IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

LEAGUE OF WOMEN VOTERS OF CALIFORNIA, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, ALL OF US OR NONE, ROBERTA CRONIN, NICHOLAS KRASOWSKI, and JASON LOVE, Petitioners, vs. BRUCE MCPHERSON, California Secretary of State, and JOHN ARNTZ, Director of the Department of Elections, County of San Francisco, Respondents.	A114988

REPLY TO OPPOSITION TO PETITION FOR WRIT OF MANDATE

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INTRODUCTION

Respondent Secretary of State ("Respondent") makes three principal arguments:

1. The plain language rule does not support a reading of Article II, Section 4 that preserves probationers' voting rights.

2. The ballot arguments demonstrate that voters intended to allow only *ex*-felons the right to vote, not individuals who still have "felony status" and have not yet "fully paid their debt to society."

3. Individuals convicted and sentenced to county jail under Penal Code section 18 are not misdemeanants.

These arguments miss the mark in six respects:

First, the plain language of Article II, Section 4 preserves probationers' voting rights insofar as the word "probation" is nowhere mentioned in the constitutional provision and courts have construed the term "conviction" to require judgment and sentence for purposes of imposing a civil disability such as felony disenfranchisement.

Second, the term "imprisoned" as used in Article II, Section 4 may reasonably be interpreted under California law to refer to state prison and exclude felony probationers confined in county jail as a condition of probation, and thus must be interpreted to preserve probationers' voting rights.

Third, the ballot materials demonstrate that the voters intended to disenfranchise only those in prison and on parole, not probationers. This becomes particularly clear in the Legislative Analyst's impartial analysis of Proposition 10, which Respondent fails to reference in any manner. Moreover, Respondent's interpretation of the ballot arguments, taken to its logical conclusion, would disenfranchise even *non*-incarcerated probationers, which was clearly not intended by the voters and is not a plausible reading of the plain language of Article II, Section 4.

Fourth, Respondent disregards subsequent legislative and administrative interpretations of Article II, Section 4 that preserve probationers' voting rights, including the Legislature's interpretation of the initiative it had presented to voters and three decades of interpretation by Respondent's own office that contradicts his current position.

Fifth, Respondent conflates two classes of individuals—misdemeanants and felony probationers—and confuses the issues. Individuals sentenced to county jail pursuant to Penal Code section 17(b) after conviction for a Penal Code section 18 "wobbler" are misdemeanants.

Sixth, adopting the Attorney General's Opinion and Respondent's interpretation that Article II, Section 4 disenfranchises confined felony probationers would lead to unfair, unworkable results.

ARGUMENT

I.
THE PLAIN LANGUAGE OF ARTICLE II, SECTION 4 PRESERVES PROBATIONERS' VOTING RIGHTS

Respondent argues that the "plain language rule does not support petitioners' construction of article II, section 4" to preserve felony probationers' voting rights. Resp. Brief, at 7. He is mistaken.

A. The Plain Language of the California Constitution Excludes Disenfranchisement of Probationers

The plain language of Article II, Section 4 does not disenfranchise probationers—confined or otherwise. The word "probation" is nowhere referenced in the constitutional provision, even though the status of probation—and confinement in county jail as a condition of probation—had existed for decades prior to the adoption of Article II, Section 4 in 1974. *See, e.g.*, Penal Code § 1203 (2006) (historical and statutory notes reference probation as early as 1903).

The failure to include probation language in Article II, Section 4 is powerful evidence that probationers are not encompassed within the scope of the disenfranchisement provision. Indeed, the legislative history of Assembly Constitutional Amendment No. 38 ("ACA 38")—the legislative enactment that became Proposition 10 on the ballot and Article II, Section 4 of the Constitution—only reinforces this conclusion.

In drafting ACA 38, the Legislature considered—and then rejected—language that would have disenfranchised probationers. Pet. Brief, at 19. The initial inclusion of probationers in the measure and then the subsequent omission of them from the final version is "strong evidence" that the measure, in fact, preserves probationers' voting rights. *See WDT-Winchester v. Nilsson*, 27 Cal. App. 4th 516, 534 (1994) (omission of provision from final version of statute which was included in earlier version "strong evidence" that statute should not be construed to incorporate original provision).

