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9 of State

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

13 **AURELIO SALAZAR, JUAN MARTINEZ, and**
BILL MELENDEZ,
14 Plaintiffs,
15
16 v.
17 **MONTEREY COUNTY, CALIFORNIA; STATE**
OF CALIFORNIA; KEVIN SHELLEY,
CALIFORNIA SECRETARY OF STATE,
18 Defendants.

CASE NO. CV 03-03584

**DEFENDANT SECRETARY OF
STATE'S REQUEST TO TAKE
JUDICIAL NOTICE OF
ORDERS OF THE SUPREME
COURT OF CALIFORNIA IN
OPPOSITION TO
PLAINTIFFS' EX PARTE
APPLICATION FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO
SHOW CAUSE RE
PRELIMINARY RELIEF**

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8 Attorneys for Defendants STATE OF CALIFORNIA
and KEVIN SHELLEY, California Secretary of State

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10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 **AURELIO SALAZAR, JUAN MARTINEZ,**
13 **and BILL MELENDEZ,**

14 Plaintiffs,

15 v.

16 **MONTEREY COUNTY, CALIFORNIA;**
17 **STATE OF CALIFORNIA; KEVIN**
18 **SHELLEY, CALIFORNIA SECRETARY OF**
19 **STATE,**

Defendants.

Case No. CV 03-03584

**DEFENDANT SECRETARY OF
STATE'S REQUEST TO TAKE
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OF THE SUPREME COURT OF
CALIFORNIA IN OPPOSITION TO
PLAINTIFFS' EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND
ORDER TO SHOW CAUSE RE
PRELIMINARY RELIEF**

20 COMES NOW THE DEFENDANT, the Honorable Kevin Shelley, California

21 Secretary of State, and moves this Honorable Court to take judicial notice of the following:

22 1. August 7, 2003, Media Advisory, "California Supreme Court Takes Action in
23 Recall Cases," Judicial Council of California, Administrative Office of the Courts, Public
24 Information Office, attached as Exhibit A;

25 2. *Eisenberg v. Shelley*, Supreme Court of California, No. S117763 (asserts that the
26 placement of two initiatives on the recall ballot is inappropriate because the recall election is not
27 a "special statewide election" within the meaning of the applicable constitutional
28 provisions)(denied unanimously), August 7, 2003, order attached as Exhibit B;

1 3. *Frankel v. Shelley*, Supreme Court of California, No.S117770 (seeks to omit from
2 the recall ballot a list of candidates seeking election to the office of Governor and contending
3 that if a majority vote in favor of the recall, the Lieutenant Governor will automatically succeed
4 to the office of Governor) (denied unanimously), August 7, 2003, order attached as Exhibit C;

5 4. *Byrnes v. Bustamante*, Supreme Court of California, No. S117832 (raises the
6 same issue as in *Frankel* concerning the succession of the Lieutenant Governor should the recall
7 election succeed) (denied unanimously), August 7, 2003, order attached as Exhibit D;

8 5. *Burton (Mark) v. Shelley*, Supreme Court of California, No. S117834 (involves
9 the nomination requirements for candidates to be placed on the recall ballot)(denied 5 to 2),
10 August 7, 2003, order attached as Exhibit E; and,

11 6. *Davis v. Shelley*, Supreme Court of California, No. S117921 (asserts that because
12 of potential use of punch card ballots and consolidation of polling places, voters in some
13 counties will be denied their equal protection right to have their votes count as much as others;
14 that the California Constitution’s prohibition on permitting the officer who is the subject of recall
15 election from being onthe ballot to pick a successor in the event of a recall violate the equal
16 protection rights of such candidate’s supporters; and that California’s recall process violates the

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1 federal constitutional guarantee of a republican form of government by frustrating majority
2 vote)(denied unanimously), August 7, 2003, order attached as Exhibit F.

