ACLU
AMERICAN CIVIL LIBERTIES UNION
of NORTHERN CALIFORNIA

April 3, 2009

VIA HAND DELIVERY

Honorable Ronald M. George
Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Legal Services for Prisoners with Children v. Bowen*
California Supreme Court No. S170852
California Court of Appeal No. A120220

Letter of *Amici Curiae* Supporting Petition for Review

Dear Chief Justice George:

This case, now before the Court on a Petition for Review, raises significant constitutional issues of first impression concerning the voting rights of tens of thousands of California parolees. Petitioners challenge California's disenfranchisement of people on parole following their conviction for statutory felonies that would not have qualified as felonies at common law. Petitioners argue that this disenfranchisement violates the Fourteenth Amendment to the United States Constitution, and have presented extensive scholarly evidence documenting the intent of the Framers of the Fourteenth Amendment to protect the franchise for African Americans against hostile state action. The Court of Appeal ruled that this disenfranchisement was constitutionally permissible.

Pursuant to California Rules of Court Rule 8.500(g), the American Civil Liberties Union (ACLU) of Northern California and the Impact Fund are writing to support petitioners' request for review. The ACLU of Northern California is the regional affiliate of the ACLU, a nonprofit, nonpartisan membership organization with more than 500,000 members. The ACLU defends the guarantees of individual liberty in state and federal Constitutions and civil rights laws. The ACLU is deeply concerned with protecting voting rights and with promoting racial equality. The ACLU of Northern California was co-counsel for petitioners in *League of Women Voters v. McPherson*, 145 Cal. App. 4th 1469 (2006), which ruled that incarcerated felony probationers are eligible to vote in California. The Impact Fund is a nonprofit foundation that supports civil rights impact litigation through grants, technical support, amicus and direct representation. It is also a California State Bar Legal Services Trust Fund Support Center. It has supported a broad range of civil rights cases including voting, criminal justice and prisoner's rights actions. It has served as amicus in many cases in California appellate courts. The ACLU of Northern California and the Impact Fund participated as *amici curiae* in the Court of Appeal in this proceeding.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 DRUMM STREET, SAN FRANCISCO, CA 94111 | T/415.621.2493 | F/415.255.1478 | TTY/415.863.7832 | WWW.ACLUNC.ORG

This Court has a proud history of protecting fundamental voting rights, and has been a national leader in applying constitutional guarantees of equality to limit felony disenfranchisement in California. *See, e.g., Ramirez v. Brown,* 9 Cal. 3d 199 (1973), *rev'd sub nom Richardson v. Ramirez,* 418 U.S. 24 (1974); *Otsuka v. Hite* 64 Cal. 2d 596 (1966). This case is a successor to that line of authority. Petitioners seek to have this Court resolve the question left unanswered in *Richardson*—the meaning of the term "other crime" in Section 2 of the Fourteenth Amendment—and argue that it means felonies at English common law, a category this Court has recognized in the past. *Otsuka*, 64 Cal. 2d at 609, n. 10.

When Congress enacted Section 2 of the Fourteenth Amendment, it intended to protect the voting rights of African-Americans by creating a penalty for states that did not limit criminal disenfranchisement to common law felonies. *See McPherson v. Blacker*, 146 U.S. 1, 39 (1892) (stating that the "object" of Fourteenth Amendment was to "preserve equality of rights and to prevent discrimination"). Congress was concerned that states would use criminal disenfranchisement and other laws to bar former slaves from voting. Accordingly, it drafted Section 2 of the Fourteenth Amendment to penalize states by reducing their representation in Congress if they limited the voting rights of their citizens. It carved out a narrow exception to this affirmative sanction for individuals convicted of "participation in rebellion or other crime." The Supreme Court has never addressed the scope of this term. [1]

The issue before this Court is whether "rebellion and other crime" as used in the Fourteenth Amendment was intended to by Congress to be a narrow exception, limited to common law felonies, or whether a broader meaning was contemplated. Since there is no plain meaning to the term "other crimes" [2], recourse must be made to other indicia of Congressional intent. *Richardson* indicates that the most "convincing evidence of the historical understanding of the Fourteenth Amendment" are the terms of the Reconstruction and Enabling Acts regarding disenfranchisement. 418 U.S. at 53. As *Richardson* noted, the Reconstruction Act explicitly prohibited disenfranchisement except "for participation in the rebellion, or for felony at common law." *Id* at 49.