The Legislature knew that it had the authority to disenfranchise probationers; indeed, it had entertained probationer disenfranchisement language on at least two prior occasions in 1960 and 1970. Pet. Brief, at 20. Yet, the Legislature declined to do so in drafting Article II, Section 4's disenfranchisement provision. *See, e.g.*, *Knight v. Superior Court*, 128 Cal. App. 4th 14, 24–25 (2005) (court states that initiative drafters could have "easily and effectively" inserted domestic partner language in initiative similar to laws in other states, but chose not to do so); *Californians for Political Reform Found. v. Fair Political Practices Comm'n*, 61 Cal. App. 4th 472, 485 (1998) (court highlights definition of "contribution" in pre-existing regulations and notes that initiative proponents "obviously" knew they could insert existing regulatory definition into statute, but chose not to do so).

Instead, the Legislature ultimately resolved to limit disenfranchisement to individuals in state prison or on parole, continuing the existing restriction on

voting separately set forth in the Penal Code and preserving voting rights for probationers. Pet. Brief, at 21–23.

B. Courts Have Given the Term "Conviction" A Precise, Technical Construction For Purposes of Imposing A Civil Disability Such As Disenfranchisement That Preserves Unsentenced Probationer Voting Rights

Judicial construction of the term "conviction" is also consistent with reading the plain language of Article II, Section 4 to preserve "unsentenced" probationers' (probationers for whom the court has suspended imposition of sentence) voting rights in particular.

Where an initiative uses terms that have been judicially construed, the "presumption is almost irresistible" that the terms have been used in the "precise and technical sense" placed upon them by the courts. *People v. Weidert*, 39 Cal. 3d 836, 845–846 (1985) (quoting *In re Jeanice D.*, 28 Cal. 3d 210, 216 (1980)).

Courts have long construed the term "conviction" to require entry of judgment and sentence *for purposes of imposing a civil disability* like felony disenfranchisement. *See, e.g.*, *People v. Treadwell*, 66 Cal. 400, 401 (1885) (holding "conviction" requires "final judgment" to impose attorney disbarment); *In re Riccardi*, 182 Cal. 675, 678, 679 (1920) (same); *Truchon v. Toomey*, 116 Cal. App. 2d 736, 742 (1953) (holding term "convicted" as used in criminal disenfranchisement provision required both verdict or plea and imposition of judgment and sentence); *Stephens v. Toomey*, 51 Cal. 2d 864, 869 (1959) (stating "conviction" as used in disenfranchisement provision "must mean a final judgment of conviction"); *Helena Rubenstein Int'l v. Younger*, 71 Cal. App. 3d 406, 418 (1977) (where constitutional provisions impose civil penalties or disabilities, "conviction" never construed to mean verdict of guilt; rather, penalties or disabilities not applicable until court judgment entered); *Boyll v. State Personnel Bd.*, 146 Cal. App. 3d 1070, 1074 (1983) (where civil disability flows from conviction, the "majority and better rule is that 'conviction' must include both the

guilty verdict (or guilty plea) *and* a judgment entered upon such verdict or plea") (emphasis in original).

The voters who adopted Proposition 10 are "deemed to be aware" of this longstanding judicial construction of the term "conviction" and presumed to have used it accordingly when they adopted a constitutional provision that based the civil disability of disenfranchisement on the existence of a felony "conviction." *See Weidert*, 39 Cal. 3d at 844.

Since "unsentenced" felony probationers have neither a judgment nor a sentence imposed (*See People v. Howard*, 16 Cal. 4th 1081, 1087 (1997)), they have no "conviction" for purposes of imposing a civil disability such as felony disenfranchisement. Unsentenced probationers retain their voting rights under Article II, Section 4. Respondent John Arntz concurs with this result. Resp. Arntz Brief, at 8–10.

Respondent Secretary of State, on the other hand, contests this construction of the term "conviction" by advancing three meritless arguments.

