S117834

IN THE SUPREME COURT OF CALIFORNIA

En Banc

MARK BURTON, Petitioner,

v.

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