The distinction between crimes at common law and felonies in general is not technical, but has profound implications for the voting rights of thousands of parolees who have been convicted of crimes that were not felonies at common law.

At common law, a felony was understood to be limited to "only such serious offenses as were formerly punishable by death, or by forfeiture of the lands or goods of the offender." *United States v. Bannon*, 156 U.S. 464, 468 (1895). When Congress passed the Fourteenth Amendment and the Reconstruction and Enabling Acts, it understood that common law felonies were a small number of very serious crimes. One hundred years later, this Court had no trouble identifying common law felonies. See *Otsuka, supra,*

---

[1] In *Richardson*, the Supreme Court considered whether an equal protection challenge could be made by individuals disenfranchised due to a felony conviction. In holding that Section 2 created an affirmative sanction which precluded an equal protection challenge, the Court did not address the issue raised by this case—the scope of the term "other crime" and whether it was limited to non common law felonies.

[2] "Crime" is used in various places in the Constitution, with different meanings. Compare Article III sec. 2 clause 3 ("trial of all crimes...shall be by jury"); Article IV sec. 2 ("treason, felony or other crime"), 5th Amendment (Indictment required for "capital or otherwise infamous crime"); 13th Amendment (no involuntary servitude "except as punishment for a crime"). Although the 14th Amendment uses the word "crime", there is no dispute that it does not contemplate misdemeanors.

64 Cal. 2d at 609 n. 10. California's Penal Code incorporates a much broader definition of felony: *any* "crime which is punishable with death *or by imprisonment in the state prison*." Cal. Penal Code §17 (2008) (emphasis added). In the years since the passage of the Fourteenth Amendment, California, along with other states, has expanded its Penal Code to create numerous new felony crimes that were not contemplated under common law. *Tennessee v. Garner*, 471 U.S. 1, 14 (1984). "[W]hile in earlier times 'the gulf between the felonies and the minor offences was broad and deep,' ... today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies." *Id.* at 14 (internal citations omitted).

California's Penal Code now has at least five hundred felony offenses in addition to three hundred "wobbler" offenses that may be treated as felonies or misdemeanors at the discretion of the judge. Autumn D. McCullogh, *Three Strikes and You're in (for Life): An Analysis of the California Three Strikes Law as Applied to Convictions for Misdemeanor Conduct*, 24 T. Jefferson L. Rev. 277, 282 (2002); Cal. Penal Code §17. Many of these felonies are for nonviolent offenses such as property or drug offenses. *See* Cal. Penal Code §594(b)(1), 528, 514, 478; Cal. Legislative Analyst's Office, *Judicial & Criminal Justice*, at D-112-13 (2008-09).

The expansion of California's felony offenses has resulted in racially disparate disenfranchisement for numerous nonviolent crimes not recognized as felony crimes at common law. Although African Americans constitute less than seven percent of California's adult population, they were approximately 28 percent (78,000) of the 293,000 persons disenfranchised as the result of serving a prison sentence or being on parole for a felony conviction in 2006. U.S. Census Bureau, U.S. Dep't of Commerce, *State & County QuickFacts* (2008), Cal. Dep't of Corr. and Rehab., *California Prisoners and Parolees, 2006* (2007) available at http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd2006.pdf. The current application of disenfranchisement laws to persons on parole for any felony leads to a disproportionate number of African Americans in California losing the right to vote, contrary to the intent of the Fourteenth Amendment.

Accordingly, the ACLU of Northern California and the Impact Fund respectfully urge this Court to grant the Petition for Review. Should this Court grant review, we will seek leave to file an *amici curiae* brief.

Respectfully submitted,

Saneta deVuono-Powell
American Civil Liberties Union
of Northern California

Brad Seligman
NS

Brad Seligman
Impact Fund