Respondent cites to Witkin's *California Criminal Law* for the proposition that imposition of probation without pronouncement of judgment may mean that felony probationers have been convicted, because the word "conviction" has various meanings under California law. Resp. Brief, at 24–25. However, the cited section of Witkin (section 539) merely recognizes that a probationer is "convicted" for criminal justice purposes. That definition has no application to disenfranchisement or other civil disabilities. *See, e.g.*, *Helena Rubenstein*, 71 Cal. App. 3d at 413, 421, 418 (acknowledging that "conviction" has varying meanings depending upon the context, yet concluding that it always means at least entry of judgment for purposes of imposing civil penalties or disabilities).

Respondent also argues that because *Truchon* dealt with permanent disenfranchisement, "its view that a conviction requires the imposition of judgment and sentence does not necessarily apply here, particularly in light of the voters' intent in adopting Proposition 10." Resp. Brief, at 25. However, there is

no evidence of a contrary intent in Proposition 10. In fact, Respondent's contention is inconsistent with the Proposition 10 ballot arguments that stressed the importance of the franchise, expanding the franchise, and the need to eliminate unnecessary restrictions on the franchise. *See* Pet. Brief, at 25–26. Against this backdrop, it is even more likely that the voters intended to adopt the protective meaning of "conviction" that would preserve unsentenced probationer voting rights, rather than a meaning that would exclude them from the franchise.

And, finally, Respondent argues that *Truchon* is distinguishable because that case involved the disenfranchisement provision that preceded Article II, Section 4 and the probationer in *Truchon* had received an expungment order. Resp. Brief, at 24–25. While *Truchon* did involve interpretation of the predecessor provision, the *Truchon* court relied on case law decided before expungment orders or probation were authorized in determining that the term "conviction" required a final judgment from California's original 1849 Constitution to the present era. Moreover, the *Stephens* court also held that "conviction" requires a final judgment, yet that case did not involve an expungment order.

There is nothing in the language or history of Article II, Section 4 or the Respondent's brief to suggest that the voters who adopted Proposition 10 intended the term "conviction" to mean anything short of judgment and sentence consistent with longstanding judicial construction.

II.
THE TERM "IMPRISONED" AS USED IN ARTICLE II, SECTION 4 MAY REASONABLY BE—AND THUS MUST BE—INTERPRETED TO PRESERVE PROBATIONERS' VOTING RIGHTS

While the word "imprisoned" has no single meaning or "precise and technical" construction under California law, the word may reasonably be interpreted to preserve probationers' voting rights when considered in context and in light of case law and existing statutes. Principles of construction regarding

voting laws dictate adoption of this non-disenfranchising meaning: "[E]very reasonable presumption and interpretation is to be indulged in favor of the right of the people to exercise the elective process...no construction of an election law should be indulged that would disenfranchise any voter if the law is reasonably susceptible of any other meaning." *Otsuka v. Hite*, 64 Cal. 2d 596, 603–604 (1966).

The word "imprisoned" does not stand alone in Article II, Section 4; it is part of a phrase, "imprisoned or on parole for the conviction of a felony." The word should be interpreted in the context of the phrase in which it is used. *See Lungren v. Deukmejian*, 45 Cal. 3d 727, 735 (1988) (meaning of a statute not determined from a single word; rather, words must be construed in context and provisions relating to same subject matter should be harmonized to extent possible).

Viewing the phrase "imprisoned or on parole" in context and as a whole, it is reasonable to infer that "imprisoned" as used in Article II, Section 4 means "state prison." Pet. Brief, at 12–13. It is well settled that parole is an extension of prison. *See, e.g.*, *People v. Hernandez*, 229 Cal. App. 2d 143, 149 (1964) (although "a parolee is not a prison inmate in the physical sense, he is constructively a prisoner under legal custody of the State Department of Corrections"); *People v. Howard*, 79 Cal. App. 3d 46, 49 (1978) (A "parolee is at all times in *custodia legis*. Although he is not a prison inmate in the physical sense, he is serving the remainder of his term outside rather than within the prison walls."). The use of the word "imprisoned" coupled with "parole" (and without additional reference to "probation") may be interpreted to limit disenfranchisement to those individuals under a continuum of custody under the supervision of state prison authorities, i.e., prisoners and parolees, and to preserve probationers' voting rights.

