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**ENDORSED**  
AUG 18 2005  
By B. Beddow, Deputy

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

THERESA BRIDGEMAN et al.,

Dept. 33

No. 05CS01051

Petitioners,

v.

JUDMGENT

BRUCE McPHERSON, Secretary of State of  
the State Of California,

Respondent.

This matter comes before the court on an order of the California Supreme Court requiring respondent to show cause before the Sacramento Superior Court why a writ of mandate should not be issue, restraining respondent from enforcing a portion of Elections Code section 3103.5 challenged by a petition filed in the Supreme Court. The petition alleges that an oath of voter declaration set forth in section 3103.5 for use by special absentee voters when they return their ballots to their election officials by facsimile transmission violates the voting secrecy requirement of article II, section 7, of the California Constitution (section 7). The petition further alleges that the oath of voter declaration violates provisions of the federal Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) because the oath does not replicate a standard oath that has been prepared by federal administrators pursuant to the UOCAVA and that states are required to use for absentee voting documents. (See 42 U.S.C. §§1973ff(b)(7), 1973ff-1(a)(5).) By way of relief, petitioner requests the issuance of a writ of mandate ordering

1 respondent to refrain from enforcing the oath of voter declaration requirement of section 3103.5  
2 and to reform section 3103.5 by eliminating the oath from its provisions.

3 Having considered the pleadings, declarations, documentary evidence and written  
4 briefs filed by the parties and their oral arguments at a hearing on August 17, 2005, the court now  
5 determines the issues raised by the petition and renders judgment.

6 Oath of Voter Declaration

7 Elections Code section 3103.5 provides for special absentee voters who are  
8 temporarily living outside the territorial limits of the United States or the District of Columbia to  
9 return their voted ballots to their election officials by facsimile transmission. (See Stats. 2004,  
10 ch. 821 (A.B. 2941), §5, effective September 27, 2004) As explained in legislative committee  
11 reports for Assembly Bill 2941, section 3103.5 was enacted to provide special absentee voters  
12 with a method of voting that would avoid the delays encountered with mail and permit their  
13 ballots to be timely received and counted by election officials.

14 To be counted, ballots transmitted by facsimile pursuant to section 3103.5 must be  
15 received by the election officials no later than the closing of the polls on election day and must be  
16 accompanied by an identification envelope containing all of the information required by  
17 Elections Code section 3011 for absentee voting and an oath of voter declaration. In pertinent  
18 part, the oath of voter declaration must state: "I, \_\_\_\_\_, acknowledge that by returning  
19 my voted ballot by facsimile transmission I have waived my right to have my ballot kept secret.  
20 Nevertheless, I understand that, as with any absent voter, my signature, whether on this oath of  
21 voter form or my identification envelope, will be permanently separated from my voted ballot to  
22 maintain its secrecy at the outset of the tabulation process and thereafter." In addition, the oath  
23 must be followed by an admonition that "your vote cannot be counted unless you sign the above  
24 oath and include it with your ballot and identification envelope, all of which are returned by  
25 facsimile transmission." Notwithstanding the voter's waiver of the right to a secret ballot in the  
26 oath, subdivision (a)(2) of section 3103.5 requires elections officials to adopt appropriate  
27 procedures to protect the secrecy of absentee ballots returned by facsimile transmission.

28

1 In enacting section 3103.5, the Legislature made no specific and express findings  
2 regarding the seriousness of the risk that facsimile transmission may compromise the secrecy of  
3 ballots returned by facsimile transmission. Rather the Legislature appears to have enacted the  
4 ballot secrecy waiver in section 3103.5 on the basis of committee analyses which generally refer  
5 to "potential problems with fax voting." (See Report of Assembly Committee on Elections,  
6 Redistricting and Constitutional Amendments for A.B. 2941, April 20, 2004, p.4 ("Potential  
7 Problems with Fax Voting").) In addition, section 3103.5 appears to be based on federal  
8 procedures for returning voted absentee ballots by fax set forth in the Voting Assistance Guide to  
9 the Federal Voting Assistance Program, a program developed by the United States Department of  
10 Defense to implement the UOCAVA. (See 42 U.S.C. § 1973ff et seq. See also Respondent's  
11 Request for Judicial Notice, Exhibit 4, pp. 329-331; Exhibit 5; Exhibit 6.) These federal  
12 procedures for faxing ballots, including a fax transmission sheet setting forth a ballot secrecy  
13 waiver, are not mentioned in the UOCAVA and are not accompanied by any analysis regarding  
14 the validity of the procedures.

15 Section 7

16 Article II, section 7, of the California Constitution provides: "Voting shall be  
17 secret." This constitutional mandate for secret balloting forms the "very foundation of our  
18 election system" and must be maintained for absentee voters' ballots to the same extent as it is  
19 maintained for regular ballots cast at the polls to protect the integrity of elections from voter  
20 coercion and fraud. (*Scott v Kenyon* (1940) 16 Cal.2d 197, 201-202.) Thus, the Legislature has  
21 enacted measures and election officials have adopted procedures to preserve ballot secrecy and  
22 protect the integrity of elections. (See *Peterson v. City of San Diego* (1983) 34 Cal.3d 225, 231.  
23 See also, e.g., Elec. Code §§ 18371, 18403, 18576.) When the identity of a person casting a  
24 ballot is disclosed, the ballot may not be counted. (*Scott v Kenyon, supra*, 16 Cal.2d at p. 202.)