3 Dated: August 14, 2003

4 Respectfully submitted,

5 BILL LOCKYER
Attorney General of the State of California

6 LOUIS R. MAURO
Senior Assistant Attorney General

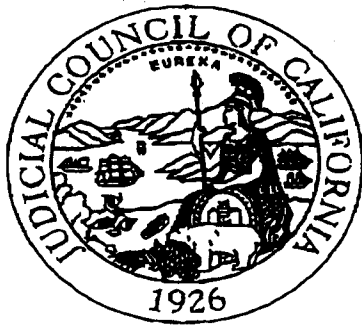
7 KENNETH R. WILLIAMS
8 Supervising Deputy Attorney General

9
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11 Attorneys for Defendants STATE OF CALIFORNIA and
12 KEVIN SHELLEY, California Secretary of State

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EXHIBIT A



MEDIA ADVISORY

Judicial Council of California
ADMINISTRATIVE OFFICE OF THE COURTS
Public Information Office
(415) 865-7740

Lynn Holton, Public Information Officer

Release Date: August 7, 2003

Advisory Number: 07

TO: Legal Affairs Editors and Reporters
FROM: Lynn Holton, Public Information Officer
DATE: August 7, 2003
SUBJECT: California Supreme Court Takes Action in Recall Cases

The California Supreme Court today unanimously denied relief in four of the five cases filed before it involving the special recall election set for October 7, 2003. In the fifth case, *Burton v. Shelley*, the court denied relief by a 5-2 vote, which was accompanied by a "speaking order" subscribed to by a majority of the court, a "speaking concurrence" subscribed to by Justice Joyce Kennard, and a "speaking dissent" signed by Chief Justice Ronald M. George and Justice Carlos Moreno. A list of the five cases that were denied today by the California Supreme Court appears at the end of this advisory.

In an order signed by Justices Marvin Baxter, Katherine Werdegar, Ming Chin, and Janice Rogers Brown, the majority concluded that the Secretary of State's selection of a 65 to 100 signature requirement for candidates' nominating papers and a \$3500 filing fee was appropriate for placing an individual on the ballot for the office of Governor should the recall election be successful. Justice Kennard filed a separate concurring order in which she relied solely on the principle of affording deference to the exercise of discretion by the Secretary of State.

In their dissent, Chief Justice George and Justice Moreno concluded that there are substantial questions concerning the legality of the procedure selected by the Secretary of State in the context of a statewide recall election, given the history of the recall procedure in the state and the provisions of the current statutory scheme. For the reasons stated in their dissent, they would have ordered the Secretary of State not to take further steps to prepare for the state recall election until the issues could be fully considered and resolved by the court.

The three separate orders in the *Burton* case are attached, as well as a speaking order issued in *Frankel v. Shelley*. The other three cases were summarily denied.

The five cases in which the court denied review, in order of their date of filing, are:

1. *Eisenberg v. Shelley*, S117763. (Asserts that the placement of two initiatives on the recall ballot is inappropriate because the recall election is not a "special statewide election" within the meaning of the applicable constitutional provisions.) [Denied unanimously.]

2. *Frankel v. Shelley*, S117770. (Seeks to omit from the recall ballot a list of candidates seeking election to the office of Governor and contending that if a majority vote in favor of the recall, the Lieutenant Governor will automatically succeed to the office of Governor.) [Denied unanimously; see attached order.]

3. *Byrnes v. Bustamante*, S117832. (Raises the same issue as in *Frankel* concerning the succession of the Lieutenant Governor should the recall election succeed.) [Denied unanimously.]

4. *Burton (Mark) v. Shelley*, S117834. (Involves the nomination requirements for candidates to be placed on the recall ballot.) [Denied 5 to 2; see attached orders.]

5. *Davis v. Shelley*, S117921. (Asserts that because of potential use of punch card ballots and consolidation of polling places, voters in some counties will be denied their equal protection right to have their votes count as much as others; that the California Constitution's prohibition on permitting the officer who is the subject of recall election from being on the ballot to pick a successor in the event of a recall violates the equal protection rights of such candidate's supporters; and that California's recall process violates the federal constitutional guarantee of a republican form of government by frustrating majority rule. [Denied unanimously.]