Defining "imprisoned" in this manner is also consistent with California law that has long drawn a distinction between individuals confined under a judgment

and sentence of "imprisonment" (i.e., convicted and sentenced misdemeanants and felons denied formal probation) and those confined "as a condition of probation" (i.e. felony probationers). *See, e.g.*, *People v. Wallach*, 8 Cal. App. 2d 129, 133 (1935) (jail as a condition of probation does not amount to serving a term of imprisonment after judgment and sentence); *People v. Atwood*, 221 Cal. App. 2d 216, 223 (1963) (suspension of execution of sentence and provision of time in county jail were "conditions of probation, not a judgment and sentence). In this context, the use of the phrase "imprisoned...for the conviction of a felony" in Article II, Section 4, without the "as a condition of probation" qualifier, may be interpreted to mean imprisonment in state prison after judgment and sentence for a felony conviction.

California statutes in effect when voters adopted Article II, Section 4 and adopted since then reflect a similar distinction by explicitly referencing probation. *See, e.g.*, Penal Code § 1208 (1974) ("convicted of a misdemeanor and sentenced to the county jail, or is imprisoned therein . . . as a condition of probation for any criminal offense"); Penal Code § 4017 (1974) ("persons confined in the county jail...under a final judgment of imprisonment rendered in a criminal action . . .and all persons confined in the county jail...as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence"); Penal Code § 4125.1 (1974) (referring to persons confined "under a final judgment of imprisonment...or as a condition of probation"); Penal Code § 4017.5 (1976) (referring to persons confined in a county jail "under a judgment of imprisonment...or as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence"); Penal Code § 4019 (1976) (separate paragraphs pertaining to a person confined in a county jail "under a judgment of imprisonment" and one confined "as a condition of probation after suspension of imposition of a sentence or suspension of execution of sentence").

Moreover, where "imprisoned in county jail" or some version of this phrase is used in statutes, it frequently refers to post-judgment and sentence, non-

probation status. In other words, it refers to individuals who have been convicted, denied formal probation, and sentenced to county jail for a period of less than one year, i.e. misdemeanants. This is the case, for example, with the majority of Penal Code sections cited in the Attorney General's Opinion. *See, e.g.*, Penal Code §§ 18, 19, 136.7, 186.22, 273h, 273.6, 273.65, 286, 288a, 289, 337.2, 381a, 383, 412, 422.77, 499, 560.6, 647d, 919, 2042, 4133, 11149.3. Similarly, in many of these statutes, where "imprisoned" is used in reference to state prison, it also refers to those who have been convicted, denied formal probation, and sentenced to state prison after judgment for a felony conviction. *See, e.g.* Penal Code §§ 136.7, 186.22, 273.6, 273.65, 286, 288a, 289, 499, 2042, 4133, 11149.3. In contrast, when the word "imprisoned" is used with reference to confined felony probationers, the term is often accompanied by the phrase "as a condition of probation" or "as a condition thereof." *See, e.g.,* Penal Code §§ 243, 273.5, 337a, 551, 626.9, 666, 1203.1, 1208, 2903, 6301, 12025. In most of the Penal Code sections cited by the Attorney General dealing with felony probationers confined in county jail, the Legislature explicitly distinguishes this group by making some reference to their probation status. *See, e.g.,* Penal Code §§ 17, 166, 243, 273.5, 337a, 551, 626.9, 666, 1203.1, 1208, 2903, 6301, 12025. Since Article II, Section 4 uses only the term "imprisoned" without any reference to "as a condition of probation," it is reasonable to infer that the term signifies imprisonment in state prison after judgment and sentence for a felony conviction and excludes confined probationers.