25 In violation of section 7, the oath of voter declaration required by section 3103.5  
26 requires special absentee voters to acknowledge that they are waiving the secrecy of their ballots  
27 when they return the ballots by facsimile transmission to their election officials. This waiver of  
28 ballot secrecy directly contradicts the ballot secrecy policy mandated by section 7 as well as

1 provisions of the Elections Code enacted to protect ballot secrecy. In addition, because ballot  
2 secrecy is indispensable to the integrity of elections, such a waiver by individual voters is not  
3 permissible or effective. (Compare Civ. Code § 3513 (law established for public reason or  
4 benefit cannot be contravened by private agreement); *DeBerard Properties, Ltd. v. Lim* (1999) 20  
5 Cal.4th 659, 668-669 (waiver of right conferred by statute is unenforceable where it would  
6 seriously compromise any public purpose that statute was intended to serve).)

7 True, section 7 does not bar absentee or mail ballot voting per se. The Legislature  
8 may properly enact such measures to facilitate and increase the exercise of right to vote where  
9 there is no significant potential for fraud and no showing of significant wrongdoing with respect  
10 to absentee or mail ballot voting. (See *Peterson, supra*, 34 Cal.3d at pp. 230-231; *Beatie v.*  
11 *Davila* (1982) 132 Cal.App.3d 424, 431-432.). However, the oath of voter declaration in section  
12 3103.5, waiving the secrecy of faxed ballots, implies the Legislature's belief that facsimile  
13 transmission of ballots carries a serious risk of compromising ballot secrecy, at least prior to  
14 receipt of the ballots by election officials. (See Report of Assembly Committee on Elections,  
15 Redistricting and Constitutional Amendments for A.B. 2941, April 20, 2004, p.4 ("Potential  
16 Problems with Fax Voting").) Therefore, the waiver contravenes the ballot secrecy mandate of  
17 section 7.

18 Contrary to respondent's contention, the violation of section 7 by the ballot secrecy  
19 waiver in the oath of voter declaration required by section 3103.5 is not cured or avoided by the  
20 second sentence of the oath or by the requirement in subdivision (a)(2) of section 3103.5 for  
21 procedures by election officials to protect the secrecy of absentee ballots returned by facsimile  
22 transmission. Regardless of the procedures election officials may adopt and implement to  
23 maintain the secrecy of ballots received by facsimile transmission, the procedures would not  
24 protect the secrecy of the ballots during facsimile transmission and prior to receipt by election  
25 officials. The oath of voter declaration in section 3103.5, waiving the secrecy of ballots  
26 transmitted by facsimile, potentially permits election officials to count ballots whose secrecy has  
27 been compromised during facsimile transmission, in violation of section 7. (*Scott v Kenyon,*  
28 *supra*, 16 Cal.2d at p. 201-204.)

1 Also contrary to respondent's contention, the oath of voter declaration in section  
2 3103.5 does not merely serve as a means to ensure that voters, before returning their ballots by  
3 facsimile transmission, will consider and acknowledge the "potentially reduced assurance of  
4 privacy associated with expanded voting opportunity to submit ballots by facsimile transmission.  
5 The oath, by the plain meaning of its terms, waives ballot secrecy. This plain meaning will be  
6 apparent to any special absentee voter reading the oath.

7 And contrary to respondent's contention, the ballot secrecy waiver required by  
8 section 3103.5 does not constitute a voluntary waiver permissible under section 7 in which an  
9 absentee voter voluntarily discloses his vote to a family member, friend, candidate's  
10 representative or other person. (See *Wilks v. Mouton* (1986) 42 Cal.3d 400, 408-410, quoting  
11 *Beatie v. Davila, supra*, 132 Cal.App.3d at p. 431. Note that *Wilks* was statutorily superseded on  
12 another ground, as recognized in *Escalante v. City of Hermosa Beach*, 195 Cal. App. 3d 1009,  
13 1020.) The ballot secrecy waiver required by section 3103.5 gives an absentee voter no choice  
14 but to waive the secrecy of any ballot he or she returns to an election official by facsimile  
15 transmission if the ballot is to be counted. Further, the absentee voter's option of using mail  
16 instead of facsimile to return his or her ballot to the election official is largely theoretical:  
17 facsimile transmission was authorized by the Legislature to compensate for the problems  
18 encountered by absentee voters in using mail to timely obtain and return ballots, and many of the  
19 absentee voters seeking to return ballots to their election officials by facsimile will simply not be  
20 able to use mail to return the ballots on time.