To find the names of the attorneys in the cases, please see the Supreme Court's online case management system at <http://appellatecases.courtinfo.ca.gov/search.cfm?dist=0> .

EXHIBIT B

S117763

IN THE SUPREME COURT OF CALIFORNIA

En Banc

**SUPREME COURT
FILED**

JON B. EISENBERG, Petitioner,

AUG - 7 2003

Frederick K. Ohlrich Clerk

v.

DEPUTY

KEVIN SHELLEY as Secretary of State etc., Respondent.

Petition for writ of mandate DENIED.



Chief Justice

EXHIBIT C

S117770

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JAMES B. FRANKEL et al. Petitioners,

v.

KEVIN SHELLEY as Secretary of State etc., Respondent.

SUPREME COURT
FILED

AUG - 7 - 2003

Frederick K. Ohlrich Clerk

DEPUTY

Petitioners seek an original writ of mandate to compel the Secretary of State to omit from the recall ballot measure that is to be submitted to the voters at the October 7, 2003, election, any list of candidates to be voted upon to select a successor to the Governor should a majority of voters vote in favor of recall. Petitioners contend that should a majority vote in favor of recall, the Lieutenant Governor will automatically succeed to the office of Governor, and thus the inclusion of a list of candidates is unauthorized and unnecessary.

We have concluded that petitioners have not demonstrated a sufficient likelihood of success to warrant the issuance of an alternative writ or order to show cause. To support their legal claim, petitioners rely on two provisions of the California Constitution: (1) article V, section 10 ["The Lieutenant Governor shall become Governor when a vacancy occurs in the office of Governor"], and (2) article II, section 15, subdivision (a) ["An election to determine whether to recall an officer and, *if appropriate*, to elect a successor shall be called by the Governor and held not less than 60 days nor more than 80 days from the date of certification of sufficient signature" (italics added)]. The history of the recall procedure embodied in the California Constitution, however, makes it clear that, as a general matter, when an officer is removed from office by recall and is immediately replaced by the candidate who receives a plurality of votes at the election, no "vacancy" in the office occurs (see Cal. Const., former art. XXIII, § 1,

¶ 6, Elec. Code, §§ 11384, 11385, 11386), and thus article V, section 10, does not apply. Further, the circumstances relating to the origin of the "if appropriate" language in article II, section 15, subdivision (a), make it clear that this language was added simply to recognize that the election of a successor at a recall election is not appropriate when the subject of the recall election is a justice of the Court of Appeal or Supreme Court. The "if appropriate" clause was added at the same time, and to the same paragraph, as language explicitly providing that there shall not be any candidacy for a potential successor in the case of a recall election for an appellate justice, and was inserted to make the first sentence of the paragraph consistent with this addition. (See Assem. Const. Amend. No. 29 (1973-1974 Reg. Sess.) as amended by Assem., Aug. 6, 1973; thereafter adopted by voters as Cal. Const., former art. XXIII, § 3, at Gen. Elec., Nov. 5, 1974 (now Cal. Const., art. II, § 15).) If an appellate justice is recalled, a successor is appointed by the Governor pursuant to the provisions of article VI, section 16, subdivision (d) of the California Constitution. Nothing in article II, section 15, subdivisions (a) or (c), or in the history of the California constitutional recall procedure as a whole, indicates that it is not appropriate to include a list of potential successor candidates when a recall election involves the office of Governor.

Accordingly, the petition is denied.


Chief Justice

EXHIBIT D

S117832

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT

FILED

ANDREW C. BYRNES et al., Petitioners,

AUG - 7 2003

Frederick K. Ohlrich Clerk

v.

DEPUTY

CRUZ BUSTAMANTE as Lieutenant Governor, Respondent.

Petition for writ of mandate DENIED.


Chief Justice

EXHIBIT E

IN THE SUPREME COURT OF CALIFORNIA

 En Banc

SUPREME COURT

FILED

MARK BURTON, Petitioner,

AUG - 7 2003

Frederick K. Chirich Clerk

v.

 DEPUTY

 KEVIN SHELLEY as Secretary of State etc., Respondent.