Other authorities also provide definitions for "imprisoned" as referring to state prison. *See, e.g.*, Cal. R. Ct. 4.405 (2006) (in sentencing definitions section, defines "imprisonment" as "confinement in a state prison"); Webster's Dictionary, Pet. Exh. 9 (defining "imprison" as "to put in prison" and defining "prison" as "*often*: an institution for the imprisonment of persons convicted of...felonies: a pentitentiary as distinguished from a...local jail"); Black's Law Dictionary, Pet. Exh. 10 (defining "imprisonment" as the act of confining someone, especially "in

a prison" and defining "prison" as a "state or federal facility" for confinement of convicted "felons").

The Court should adopt this narrow, reasonable meaning of "imprisoned" to preserve probationers' voting rights. *Otsuka*, 64 Cal. 2d at 603–604.

III.
THE PROPOSITION 10 BALLOT MATERIALS DEMONSTRATE THAT VOTERS INTENDED TO DISENFRANCHISE ONLY THOSE IN PRISON OR ON PAROLE, NOT PROBATIONERS

Interpreting the language of Article II, Section 4 to preserve probationers' voting rights is entirely consistent with the voters' intent as evidenced by the ballot materials accompanying Proposition 10.

A key component of those ballot materials is the impartial analysis of Proposition 10 by the Legislative Analyst, which Respondent ignores in analyzing the voters' intent. *See* Resp. Brief, at 3–10. The Legislative Analyst explicitly advised voters that Proposition 10 would limit disenfranchisement to the duration of a "prison" and parole "sentence," repeatedly using these terms in describing the scope and effect of the initiative. *See* Pet. Brief, at 24. *See also* Rebuttal to Argument in Favor of Prop 10, Exh. 28 ("The real question here is whether the State of California should grant a blanket, automatic restoration of voting rights to each and every person convicted of a felony on the very day he is released from *prison*.") (emphasis added). Neither "jail" nor "probation" are referenced anywhere in these ballot materials.

Respondent fails to address, much less explain, these references and omissions, which are consistent with an interpretation that Article II, Section 4 preserves confined probationers' voting rights. Instead, Respondent selectively seizes upon language in the proponents' ballot arguments to conclude that voters intended to disenfranchise individuals while they have "felony status" and until they have "fully paid their debt to society" and become "ex-felons." Resp. Brief, at 8–10.

This interpretation is plainly wrong. Respondent's reasoning would strip even *non-incarcerated* felony probationers of the right to vote because, arguably, they have not yet "fully paid their debt to society" and are not "ex-felons" since they continue to be under the supervision of the criminal justice system. This is an absurd result since non-incarcerated probationers are neither "imprisoned" nor "on parole," and "probation" is not mentioned anywhere in the language of Article II, Section 4, Proposition 10, the ballot materials, or the implementing legislation.

Moreover, the statements relied upon by Respondent describe the effect of the measure on those previously subject to the lifetime ban. The proponents' ballot arguments do not purport to define the class of persons who would be disenfranchised if Proposition 10 were to be adopted. The *only* description of the class of persons who would be disenfranchised post-Proposition 10 is found in the Legislative Analyst's opinion, which advised voters that the proposition would limit disenfranchisement to those "in prison or on parole" and restore voting rights once "their prison sentences, including time on parole, have been completed." *See* Pet. Brief, at 24.

The Proposition 10 ballot materials directly support an interpretation of Article II, Section 4 that narrows disenfranchisement to only those in state prison or on parole and that preserves probationers' voting rights. No mention is made of disenfranchising probationers. To the extent that Respondent argues that the initiative was intended to encompass probationers despite the absence of such language, the voters were not presented with the opportunity to vote on that undisclosed objective. *See Knight*, 128 Cal. App. 4th at 26.

Respondent not only ignores ballot materials relevant to establishing the voters' intent, he disregards legislative and administrative interpretations of Article II, Section 4 that contradict his position.

IV.
RESPONDENT DISREGARDS SUBSEQUENT AUTHORITIES THAT CONTRADICT HIS POSITION

Respondent disregards subsequent legislative and administrative interpretations of Article II, Section 4 that preserve probationers' voting rights, including the Legislature's interpretation of the initiative it had presented to voters and three decades of interpretation by Respondent's own office that contradict his current position.