#### 21 UOCAVA

22 Pursuant to 42 United States Code sections 1973ff(b)(7) and 1973ff-1(a)(5), the  
23 UOCAVA requires a state to use the standard oath prescribed by the United States Department of  
24 Defense, the agency designated to implement the UOCAVA, if the state requires an oath or  
25 affirmation to accompany any absentee voting document covered by the UOCAVA. California  
26 requires such an oath pursuant to Elections Code section 3011 and arguably must use the  
27 standardized oath prescribed by the Department of Defense to the extent that it differs from the  
28 oath required by section 3011.

1 The oath of voter declaration required by section 3103.5 for the facsimile  
 2 transmission of ballots is distinct in purpose and content from the oath required by section 3011  
 3 and the standardized oath referred to sections 1973ff(b)(7) and 1973ff-1(a)(5) of the UOCAVA.  
 4 Accordingly, sections 1973ff(b)(7) and 1973ff-1(a)(5) do not apply to, and cannot be violated by,  
 5 the oath of voter declaration required by section 3103.5.

6 Reformation of section 3103.5

7 Because the oath of voter declaration required by section 3103.5 violates section 7,  
 8 the oath requirement is invalid, and the court will issue a writ of mandate ordering respondent to  
 9 refrain from enforcing the requirement. In addition, because a signed oath of voter declaration is  
 10 a condition of counting a special absentee ballot returned by facsimile transmission pursuant to  
 11 section 3103.5, the oath requirement cannot be eliminated to preserve the constitutionality of  
 12 section 3103.5 without intruding upon the legislative policy judgments underlying the inclusion  
 13 of the oath in section 3103.5. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal. 4th 607,  
 14 660-661.) The text of section 3103.5 and its legislative history archived on the California State  
 15 Legislature’s website reveals no indication that the Legislature would have authorized election  
 16 officials to count a special absentee ballot received by facsimile transmission without a signed  
 17 oath of the special absentee voter waiving the secrecy of the ballot.

18 WHEREFORE IT IS ORDERED, ADJUDGED AND DECREED that a peremptory  
 19 writ of mandate shall issue from this court requiring respondent to refrain from enforcing the  
 20 portion of Elections Code section 3103.5 requiring a special absentee voter to sign a voter’s oath  
 21 acknowledging “that by returning my voted ballot by facsimile transmission I have waived my  
 22 right to have my ballot kept secret.” Because section 3103.5 conditions the counting of a voter’s  
 23 ballot cast by facsimile transmission on the voter’s signed oath, no ballot cast by facsimile  
 24 transmission pursuant to section 3103.5 may be counted.

25 Dated: August 18, 2005

**LLOYD G. CONNELLY**

\_\_\_\_\_  
 LLOYD G. CONNELLY  
 Judge of the Superior Court

Case Number: 05CS01051  
Case Title: BRIDGEMAN v SHELLEY

Department: 33

CERTIFICATE OF SERVICE BY MAILING  
(C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the RULING ON SUBMITTED MATTER and JUDGMENT by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

SCOTT J. RAFFERTY  
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4730 MASSACHUSETTS AVE, N.W.  
WASHINGTON, DC 20016

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LISA B. NIEGEL  
STAFF COUNSEL  
SECRETARY OF STATE OFFICE  
ELECTIONS DIVISION  
1500 - 11<sup>TH</sup> Street  
Sacramento, CA 95814

I, the undersigned deputy clerk, declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 2005

Superior Court of California,  
County of Sacramento

By: B. BEDDOW,  
Deputy Clerk

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO

THERESA BRIDGEMAN et al.,

Dept. 33

No. 05CS01051

Petitioners,

v.

PEREMPTORY WRIT OF MANDATE

BRUCE McPHERSON, Secretary of State of  
the State Of California,

Respondent.

TO RESPONDENT SECRETARY OF STATE OF THE STATE OF CALIFORNIA:

Judgment having been entered in this proceeding, ordering that a peremptory writ of mandate issue from this court, you are hereby commanded immediately upon receipt of this writ to refrain from enforcing the portion of Elections Code section 3103.5 requiring a special absentee voter to sign a voter's oath acknowledging "that by returning my voted ballot by facsimile transmission I have waived my right to have my ballot kept secret." Because section 3103.5 conditions the counting of a voter's ballot cast by facsimile transmission on the voter's signed oath, no ballot cast by facsimile transmission pursuant to section 3103.5 may be counted.

Dated: AUG 18 2005

JODY PATEL  
CLERK OF THE SUPERIOR COURT

By B. BEDDOW  
BARBARA BEDDOW, DEPUTY





# Superior Court of California, County of Sacramento

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## FACSIMILE TRANSMITTAL SHEET

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Date:  
**08-18-05**

Send FAX to:  
**Douglas Woods**

Company:  
**State of California**

Telephone:  
**916-324-4663**

Fax Number:  
~~916-324-5285~~ **324-5567**

Number of pages including this page: **9**

SUBJECT:

**Birdgeman vs Shelley, 05CS01051 - Judgment + Copy of Writ**

Court Contact: Barbara Beddow  
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