Petitioner seeks an original writ of mandate to compel the Secretary of State to place on the ballot for the October 7, 2003 election, as replacement candidates in the event the Governor is recalled, only those persons who have qualified for nomination under Elections Code section 8400. This provision, applicable by its terms to independent candidates who wish to run in a general election though not nominated in a party primary (see *id.*, §§ 8300, 8550, subd. (f)), would require, among other things, that recall replacement candidates obtain and submit the signatures of registered voters equal to "1 percent of the entire number of registered voters in the state" (*id.*, § 8400). We are advised that this amounts to approximately 153,000 valid signatures.

No provision of law states expressly what number of voter signatures is necessary to nominate a candidate for a position on a recall replacement ballot. Elections Code section 11381, subdivision (a), provides simply that the nomination of candidates to succeed recalled officers shall be governed by the nominating procedures applicable in "regular elections." Under authority of this statute, the Secretary of State has adopted a standard of 65 qualifying signatures, derived from the nomination procedures for party primary elections. (Elec. Code, §§ 8062, subd. (a)(1), 8600, subd. (b).) The Secretary of State advises that this policy has been consistently followed by his two immediate predecessors in recent recall elections.

We have concluded that petitioners have not demonstrated a sufficient likelihood of success to warrant the issuance of an alternative writ or order to show cause, which would delay a duly scheduled recall election. The Secretary of State is the constitutional officer charged with administering California's election laws (Gov. Code, § 12172.5; *Assembly v. Deukmejian* (1982) 30 Cal.3d 682, 650), and his interpretations of those laws are entitled to substantial judicial deference. (See, e.g., *Styne v. Stevens* (2001) 26 Cal.4th 42, 53; *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1118.) That deference is especially great where, as here, the Secretary of State conformed to policies consistently followed by his two predecessors (see *Ramirez v.*

Yosemite Water Co. (1999) 20 Cal.4th 785, 801), who represented both major political parties.

The directive of Elections Code section 11381, subdivision (a), is flexible, and the Secretary of State has chosen, from among the available options, a mode of procedure that serves practicality and avoids constitutional concerns. Once a recall election qualifies and is scheduled, the time for potential replacement candidates to circulate nominating petitions is extremely short—as little as one day and no more than 21 days. (See Cal. Const., art. II, § 15, subd. (a) [election must be scheduled within 60 to 80 days after recall petition is certified]; Elec. Code, § 11381, subd. (a) [nominating petitions, containing requisite number of valid signatures, must be filed with Secretary of State no later than 59th day before election].) In this case, only 16 days were allowed. Petitioner suggests that replacement candidates must collect some 153,000 signatures in this abbreviated period, and the Chief Justice proposes an alternative standard—one percent of voters for Governor in the last election—that would still require 74,767 signatures.

Either alternative would risk unconstitutional interference with the ability of *any* replacement candidate to appear on the ballot, and thus with the electorate's right to cast ballots for a replacement in the event the incumbent is recalled. The Chief Justice cites no authority for the premise that potential replacement candidates may circulate nomination petitions before it is even clear a recall election will be held. Given the obvious policy considerations of allowing, indeed effectively requiring, such premature circulation, this is a matter best addressed directly by the Legislature.

For these reasons, there appears no clear error in the Secretary of State's decision to apply a lower voter-signature standard derived from the statutory procedures for primary election nominations. The statutory standard advocated by petitioner, which applies by its terms only to *independent* candidates who wish to appear on a general election ballot, has no greater inherent application to recall replacement elections than the procedure selected by the Secretary of State and his recent predecessors. The alternative standard proposed by the Chief Justice relies on a formula for recall elections that was removed from the Constitution in 1974 (compare Cal. Const., former art. XIII, § 1, ¶ 5, with Cal. Const., art. II, § 15, subd. (a)), and from statutory law in 1976 (see Stats. 1976, ch. 1437, § 4, p. 6647, repealing Elec. Code, former § 27008, and adding Elec. Code, former § 27341). The Secretary of State cannot be faulted for failing to apply a standard that does not explicitly appear in current law.

