S117834

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARK BURTON, Petitioner,

v.

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. I 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 in the event he is recalled, 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 have characterized the current recall process undoubtedly have 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.