A. Respondent Ignores The Legislature's Interpretation of Article II, Section 4

Respondent completely ignores the Legislature's subsequent interpretation of the initiative it had placed before the voters. This is despite the settled principle of construction that affords a "strong presumption" in favor of the Legislature's interpretation of a constitutional provision, regardless of whether the Legislature's construction is "more probably than not" the meaning intended by those who adopted the measure. *See Methodist Hosp. of Sacramento v. Saylor*, 5 Cal. 3d 685, 692, 693 (1971).

The Legislature, in a series of enactments from 1979 to the present, has interpreted Article II, Section 4 to disenfranchise only individuals "in prison or on parole." Pet. Brief, at 27–28. If the Legislature meant to include jails in addition to prisons, it would have said "in jail" in addition to "in prison." California law has long recognized a separate system of laws governing jails and prisons; the Legislature is well aware of this distinction. *See* Penal Code §§ 2000 *et seq.* (2006); §§ 4000 *et seq.* (2006). Instead, the Legislature used only the term "in prison" in place of "imprisoned." Interpreting this language as limiting disenfranchisement to state prison—as opposed to also encompassing jail—is a reasonable, non-disenfranchising construction of the law that is consistent with the Proposition 10 ballot arguments and voters' intent. *See Otsuka v. Hite*, 64 Cal. 2d at 603–604. The Court should adopt it.

B. Respondent Disregards the Secretary of State's Three-Decade Interpretation of Article II, Section 4

Respondent also dismisses the Secretary of State's three-decade interpretation that Article II, Section 4 preserves probationers' voting rights as "interesting background" that should "take a backseat to the intent of the voters." Resp. Brief, at 5 n.7. Petitioners agree that the voters' intent is paramount. However, as California's chief elections officer, the Secretary of State's construction of Article II, Section 4 should be afforded "great weight" in interpreting the provision. *See Whitcomb Hotel, Inc. v. California Employment Comm'n*, 24 Cal. 2d 753, 756–757 (1944). In particular, the Secretary of State's "substantially contemporaneous expressions of opinion are highly relevant and material evidence of the probable general understanding of the times...." *Id.*

Within two years of adopting Article II, Section 4, the Secretary of State advised local election officials that individuals on probation could register to vote. Pet. Brief, at 29. The Secretary of State reiterated this position again in 1976, 1979, and, most recently, in 2004. Pet. Brief, at 30. This interpretation of Article II, Section 4 is consistent with the language of the Proposition 10 ballot arguments and reinforces the conclusion that the voters' intended to preserve probationers' voting rights.

V.
INDIVIDUALS SENTENCED TO IMPRISONMENT IN THE COUNTY JAIL FOR A PENAL CODE SECTION 18 "WOBBLER" ARE MISDEMEANANTS AND RETAIN THEIR VOTING RIGHTS

The Attorney General's Opinion cites Penal Code section 18, without any legal analysis, as an example of a category of individuals incarcerated in local county jail who are disenfranchised under Article II, Section:

> Preliminarily, we note that a person who has been convicted of a felony may be confined in a local detention facility, depending upon a variety of circumstances. Penal Code section 18, for example, states in part: "...[E]very offense which is prescribed by any law of the state to be a felony punishable by imprisonment in any of the

> state prisons or by a fine, but without an alternate sentence to the county jail, may be punishable by imprisonment in the county jail not exceeding one year or by a fine, or by both."

88 Cal. Op. Att'y Gen. 207, 207 (2005). However, the only effect of this portion of Penal Code section 18 is to clarify that, where a statute prescribes punishment of state prison or a fine, the offense can still be punished as a "wobbler" with an alternate punishment of imprisonment in the county jail.[1]

Once the court imposes a "punishment other than imprisonment in the state prison" for the conviction of a "wobbler"—including when the court imposes the punishment of "imprisonment in the county jail"—the conviction is considered "a misdemeanor for all purposes." *See* Penal Code § 17(b) (2006);[2] *People v. Simon*, 227 Cal. App. 2d 849, 858 (1964) (where court imposes county jail sentence, "crime is deemed a misdemeanor for all purposes after judgment"). This would include for purposes of felony disenfranchisement.[3]

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[1] A "wobbler" is an offense that can be punished, in the court's discretion, either as a misdemeanor by incarceration in county jail, or as a felony by incarceration in state prison. *See People v. Howard*, 34 Cal. 4th 1129, 1137 (2005); *People v. Corpuz*, 38 Cal. 4th 994, 997 (2006).