Petitioner points to a statute declaring that the nomination procedures for primary election candidates “[do] not apply to . . . [r]ecall elections.” (Elec. Code, § 8000, subd. (a).) But this language was adopted at a time when detailed procedures for the nomination of recall replacement candidates were already contained in the Constitution (see Elec. Code, former § 2500, subd. (a), as enacted by Stats. 1939, ch. 26, § 2500, p. 120; see also Cal. Const., former art. XXIII, § 1, ¶ 5), and it appears intended only to reflect that fact. In any event, the Secretary of State in a recall replacement election formally acts under Elections Code section 11381 rather than under section 8000 et seq.; the former refers to the latter only as a model.

The Chief Justice suggests the primary-election model is inappropriate, because a primary election is not a “regular election” that nominates a candidate “to . . . office.” But a primary election is a regular election. (*O'Connor v. Superior Court* (1979) 90 Cal.App.3d 107, 113.) Moreover, the Chief Justice provides no persuasive indication

that by use of the language "nominati[on] . . . to . . . office," section 11381 intended to preclude resort to the qualification procedures for primary elections.

In any event, to derive the 65-signature standard, the Secretary of State might also have referred to the nomination provisions for write-in candidates. These incorporate by reference the signature requirement for primary nominations, but contain no language indicating they are inapplicable to recall elections. (Elec. Code, § 8600, subd. (b).)

Petitioner does not expressly request a stay of the election while his arguments are considered, but it would be necessary, as a practical matter, to issue such a stay in order to resolve his claim before the election was held. Having shown no strong likelihood of success on the merits, petitioner establishes no sufficient reason to stay the scheduled conduct of a duly qualified recall election, which the Constitution requires to proceed in expedited fashion. (Cal. Const., art. II, § 15, subd. (a).)

The current recall provisions contain ambiguities which require the Secretary of State to exercise his discretion. If the Legislature disagrees with the manner in which the Secretary of State has exercised his discretion, it is within the Legislature's province to specify other procedures.

Accordingly, the petition is denied.

Baxter

Associate Justice

Werdegar

Associate Justice

Chin

Associate Justice

Brown

Associate Justice

.S117834

IN THE SUPREME COURT OF CALIFORNIA
SUPREME COURT
FILED

MARK BURTON, Petitioner,

AUG - 7 2003

v.

Frederick K. Ohlrich Clerk

KEVIN SHELLEY as Secretary of State etc., Respondent.

DEPUTY

My basis for denying the petition is this:

A writ of mandate may issue to compel a public official to perform a ministerial duty (Code Civ. Proc., § 1085, subd. (a); *Schmitz v. Younger* (1978) 21 Cal.3d 90, 92-93), or to exercise discretion (*State of South Dakota v. Brown* (1978) 20 Cal.3d 765, 779-780). But it will not issue to control the manner in which a public official, particularly a constitutional officer like the Secretary of State, exercises discretion. (See *Anderson v. Phillips* (1975) 13 Cal.3d 733, 737; *Lindell Co. v. Board of Permit Appeals* (1943) 23 Cal.2d 303, 315.)

The constitutional and statutory provisions governing recall elections vest discretion in the Secretary of State to adapt regular election procedures for use in recall elections, and in particular to adapt procedures for use in qualifying candidates to appear on the recall election ballot to replace the governor in the event the recall succeeds. Faced with a highly confusing statutory scheme, he has exercised his discretion by choosing the method that, in his professional judgment, is the most practical. This procedure was adopted by former Secretary of State March Fong Eu, a Democrat, and it was then followed by former Secretary of State Bill Jones, a Republican. It has been used in each of the four recall elections that has been held in the past ten years. I join in denying the petition because, in my view, it improperly seeks to control the Secretary of State's exercise of discretion. My colleagues have offered additional grounds for denying the petition; although these may well be persuasive, I see no reason to address them.

