. Van de Kamp*, 181 Cal.App.3d 245, 263 (1986). Prohibitory writs are routinely used to obtain the very relief sought here—preventing state officials from implementing an unconstitutional statute. *See, e.g., Comm. to Defend Repro. Rights v. Myers*, 29 Cal.3d 252, 285 (1981) (preventing state officials from enforcing Budget Act that unconstitutionally denied Medi-Cal funding for abortions); *Hardie v. Eu*, 18 Cal.3d 371, 374 (1976) (same regarding statute imposing expenditure limitations on initiatives that violated First Amendment). "Because actions," such as this "to enforce … constitutional rights of prisoners are brought to 'compel the performance of an act which the law specifically enjoins, as a duty resulting from office,' there is no question but that mandamus lies." *In re Head*, 42 Cal.3d 223, 231 n.7 (1986) (quoting Cal. Code Civ. Proc. § 1085). None of the cases cited by Defendants addresses a writ of prohibitory mandate. But notably, one of Defendants' cases, *Alfaro v. Terhune*, 98 Cal.App.4th 492 (2002), acknowledges that "[t]he rule against enjoining the execution of a public statute is subject to," several exceptions, including "where the statute is unconstitutional." *Id.* at 501.[8]

3. Plaintiffs Have Adequately Pleaded A Taxpayer Cause Of Action

Defendants raise two meritless challenges to Plaintiffs' taxpayer cause of action. First, Defendants argue that section 526a "does not create a cause of action." Demurrer at 12:5. But the statute expressly provides for the maintenance of "*[a]n action* to obtain a judgment, *restraining and preventing* any illegal expenditure of" public funds. Cal. Code Civ. Proc. § 526a (emphasis added).

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[8] Defendants' writ argument, even if correct, would have no practical consequence. Plaintiffs have also brought this action as a complaint for declaratory and injunctive relief and have standing to do so. While Defendants' argue that declaratory relief is not appropriate to review an administrative decision (Demurrer at 5 n.3), Plaintiffs do not seek review of CDCR's administrative decisions. They seek review of a statute. As death-sentenced inmates, Plaintiffs Sims and Morales are beneficially interested in the constitutionality of any execution protocols. And the ACLU has taxpayer standing because many of its members pay taxes. Compl. ¶ 13; *see Tobe v. City of Santa Ana*, 9 Cal.4th 1069, 1086 (1995) (plaintiff raising constitutional claim can seek relief "either by a petition for writ of mandamus or complaint for declaratory and injunctive relief," as long as plaintiff is "beneficially interested" or has taxpayer standing); *Gilbane Bldg. Co. v. Superior Court*, 223 Cal. App. 4th 1527, 1531 (2014) (representative organization can establish taxpayer standing based on its members).

Defendants' cases confirm this point. *See Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist.*, 215 Cal.App.4th 1013, 1021, 1033 (2013) (holding that Plaintiff "could properly bring, and had standing to bring, a taxpayer action … to challenge [defendant's] use of Proposition S bond funds"); *Van Atta v. Scott*, 27 Cal.3d 424, 433, 453 (1980) (upholding "a taxpayer action … [that] attacked the statutes providing for pretrial release and San Francisco's application of those statutes").

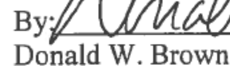
Second, Defendants argue that Plaintiffs cannot "show that [CDCR] failed to comply with a mandatory duty." Demurrer at 12:14–15. But the statute requires no such demonstration and expressly provides for "[a]n action to obtain a judgment, *restraining and preventing any illegal expenditure* of, waste of, or injury to" public funds. Cal. Code Civ. Proc. § 526a (emphasis added). The case law is clear that "an injunction under section 526a will issue to restrain … enforcement if the provision is unconstitutional." *Blair v. Pitchess*, 5 Cal.3d 258, 268 (1971); *see also Planned Parenthood Aff'l*, 181 Cal.App.3d at 257.[9]

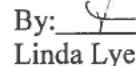
CONCLUSION

For the foregoing reasons, Defendants' demurrer should be overruled.

Dated: January 17, 2017

Respectfully submitted,

By: 
Donald W. Brown

By: 
Linda Lye

Attorneys for Plaintiffs

[9] Defendants' reliance on *Daily Journal Corp. v. County of Los Angeles*, 172 Cal.App.4th 1550 (2009), is misplaced. That case merely held that a taxpayer action is not available to compel a public entity to engage in a discretionary act, such as whether to pursue a legal claim. *See id.* at 1557-58. Here, Plaintiffs do not challenge any discretionary decision by CDCR or seek to compel CDCR to exercise its discretion in any particular manner. Moreover, *Daily Journal* explicitly recognized that section 526a authorizes actions, such as this, that seek to "restrain[] and prevent[] any illegal expenditure" of funds. *See* 172 Cal.App.4th 1550, 1557 (2009) (quoting Cal. Code. Civ. Proc. § 526a).