[2] Penal Code section 17(b) provides: "When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances: (1) After a judgment imposing a punishment other than imprisonment in the state prison...."

[3] Of course, if the punishment imposed by the court is a state prison sentence (instead of imprisonment in county jail), the conviction becomes a felony. If, as a result of such a felony conviction, the individual is denied probation and either sent off to state prison or serves their state prison sentence in county jail under contract between state and local officials, the individual is disenfranchised under Article II, Section 4. *See* Pet. Brief, at 7 n.14. If the court instead places the individual on formal probation with either suspended imposition of sentence or suspended execution of sentence, with time in county jail as a condition of probation, the individual would be deemed a confined felony probationer, who, Petitioners argue, may vote. *See* Pet. Brief, at 9–33.

Respondent Secretary of State appears to agree with this conclusion. *See* Resp. Brief at 1 n.2 ("if an offense could be either a felony or a misdemeanor and the defendant is convicted of a misdemeanor, article II, section 4 does not apply"), and at 17 n.16 ("where a crime is actually rendered a misdemeanor under Penal Code section 17, subdivision (b)(1), because there has been a *judgment* imposing a punishment other than imprisonment in the state prison...[o]f course, in those circumstances the person is eligible to vote") (emphasis in original).[4] Respondent John Arntz also concurs. *See* Resp. Arntz Brief at 7–8.

VI.
THE ATTORNEY GENERAL'S OPINION AND RESPONDENT'S POSITION RESULT IN UNFAIR AND UNWORKABLE RESULTS

Petitioners pointed out that interpreting Article II, Section 4 to disenfranchise confined probationers means that many probationers could lose, regain, then lose again the right to vote within a matter of months, even days, based on shifting confinement status which can occur several times during a multi-year probationary period. Pet. Brief, at 32–33. This would include, for example, losing the right to vote merely because the individual was confined on a suspected probation violation, which eventually turned out to be a mistake, or because the individual was without the financial resources to make bail pending a hearing on the matter. Moreover, it would require local election officials to cancel and then potentially renew voting registration on each of these occasions.

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[4] Respondent spends several pages of his reply brief arguing that individuals convicted of a Penal Code section 18 "wobbler" are not misdemeanants until the court reduces the offense to a misdemeanor. *See* Resp. Brief, at 11–16. Petitioners agree. Respondent also argues that confined felony probationers, including the individual Petitioners, are not deemed misdemeanants by virtue of doing "local jail time" as a condition of probation. *See* Resp. Brief, at 17–23. Petitioners agree and did not argue otherwise in the Petition for Writ of Mandate or opening brief.

Respondent does not contend that these results would not occur or offer any argument regarding these results. Instead, Respondent argues that Petitioners' construction would lead to absurd results in two ways; neither is persuasive.

First, Respondent argues that, under Petitioners' interpretation of Article II, Section 4, a convicted felon who is sentenced to state prison and is waiting for transport to prison would be eligible to vote while he is still in county jail. However, nothing in Petitioners' argument would suggest such a result. On the contrary, Petitioners would agree that individuals waiting for the bus to state prison after judgment and sentence cannot vote and, indeed, Petitioners acknowledged in their opening brief that even those individuals who are serving the entirety of their state prison sentence in local county jail as a result of a contract between the CDC and local authorities cannot vote. Pet. Brief, at 7 n.14.