Moreover, any intervention by this court at this time would interfere with the recall election as presently scheduled. The recall has qualified overwhelmingly for the ballot, and the wisdom of holding the recall election is not before this court. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 795.) To postpone the election would thwart the will of the People, who have spoken. Petitioner has argued in effect that the Secretary of State has made it *too easy* for candidates to qualify for the recall ballot. This court should not postpone the election just because there may be *too many* candidates on the ballot, giving the People too many choices.

KENNARD, J.

Associate Justice

IN THE SUPREME COURT OF CALIFORNIA

En Banc

**SUPREME COURT
FILED**

MARK BURTON, Petitioner,

AUG - 7 2003

Frederick K. Ohlrich Clerk

v.

DEPUTY

KEVIN SHELLEY as Secretary of State etc., Respondent.

For the reasons that follow, I would order respondent Secretary of State not to take further steps in preparation for the statewide recall election now set for October 7, 2003, pending determination of this petition, and would order respondent Secretary of State to show cause why he should not be directed to require candidates who wish to have their names printed on the ballot to succeed the Governor to submit a nomination petition signed by registered voters equal in number either to at least 1 percent of the total number of votes cast for that office at the preceding election (in this instance, 74,767 signatures), or 1 percent of all registered voters as of the date of the last election (here, 153,035).

The chaos, confusion, and circus-like atmosphere that has characterized the current recall process undoubtedly has been brought about in large measure by the extremely low threshold set by respondent for potential candidates to qualify for inclusion on the ballot to succeed to the office of Governor: the signatures of only 65 registered voters on a nomination petition and payment of a \$3500 filing fee. As explained below, there are very serious questions whether respondent Secretary of State has erred in determining that so few signatures of registered voters are required in order for a candidate to be placed on the recall election ballot. The substantial questions that are raised by this petition involve fundamental rights of all voters in the recall election, and of the potential candidates on the recall ballot, that could well affect the outcome of the recall election. These questions should be resolved before the election, rather than after the election in the event the recall is successful.

To understand the issue presented by the petition, it is helpful briefly to review the relevant aspects of the history of the recall procedure in California. This procedure was added to the California Constitution in 1911. As originally adopted, the constitutional recall provision explicitly provided, with respect to the

requirements applicable to potential candidates, that "[a]ny person may be nominated for the office which is to be filled at any recall election by a petition signed by electors, qualified to vote at such recall election, *equal in number to at least 1 percent of the total number of votes cast at the last preceding election for all candidates for the office which the incumbent sought to be removed occupies.*" (Cal. Const., former art. XXIII, § 1, par. 5, italics added.) Thus, as originally adopted, the constitutional provision itself clearly required a person to obtain a very substantial number of signatures in order to be placed on the recall ballot as a potential successor should the incumbent be recalled. That number was set at a relatively high figure in order to avoid having frivolous candidates appear on the recall ballot. (See Cal. Const. Rev. Comm., Background Study of Article XXIII (1968) pp. 30-31 [describing the requirement of obtaining signatures equal to at least 1 percent of the total votes cast at the last election as a "workable method [that] probably demands sufficient signatures, at least for statewide offices, to discourage frivolous filing for that office"].)

The constitutional recall provisions enacted in 1911 remained in effect without change until 1974. In 1974, pursuant to a proposal of the California Constitution Revision Commission to reorganize and streamline article XXIII, many of the details of the recall procedure that previously had been set forth in the Constitution were removed from the Constitution and enacted as statutes. One of the provisions that was moved from the Constitution to statute was the provision setting forth the number of signatures required to be submitted by potential candidates in a recall election. In 1974, the Legislature enacted former Elections Code section 27008 (Stats. 1974, ch. 233, § 6, p. 439) which, like its constitutional predecessor, required a potential candidate to submit a petition with signatures *equal in number to 1 percent of the total number of votes cast in the last election for the office at issue.* (All further statutory references are to the Election Code.)