Second, Respondent argues that treating individuals who have been sent to state prison differently for purposes of voting from those who have been granted probation with time in the county jail as a condition of probation is an unreasonable consequence since both may have been convicted of the same crime under the same circumstances. To the contrary, a sentence to state prison is a qualitatively different consequence than the grant of probation. *See, e.g., In re Solis*, 274 Cal. App. 2d 344, 349 (1969) ("jail detention... ordered as a condition of probation... is not regarded as punishment but as a part of the whole supervised program of rehabilitation"); *People v. Zuniga*, 108 Cal. App. 3d 739, 743 (1980) (noted that "[p]robation is a form of leniency which is predicated on the notion that a defendant, by proving his ability to comply with the requirements of the law and certain special conditions imposed upon him, may avoid the more severe sanctions justified by his criminal behavior."); *People v. Guzman*, 35 Cal.4th 577, 590 (2005) (period of probation operates as a substitute for... the prison term) (internal quotations omitted). Therefore, interpreting the language of Article II, Section 4 to treat the two statuses differently for purposes of voting is not absurd.

VII.
THIS COURT'S WRIT SHOULD DIRECT RESPONDENT TO PROVIDE LOCAL ELECTION OFFICIALS ALL INFORMATION NECESSARY TO ALLOW REGISTRATION OF ELIGIBLE MISDEMEANANTS AND FELONY PROBATIONERS

Respondent John Arntz has advised the Court that the Superior Court transmits a list of all persons convicted of felonies. Elec. Code § 2212 (2006). That list does not allow him to ascertain which individuals are sentenced to probation with a jail condition or sentenced to county jail under Penal Code sections 17(b) and 18. He is therefore unable to accept affidavits of registration from the individual petitioners in this case and similarly situated people without a more detailed description of the sentences given to persons with felony or "wobbler" convictions.

To address the problem that respondent Arntz has identified, Petitioners request that the writ direct Respondent McPherson to obtain and disseminate information in sufficient detail to allow the local registrars to determine whose convictions disqualify them from voting and whose do not. As chief elections officer, the Secretary of State is responsible for administering provisions of the Elections Code. Gov't Code § 12172.5, *amended by* 2006 Cal. Legis. Serv. Ch. 588 (A.B. 3059). He obtains records from the Department of Corrections and Rehabilitation of persons whose felony convictions "render them ineligible to vote" and transmits this information to county elections officials. Cal. Code Regs. Tit. 2, § 20108.55(e) (2006).

Similarly, the Secretary of State should notify the courts that, in fulfilling their obligations under Elections Code section 2212, they should transmit to local elections officials records of people whose felony convictions *render them ineligible to vote.*

To ensure meaningful relief in this proceeding, therefore, Petitioners respectfully request that this Court's writ include language directing the Secretary of State to advise the Superior Courts they should provide sufficient information

on the sentences imposed following felony and "wobbler" convictions to permit registrars to allow persons serving time in county jails as a condition of felony probation or pursuant to Penal Code sections 17(b) and 18 to exercise their right to vote. For petitioners to register for the November election, respondent Arntz would need this information from the Superior Court no later than October 23.

CONCLUSION

Article II, Section 4 preserves confined probationers' voting rights. The plain language of Article II, Section 4, the reasonable meaning of the term "imprisoned" as used in the constitutional provision, the voters' intent, and decades of legislative and administrative interpretation all point to this result. To conclude otherwise would lead to unfair and unworkable results.

Dated: October 10, 2006

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF NORTHERN CALIFORNIA

SOCIAL JUSTICE LAW PROJECT

By: _____
Maya L. Harris

Attorneys for the Petitioner

CERTIFICATION OF COMPLIANCE

Pursuant to California Rule of Court 13, I certify that the attached Reply to Opposition to Petition for Writ of Mandate contains 5,488 words.

Dated: _____

AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

SOCIAL JUSTICE LAW PROJECT

By: _____
Maya L. Harris

Attorneys for the Petitioners

PROOF OF SERVICE

California League of Women Voters, et al. v. McPherson, et al.
Case No. A114988

I, Leah Cerri, declare that I am a citizen of the United States, employed in the City and County of San Francisco; I am over the age of 18 years and not a party to the within action or cause; my business address is 39 Drumm Street, San Francisco, California 94111.

On October 10, 2006, I served a copy of the attached

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

on each of the following by placing a true copy in a sealed envelope with postage thereon fully prepaid in our mail basket for pickup this day at San Francisco, California, addressed as follows:

Bill Lockyer, Attorney General
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 10, 2006 at San Francisco, California.

Leah Cerri