In 1976, former section 27008 was repealed as part of a reorganization of the statutory recall provisions, and former section 27431 was enacted. (Stats. 1976, ch. 1437, § 4, p. 6447.) Former section 27431 did not directly address the number of signatures required of a potential candidate in a recall election, but provided in more general terms that "[n]ominations of candidates to succeed the recalled officer shall be made in the manner prescribed for nominating a candidate to that office in a regular election insofar as that procedure is consistent with this article [that is, the article dealing with recall elections]." The legislative history of the 1976 legislation indicates that the enactment was intended to reduce the complexity of the recall statutes by consolidating the five major types of recall elections (school board, state, county, city and district elections) and by making the procedure for the nomination of candidates in recall elections similar to the nomination procedure in other elections. Nothing in the legislative history of the 1976 legislation, however, indicates that the Legislature specifically intended to drastically reduce, or indeed to make any change in, the number of signatures that a potential candidate was required to submit in order to be placed on the ballot in a recall election. In 1994,

the Elections Code was completely reorganized again, and the language of former section 27341 was moved without change to section 11381.

In light of this constitutional and statutory history and framework, the issue presented in this petition raises the following substantial questions:

(1) Why is respondent applying the 65-to-100 signature requirement set forth in Elections Code section 8062 and incorporated in Elections Code section 8600 to a gubernatorial recall election in light of the circumstances that 1) section 8062 applies to nomination papers for candidates seeking the nomination of a party in a *primary* election (whose purpose is to sort out candidates to appear in an ensuing *general* election) and 2) section 8600 applies to *write-in* candidates seeking simply to have votes in which their names have been handwritten upon a ballot *counted* in an election (and not to have their names placed on the ballot)? Why is respondent applying this requirement when the procedure here at issue involves inclusion of a candidate's name on the sole and final ballot for statewide election for office and the Legislature explicitly has directed in Elections Code section 8000 that "[t]his chapter [which applies to primary elections and contains section 8062] does *not* apply to: [¶] (a) Recall elections . . ." (Italics added)?

(2) Because the Elections Code no longer expressly addresses the number of signatures required (or the amount of the filing fee) for nominating candidates in a recall election, but instead simply directs that "nominations of candidates to succeed the recalled officer be made in the manner prescribed for nominating a candidate to that office in a regular election insofar as that procedure is consistent with [the Elections Code's article on recall elections]" (§ 11381), why should respondent select a requirement for placing a candidate's name on the ballot that is not applicable in *any* "regular election" for nominating a candidate to the office of Governor and *is in direct conflict with the historic requirement* that candidates at a recall election submit signatures totaling one percent of the total number of votes cast for that office at the preceding election (see former Cal. Const., art. XXIII, § 1, par. 5; see also former section 27008)? Why should this approach prevail when there is *no* indication that at the time the more recent constitutional provisions were added or the ensuing statutory provisions adopted and amended, such a drastic change in procedures was contemplated, and in fact the opposite was contemplated? As noted above, the 1 percent requirement was viewed by the Constitution Revision Commission in 1968 as appropriate for statewide offices. The Report of the Joint Committee for the Revision of the Elections Code (which was incorporated into the Legislative Counsel's Report to the Governor on Assem. Bill No. 3467, which substituted former section 27341 for former section 27008 and for the first time added language identical to that found in present section 11381) states: "This bill provides that, in all cases, nominations will be made in the manner prescribed for regular elections for that office. . . . *There is no reason that the basic procedure for nominating candidates in [a] recall election should be any different from that in any other election.*" (Italics added)?

In the alternative, why should respondent not employ the *current* signature requirement set forth in section 8400, which applies to independent candidates who seek to have their names placed on the ballot in a regular general election for Governor and provides that “[n]omination papers for a statewide office for which the candidate is to be nominated shall be signed by voters of the state *equal to not less in number than 1 percent of the entire registered voters of the state at the time of the close of registration prior to the preceding general election*” (italics added), rather than the 65-100 signature requirement that is applied (1) to *primary elections* (§ 8062) whose governing procedures explicitly do “not apply to . . . [r]ecall elections” (§ 8000), and (2) to write-in candidates who seek to have ballots on which their names have been handwritten *to be counted* but not to have their names actually placed on the ballot (§ 8600 et seq.)? Independent candidates, like the candidates seeking to succeed to office in the event of a majority vote for recall, face no opponents in a primary election, and thus these two types of candidates are most similarly situated.

(3) Why under current recall procedures (§ 11381) could respondent not have made nomination papers available and instructed potential candidates for a gubernatorial recall election that they could collect nomination signatures well before the certification of the recall election, during the period in which the recall petition was being circulated, so as to provide sufficient time to collect the required number of signatures — 74,767 or, in the alternative, 153,035?

The foregoing questions are significant and should be resolved by this court at this time. As we recently stated in *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1153, 1154, “in an appropriate instance, preelection relief not only is permissible but is expressly contemplated,” and “deferring a decision until after the election . . . may contribute to an increasing cynicism on the part of the electorate.”

For example, in the event the recall is successful, a second-place finisher in a crowded field to succeed to the office of Governor might be able to establish that the presence of dozens of legally unqualified candidates made the difference in his or her losing by a percentage point or two, and that he or she readily could have met the requirement of the much larger number of signatures required for a lawful nomination. Similarly, any voter might be able to bring suit, claiming that the victor’s placement on the ballot was invalid and affected the outcome of the election. (See *Gooch v. Hendrix* (1993) 5 Cal.4th 266, 285.) Should the vote to recall the Governor be successful, we may never know who would have been the legitimate winner of the vote to succeed him, had lawful procedures been followed.

If we were to conclude after the recall election that the signature requirement for placement of candidates on the ballot set by respondent was inappropriate, we would have to nullify the election and cast our state into far more chaos and confusion than exists presently. Careful consideration and resolution of these issues prior to the election is well warranted despite the ensuing delay in the electoral process. By following this course of action, we would enhance rather than thwart

the will of the people in exercising their right to vote at a properly conducted recall election.

As the United States Supreme Court observed in the electoral context, "A desire for speed is not a general excuse for ignoring equal protection guarantees." (*Bush v. Gore* (2000) 531 U.S. 98, 108.) Nor is it an excuse for ignoring the requirements of California law relating to the conduct of recall elections.

By the vote of a majority of this court, the October 7, 2003, recall election will go forward, despite the substantial doubts outlined above concerning the legal propriety of the procedures followed by respondent Secretary of State. The majority in essence conclude that respondent has done as best he can, given the ambiguities inherent in the Constitution's recall provision (Cal. Const., art. II, § 15) and in the related statutory provisions. Although respondent was obligated to make an initial assessment as to the proper meaning and application of the relevant constitutional and statutory provisions, it is the responsibility of this court to make the ultimate determination of these fundamental and crucial legal issues. The procedures that respondent has selected have been applied in the past only in the context of local rather than statewide recall elections, and never have been subject to judicial review. Because there appears to be a very substantial possibility that respondent has erred in his interpretation and application of the applicable provisions, this court should not permit the recall election to go forward until this issue has been resolved after full briefing, argument, and adequate deliberation.

Finally, it is apparent that the provisions here at issue are ambiguous, and in some instances internally inconsistent, and deserve the attention of the Legislature, the Constitution Revision Commission, and the California Law Revision Commission.

GEORGE, C.J.

I CONCUR:

MORENO, J.

EXHIBIT F

S117921

IN THE SUPREME COURT OF CALIFORNIA

En Banc

SUPREME COURT
FILED

GRAY DAVIS, as Governor, et al., Petitioners,

AUG - 7 2003

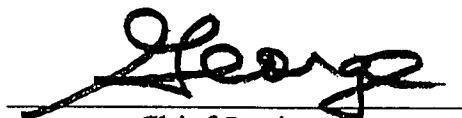
v.

Frederick K. Ohlrich Clerk

DEPUTY

KEVIN SHELLEY, as Secretary of State, et al., Respondents.

Petitioners' request for judicial notice is granted. The request of Kathleen M. Sullivan to appear as counsel *pro hac vice* is granted. The petition for writ of mandate and the request for stay are denied.



Chief Justice